U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FEB 07 2005

FILE: WAC 03 133 53435 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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 filed this nonimmigrant petition seeking to extend the employment of its president 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 is a corporation organized in the State of California that is engaged in freight transportation and importing and exporting Mexican goods. The petitioner claims that it is an affiliate of the beneficiary's foreign employer, located in Tijuana, Mexico. The petitioner now seeks to employ the beneficiary for two years.

The director denied the petition stating that the petitioner did not demonstrate: (1) that it was doing business in the United States; and (2) that the beneficiary was employed in the United States in a primarily managerial or executive capacity. The director specifically noted that the petitioning organization is capable of paying only a portion of the beneficiary's salary, and therefore was not doing "satisfactory business" in the United States. The director also noted that the petitioner employed the beneficiary as its sole employee at the time of filing the petition, and therefore, the beneficiary was likely performing non-managerial and non-executive job duties.

On appeal, counsel challenges the director's finding that the petitioning organization is not doing business. Counsel states that the director incorrectly assumed that the United States entity was not capable of paying the beneficiary's salary. Counsel also states that in determining the beneficiary was not employed as a manager or executive in the United States entity, the director "overlooked the reason for the lack of employees." Counsel claims that the events of September 11, 2001 impacted the company's business, and "has set the U.S. company back about two years in its plans for growth." The director submits a letter in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of 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) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The AAO will first address the issue of whether the petitioning organization is doing business in the United States.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

> [T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner filed the nonimmigrant petition on March 24, 2003. In an accompanying letter, dated March 19, 2003. the petitioner explained that it was established in 1998 and is engaged in freight transportation, warehousing, customs clearance, and the import and export of goods between the United States and Mexico. The petitioner submitted its year 2002 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, which reflected an annual income of approximately $64.000.

In a request for evidence, dated April 1, 2003, the director asked that the petitioner provide: (1) photographs of its inside and outside business premises, including its factory, warehouse, and office; (2) an explanation of the petitioner's business hours; and (3) its lease agreement indicating the dimensions of the business premises.

Counsel responded in a letter dated May 15, 2003. Counsel stated that the company's office hours are from 9:00 am until 5:00 pm. Counsel submitted photographs of the petitioner's business premises and a copy of its lease, dated March 1, 2003, for the use of the office premises. Counsel explained in his letter that the petitioner's current premises would be too small when additional employees are hired, and noted that the petitioner would seek other office space by the end of the year. Counsel also submitted applications for a Texas certificate of title on two truck tractors and provided a letter from the seller confirming the sale of the trucks on May 22. 1998.

In a decision dated June 2, 2003, the director determined that the petitioner had failed to establish that it was doing "satisfactory business." The director based his conclusion on the fact that the beneficiary's foreign employer was responsible for paying a portion of the beneficiary's salary, while the petitioner paid the remainder. Accordingly, the director denied the petition.

Counsel filed an appeal on July 1, 2003 stating that the director's decision "overlooked the fact that the payment arrangements for the beneficiary were incorrectly described in the Petitioner's letter of March 19, 2003." Counsel explains that his May 15, 2003 response to the director's request for evidence stated that during the petitioner's development phase, the beneficiary's salary would be paid by the foreign entity. Counsel notes that in 2002, the petitioner was able to contribute to the payment of the beneficiary's salary, and would, in the future, be responsible for the entire amount.

On review, the petitioner has not conclusively demonstrated that it has been doing business in the United States.

While the AAO determines that the record does not establish that the petitioner is operating in the United States, the AAO bases this conclusion on reasons other than that identified by the director. The petitioner claims that it is operating as a freight forwarder and importing and exporting company. Although the petitioner submitted evidence of its ownership of two trucks used for freight transportation and a lease identifying office premises used by the petitioner in the United States, there is no additional documentary evidence, such as customs forms or documents establishing a relationship between customs brokers or agents, substantiating the petitioner's claim as an importer or exporter. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation may reasonably be expected to submit copies of these forms to show that they are doing business as an import firm. Additionally, the petitioner has not provided a lease for a warehouse or garage where freight or the petitioner's vehicles may be stored. Moreover, as the petitioner does not employ any drivers, it is unclear how the petitioner is performing any of its claimed operations, such as transporting freight. The record contains insufficient documentation establishing that the petitioner has been doing business in the United States. 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).

Furthermore, the lease submitted by the petitioner reflects that the petitioner secured office premises on March 1, 2003 approximately three years after the beneficiary entered the United States as a L-1A intracompany transferee.[1] At the time of filing the original petition, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. See 8 C.F.R. § 214.2(l)(9)(iii).

Based on the foregoing discussion, the petitioner has not demonstrated that it has been doing business in the United States. For this reason, the appeal will be dismissed.

The AAO will next address the issue of whether the beneficiary has been employed in the United States 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-
>
> (i) Manages the organization, or a department, subdivision, function, or component of the organization;
>
> (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;

[1] The petitioner noted on both the nonimmigrant petition and in its March 19, 2003 letter submitted with the nonimmigrant petition that the beneficiary has been in the United States in valid L-1A status since May 2000.

(iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(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-

(i) Directs the management of the organization or a major component or function of the organization;

(ii) Establishes the goals and policies of the organization, component, or function;

(iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner noted on the nonimmigrant petition that as president, the beneficiary would direct, administer and supervise the company's import and export activities. In an attached letter from the petitioner, dated March 19, 2003, the petitioner provided the following description of the beneficiary's position as president:

In this position, he has been responsible for directing the day-to-day operations of the company as well as developing long and short term goals and plans. He receives only general supervision from the Board of Directors. Although [the beneficiary] continues to be the Co-director of our Mexican company, his position as President of our United States company is a full time position. The salary of [the beneficiary] is currently paid by our Mexican company and the United States company.

In the director's April 1, 2003 request for evidence, the director asked that the petitioner provide an organizational chart describing its managerial hierarchy and staffing levels. The director noted that the chart should identify all executives, managers, and employees of the petitioning organization, and clearly indicate all employees under the beneficiary's supervision. The director also requested that the petitioner submit a more detailed description of the beneficiary's job duties in the United States, including evidence that the beneficiary meets the petitioner's qualifications and educational requirements for the position of president. The director asked that the petitioner provide an allocation of the amount of time the beneficiary would spend on each identified job duty.

In counsel's May 15, 2003 response to the director's request for evidence, counsel stated that the beneficiary, who "is the overall manager of the U.S. business," is the sole employee of the petitioning organization. Counsel explained that "[d]ue to budget constraints caused by the events of September 11, 2001," the petitioner has not yet hired additional employees to assist the beneficiary. Counsel stated:

> The position held by the beneficiary requires a detailed and in-depth knowledge of the laws and regulations governing the importation of goods into the U.S. and Mexico. It is not possible to clear goods for such importation without this knowledge. [The beneficiary] has this knowledge. He has more than 28 years experience in this industry, and has dealt with importation issues of the kind dealt with by the U.S. company for the entire 28 years. He is one of the most experienced senior executives in this field.

With regard to the petitioner's personnel, counsel stated that the growth of the petitioning organization would require the company to hire additional workers, including: (1) an office manager/senior assistant to the president; (2) a full-time secretary; and (3) two drivers. Counsel stated that the petitioner anticipates hiring these employees by the end of the year, and noted that the petitioner's organizational structure would be similar to that of the foreign organization.

In his June 2, 2003 decision, the director determined that the petitioner had failed to establish that the beneficiary was employed in the United States in a qualifying capacity. The director acknowledged that the beneficiary may be performing some of the managerial job duties outlined by the petitioner, such as directing the business' daily operations. The director concluded, however, "[s]ince there are no other personnel involved in the petitioning organization, it appears the beneficiary may be performing some duties which are not managerial in nature." The director stated that the petitioner has not demonstrated "that basically all of the duties performed by the beneficiary are on the managerial level." Accordingly, the director denied the petition.

On appeal, counsel states "[i]t is accurate that the petitioner had only one employee at the time of the filing of the petition," but notes that the director overlooked the previously-provided explanation for the lack of employees. Counsel again explains that the events of September 11, 2001 prevented the petitioner from realizing its plans for growth, and states that because "the effects of September 11 are now behind us," the petitioner is able to continue its plans. Counsel requests that "due to the fact that there is an unusual and valid reason for the interrupted growth of the U.S. company," the petitioner be given the opportunity to employ the beneficiary as a manager or an executive.

On appeal, the petitioner has not demonstrated that the beneficiary is employed in a qualifying capacity in the United States. The petitioner indicates that it plans to hire a manager and additional employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Additionally, while the AAO recognizes the effects of the attacks of September 11, 2001 on the United States' economy, the tragic incident may not be exploited in order to receive additional time to establish the beneficiary's position as a manager or an executive. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the record does not conclusively establish that the foreign and United States entity are qualifying organizations as required in the Act at § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The regulation 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.

Here, the petitioner claimed that it is an affiliate of the beneficiary's foreign employer as both companies are "owned by substantially the same group of people." The petitioner however submitted evidence that the U.S. entity is owned by five individuals and the foreign entity is owned by four individuals. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

Moreover, the petitioner did not submit entirely translated documents relating to the ownership of the foreign entity. Rather, the petitioner provided translated sections of the documentation. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

As the petitioner did not demonstrated the existence of a requisite qualifying relationship, the appeal will be dismissed for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.