Republic of the Philippines
Department of Finance
Securities and Exchange Commission
OFFICE OF THE GENERAL COUNSEL

13 December 2019

SEC-OGC Opinion No. 19-59
Re: Foreign Participation in Travel and Tour Business and Retail Trade

JOVELLANOS-KHO MALCONTENTO and ASSOCIATES LAW OFFICES
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Attention: Atty. Mark Gjefferson E. Pabalate
Senior Litigator

Dear Sir:

This is in response to your *letter* dated 12 July 2018 requesting the opinion of the Commission on the following queries:

1. Whether incorporators of a corporation engaged in a travel and tour business, which is not engaged in any nationalized business or activity, with 40% foreign equity and 60% Filipino equity, are required to comply with the residency requirement under the Revised Corporation Code ("RCC");

2. If the answer to No. 1 is in the affirmative, is there a requirement for the foreign incorporators to provide proof of residency and if so, what are these proofs of residency;

3. Whether foreign nationals could occupy the position of President and/or Treasurer in the afore-said travel and tour business; and

4. In the alternative, whether foreign nationals could take the position of President and/or Treasurer in a corporation engaged in retail trade.

In your letter, you claim that your foreign clients intend to be the incorporators of a travel and tour business in the Philippines with a paid-up capital of Two Hundred Thousand US Dollars (US$200,000). You stated that this business would be partly owned by foreign nationals with 40% equity and 60% Filipino equity. Further, the scope of service of the said business is generally to engage in the business of travel and tour

operation in the country, marketing of travel services local and abroad, and inbound and outbound marketing of travel packages.

As to your ***first query***, we answer in the negative. The incorporators of any corporation need not comply with any residency requirement. Only the treasurer and the corporate secretary are required to be residents of the Philippines.

Please note that *Section 10* of the RCC already omitted this residency requirement under Section 10[1] of the old Corporation Code, to wit:

> "SECTION 10. Number and Qualifications of Incorporators. – Any person, partnership, association or corporation, singly or jointly with others but not more than fifteen (15) in number, may organize a corporation for any unlawful purpose or purposes: Provided, That natural persons who are licensed to practice a profession, and partnerships or associations organized for the purpose of practicing a profession, shall not be allowed to organize as a corporation unless otherwise provided under special laws. Incorporators who are natural persons must be of legal age."

Thus, the incorporators of a corporation need not be residents of the Philippines upon the effectivity of the RCC on 23 February 2019.

That said, your ***second query*** no longer needs to be addressed.

As to your ***third query***, we must first determine the applicable corporate nationality requirement for a travel and tour business in the Philippines. To do so, we must ascertain whether a travel and tour business is included in the *Eleventh Regular Foreign Investment Negative List*[2] (FINL-11) which is composed of two (2) lists: 1) List A: Foreign Ownership is Limited by Mandate of the Constitution and Specific Laws, and 2) List B: Foreign Ownership is Limited for Reasons of Security, Defense, Risk to Health and Morals and Protection of Small and Medium Scale Enterprises.

A travel and tour business is not one of the investment areas included in List A. However, it may be covered in List B depending on whether it is an export or domestic enterprise, which would depend on its output being exported.

In *SEC Opinion No. 18-04*,[3] the Commission opined that:

> "Based from the above definitions, we cannot conclude whether API is an

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[1] Section 10. Number and qualifications of incorporators. – Any number of natural persons not less than five (5) but not more than fifteen (15), all of legal age and a majority of whom are residents of the Philippines, may form a private corporation for any lawful purpose or purposes." *[Emphasis supplied]*

[2] Executive Order No. 65, Promulgating the Eleventh Regular Foreign Investment Negative List, done on 29 October 2018.

[3] SEC-OGC Opinion No. 18-04 dated 19 March 2018 addressed to AT PHIL, INC.

export enterprise or a domestic market enterprise because you mentioned only that API has been operating as travel and tour agency servicing both local and foreign markets, and providing full information full travel services at packaged prices in the online travel market. **You did not provide information as to whether it exports sixty percent (60%) or more of its output to fall under the definition of an export enterprise, or if it fails to consistently export at least sixty percent (60%) thereof in order to be considered as a domestic market enterprise.**

Nonetheless, assuming API is an export enterprise, it should not fall within Lists A and B of the Foreign Investment Negative List (FINL) in order for it to be 100% foreign-owned. The business of travel and tours agency and services is not included in List A, nor is it covered by List B, of the FINL.

Assuming, on the other hand, that API is a domestic market enterprise, the same rule applies; that is, it should not fall within Lists A and B of investment areas reserved to Philippine nationals. To reiterate, the business of travel and tours agency and services is not included in List A. Neither is it covered by List B because it has a paid-up capital of more than two hundred thousand US dollars (US$200,000). As held in one opinion, the general rule is that non-Philippine nationals can own up to one hundred percent (100%) of the equity in export as well as domestic market enterprises. However, the xxx FNL restricts foreign ownership to a maximum of forty (40%) of the equity in small and medium-sized domestic market enterprises in cases where the paid-in capital is less than the equivalent of Two Hundred Thousand US Dollars (US$200,000). xxx"

From the foregoing, and provided API does not own land, it may be allowed to be 100% owned by foreign nationals. Consequently, transfer of shares from Filipino to foreign investors is allowed. This Commission had already opined that foreign national may be a transferee of shares of stock, provided the transfer will not violate the statutory/constitutional limitation on alien equity participation." *[Emphasis supplied]*

Similar to the above opinion, you have not disclosed whether your proposed travel and tour business would export 60% or more of its output for it to be considered as an export enterprise, or if it would export less than 60% of its output for it to be considered as a domestic enterprise.

Thus, assuming that the intended travel and tour business is an export enterprise, your foreign clients can own up to 100%. On the other hand, assuming that it is a domestic enterprise, and taking into account that you intend to have a paid-up capital amounting to US$200,000, it may also be 100% foreign-owned.

Considering that in both cases the intended travel and tour business does not fall in Lists A & B, it is not engaged in a nationalized business. Hence, you may appoint or elect an alien President or Treasurer, provided that the President shall be a director and the Treasurer shall be a resident of the Philippines.[4] However, please be advised that a

[4] SEC. 24. Corporate Officers. – Immediately after their election, the directors of a corporation must

foreign national could not serve as President and Treasurer of a corporation at the same time.[5]

The Commission confirmed on several occasions that a foreigner may be appointed or elected as the President of a corporation not engaged in any nationalized activity,[6] or where the existing law neither forbid nor limit to a certain proportion foreign ownership in the enterprise.[7] On the other hand, the Commission is also replete with opinions that a corporation engaged in a nationalized activity is prohibited from hiring any foreigner who would occupy positions involving management, operation, administration, or control, such as President and Treasurer.[8]

As to your ***fourth query***, we answer in the affirmative. Note that for corporations engaged in retail trade, allowable foreign participation is dependent on the minimum paid-up capital of the corporation.[9] If the corporation engaged in retail trade business has a minimum paid-up capital that is less than Two Million and Five Hundred Thousand US Dollars (US$2,500,000), no foreign equity is allowed. However, if the minimum paid-up capital is equivalent to US$2,500,000 or more, foreign equity may be had, even up to 100% of the corporation capital.

Assuming that the intended business which would engage in retail trade has the paid-up capital requirement of not less than USD2,500,000 or its peso equivalent, it would not be considered a nationalized business or activity; hence, a foreign national may occupy the positions of President or Treasurer, subject to the same additional requirement stated above (i.e. no concurrence of President and Treasurer).

It shall be understood, however, that the above-stated opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances. If, upon further inquiry and investigation, it will be disclosed that the

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formally organize and elect: **(a) a president, who must be a director; (b) a treasurer, who must be a resident;** (c) a secretary, who must be a citizen and resident of the Philippines; and (d) such other officers as may be provided in the bylaws. If the corporation is vested with public interest, the board shall also elect a compliance officer. **The same person may hold two (2) or more positions concurrently, except that no one shall act as president and secretary or as president and treasurer at the same time, unless otherwise allowed in this Code.** *[Emphasis supplied]*

[5] Ibid.

[6] SEC Opinion dated 25 March 1987 addressed to Atty. Leonides S. Respicio; SEC Opinion No. 09-03 dated 21 January 2009 addressed to Atty. M. Jasmine S. Oporto, Mr. Joseph Trillana T. Gonzales, and Ms. Amy Rose A. Soler-Rellin.

[7] SEC Opinion dated 08 May 1986 addressed to Atty, Romeo J. Balili.

[8] SEC Opinion dated 14 June 1982; 01 July 1983; 15 May 1985; 28 May 1985; SEC Opinion dated 27 July 1990 addressed to Philippine Association of Service Exporters, Inc.; SEC-OGC Opinion No. 16-12 dated 24 May 2016 addressed to Atty. Rester John L. Nonato citing SEC-OGC Opinion No. 12-01SEC OGC Opinion No. 16-13 dated 30 May 2016 addressed to Ariel Arriola.

[9] SEC-OGC Opinion No. 18-14 dated 24 August 2018 addressed to Tokyo Consulting Firm – Philippine Branch.

facts relied upon are different, this opinion shall be rendered void.[10]

Please be guided accordingly.

Very truly yours,

ROMUALD C. PADILLA
Officer-in-Charge

[10] SEC Memorandum Circular No. 15, Series of 2003.