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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 250 55069 Office: CALIFORNIA SERVICE CENTER Date: NOV 04 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims it is a partnership organized in February 2002. It filed a Certificate of Business: Fictitious Firm Name with the County Clerk of Clark County, Nevada on February 19, 2002 to operate using the firm name Angel Manor. It operates an adult residential care home. It seeks to temporarily employ the beneficiary as its managing partner to establish a new U.S. office. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that it is affiliated with Sari-Sari, a Filipino partnership, located in Cebu, Philippines.

The director denied the petition concluding: (1) that the petitioner failed to demonstrate control of the U.S. entity, and therefore did not establish a qualifying relationship; and, (2) that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On appeal, counsel contends that the director erred in his decision.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) states if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) sufficient physical premises to house the new office have been secured;

(B) the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

b. the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

c. the organizational structure of the foreign entity.

The first issue in this proceeding is whether a qualifying relationship exists between the foreign and U.S. entities.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
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> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
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> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
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> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.
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> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
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> (J) *Branch* means an operating division or office of the same organization housed in a different location.
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> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
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> *(L) Affiliate* means
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> (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
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> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner initially provided a copy of a partnership agreement made between [redacted] and the beneficiary dated March 30, 1999 for the ownership of a mini market and transportation service in the Philippines. The March 30, 1999 agreement indicated that [redacted] and the beneficiary each held a 50

percent interest in the business partnership. The petitioner also provided a copy of a partnership agreement entered into in Clark County, Nevada between [redacted] the beneficiary in this matter, and [redacted] dated January 17, 2002. The January 17, 2002 agreement indicated that each of the partners held a 33.33 percent interest in the partnership. The three partners also filed a fictitious firm name certificate with the Nevada Clark County Clerk identifying the name of the partnership as Angel Manor.

In response to a request for evidence made by the director, the petitioner submitted an undated agreement made between [redacted] and the beneficiary confirming their agreement to vote as a collective majority block "in all issues and matters relating to and affecting both the USA and Filipino affiliate entities."

The director noted the two partnership agreements and the undated agreement between [redacted] and the beneficiary to vote as a majority, but determined that the evidence presented failed "to show that an individual, or identical group of individuals has effective *de jure* or *de facto* control of both organizations." The director stated in the concluding paragraph of his decision that the petitioner had not presented voting proxies or agreements showing that control of both entities had been formally relinquished by shareholders in favor of one of the individuals holding shares in both companies.

On appeal, the petitioner contends that the shareholders of each business do not have to be identical. The petitioner also references the undated agreement between [redacted] and the beneficiary to vote as a majority as evidence that one group controls both the foreign entity and the petitioner.

On review, counsel's assertion is not persuasive. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. Control may be "*de jure*" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "*de facto*" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In the present matter, three individuals own the U.S. entity in equal percentages. Two of the three individuals, [redacted] and the beneficiary, agreed at some indeterminate time to vote their partnership interests in concert. The same two individuals, [redacted] and the beneficiary, both own an equal interest in the foreign partnership. However, despite the agreement to vote their shares in concert, the two entities are not owned and controlled by the same parent or individual, or by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L). As noted above, in order to establish "*de facto*" control of both entities by an individual, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *See Matter of Hughes*, 18 I&N Dec. at 293. A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See* Black's Law Dictionary 1241 (7th Ed. 1999). The agreement of two individuals to vote shares in concert does not rise to the level of a proxy agreement that would give one individual control over the voting rights of a majority of the issued shares. Additionally, the petitioner has provided an undated agreement between [redacted] and

the beneficiary to vote their interests in both entities in concert, so the AAO is unable to determine when the agreement took effect. For these reasons, the petitioner has not established that a qualifying affiliate relationship exists between the two entities.

The second issue in this proceeding is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
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> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a July 31, 2002 letter submitted with the petition, the petitioner stated that the beneficiary had been the managing partner of the Filipino business. The petitioner explained that the beneficiary's position abroad was in an executive capacity and that he had been involved in the direction and control of all major areas of the business. Further, that as managing partner the beneficiary had been responsible for making decisions at the executive level and having these decisions implemented. The March 30, 1999 partnership agreement between [redacted] and the beneficiary also indicated that the beneficiary was responsible for the management of the day-to-day business operations.

In a notice dated November 6, 2002, the director requested additional evidence on the issue of the beneficiary's employment abroad including: (1) payroll records for the beneficiary for the year prior to filing the petition; (2) the total number of employees abroad; (3) the foreign company's organizational chart listing all employees under the beneficiary's supervision by name, job title, and brief description of job duties; and, (4) a more detailed description of the beneficiary's duties abroad.

In a January 22, 2003 response, the petitioner stated that the Filipino entity did not have payroll records and further, that as the beneficiary was the foreign entity's managing partner, he would not have been listed on any employee payroll records, if they existed. The petitioner listed the beneficiary's duties for the foreign entity as:

- Responsibility for all Executive level decisions in the business and attending to and making such decision. 20%
- The responsibility for the control of the business and the guiding and planning of the business as to policies, strategies and goals. 25%
- In the beneficiary's sole discretion the setting and determining the policies, strategies, business practices and philosophy of the business as regards product/services. 15%
- Ensuring that all executive level decisions as regards policy, business, strategy and philosophies of the business are implemented by the Managerial staff and through the Operations Manager to the other manager/supervisory employees and workers. Such staff to report to the beneficiary on performance of their department and related areas. 20%
- Responsibility to hire and fire Upper Managerial staff and /or determine sanctions or otherwise as regards these employees. 10%
- Responsibility for ultimate decisions on all export contracts that are negotiated and authority to accept and sign such contracts or reject the contracts proposed. 10%

The petitioner also provided the foreign entity's organizational chart showing the beneficiary as the managing partner on the same tier as the foreign entity's other 50 percent owner. The operations manager was shown to report directly to the beneficiary and his partner. A transportation operation supervisor who supervised three drivers and a reliever and a mini-mart/restaurant supervisor who supervised a chef and two helpers and a storekeeper and two helpers reported directly to the operations manager.

The director determined that the record was insufficient to establish that the beneficiary had been employed primarily in a managerial or executive capacity. The director determined that the petitioner had not established that the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees or manages an essential function within the organization. The director further

determined that the record did not show that the beneficiary would be directing the management of the organization, rather than performing many aspects of the day-to-day operations of the business.

On appeal, the petitioner asserts that the beneficiary supervises the operations manager who holds a professional position. The petitioner also contends that the beneficiary manages an essential function and that Citizenship and Immigration Services (CIS) allows sole employees to be classified in an executive position when management of an essential function is involved. The petitioner concludes that as the beneficiary manages a professional staff and an essential function, the criteria set out in the statute at 101(a)(44)(A) and (B) has been met.

The petitioner's contentions are not persuasive. First, the petitioner initially requested the beneficiary's position be considered an executive position. Only on appeal does the petitioner appear to request that the beneficiary's position also be considered a managerial position. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing that the beneficiary is both an executive and a manager.

Second, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner, in this matter, has presented a vague description of the beneficiary's duties for the foreign entity. The petitioner indicates that the beneficiary spends 60 percent of his time making decisions, and determining and planning the policies, strategies, business practices, and philosophy of the business. Such statements are not sufficient to convey an understanding of the beneficiary's daily activities. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Third, the petitioner does not submit documentary evidence to substantiate the information contained on the foreign entity's organizational chart. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Although the foreign entity's organizational chart, on its face, shows that the beneficiary is partially responsible for supervising the operations manager, a supervisory position, the petitioner allocates only 30 percent of the beneficiary's time to this purported supervisory role. The petitioner has not shown that the beneficiary primarily manages supervisory, managerial, or professional employees.

Finally, the petitioner's contention on appeal that the beneficiary manages an essential function is not persuasive. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who

primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function.

The petitioner correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of a company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the lack of documentary evidence in the record substantiating the employment of the individuals on the foreign entity's organizational chart, the broad description of the beneficiary's duties for the foreign entity, and the petitioner's lack of consistency in describing the beneficiary as a function manager, manager of professional employees, and as an executive, cannot support a conclusion that the beneficiary has been primarily a manager or executive for the foreign entity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.