U.S. Department of Homeland Security
20 Massachusetts 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

B7

PUBLIC COPY

[redacted]

File: WAC 04 191 53905 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2006

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)

IN 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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A 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 to be a partnership and was organized as a limited liability company under the laws of the State of California. It claims to import and export lubricants, oil and automobile spare parts and equipment. The petitioner states that it is a branch office of West East Coast Trading located in Dubai, United Arab Emirates. The petitioner seeks to employ the beneficiary as "manager director" of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner did not establish that the U.S. entity has a qualifying relationship with the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that director failed to consider the evidence in its entirety and misinterpreted the documentation submitted by the petitioner. Counsel asserts the foreign entity and the U.S. entity are both partnerships owned by the same individuals and emphasizes that the two entities share the same name. Counsel contends that the petitioner has submitted sufficient evidence to establish a branch relationship between the two companies. Counsel submits a brief and copies of previously submitted documentation in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that 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 involves executive or managerial authority over the new operation; and

(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:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) 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

(3) The organizational structure of the foreign entity.

The primary issue in this matter is whether the petitioner has established a qualifying relationship between the United States entity and the beneficiary's foreign employer.

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:

(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;

(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,

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(I) *Parent* means a firm, corporation , or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(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.

(L) *Affiliate* means *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or *(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. . . .

On the Form I-129, the petitioner indicated that the U.S. company is a branch of the foreign entity and described the stock ownership as follows, without specifying whether the stock ownership applied to the U.S. entity, the foreign entity, or both entities: (1) [redacted] 51 percent; (2) Noor Norris, 24 percent; and (3) [the beneficiary], 24 percent. In a June 3, 2004 letter submitted in support of the petition, the petitioner referred to the foreign entity as its parent company.

The petitioner submitted the following documents in support of the petition: (1) its limited liability company articles of organization filed with the California Secretary of State on August 25, 2003; (2) its Internal Revenue Service (IRS) Form SS-4, Application for Employer Identification Number, on which the company is identified as a partnership; (3) a Bank of America "business profile" which identifies [redacted] as the "owner/president" of the company; (5) an amendment to a "Partnership Contract Agreement" dated October 1, 2002; (6) a translation of the foreign entity's 2003 membership registration certificate issued by the Sharjah Chamber of Commerce & Industry, identifying the foreign entity as a limited liability company with three partners; (7) a translation of an excerpt from the foreign entity's memorandum of association identifying the owners of the company as: [redacted] (51 percent), [redacted] (25 percent) and the beneficiary (24 percent) and identifying the beneficiary as general manager of the company; and (8) a translation of the foreign entity's trading license identifying the same three partners and indicating that [redacted] is the manager of the foreign entity.

The petitioner also submitted a copy of an eight-page sales representative agreement made between the U.S. and foreign entities on September 18, 2003, in which the petitioner appoints the foreign entity as its sales representative for the United Arab Emirates territory. The agreement contains the following provision:

> 6. Independent Contractor.
> Representative is an independent contractor and nothing contained in this Agreement shall be construed to (i) give either party the power to direct and control the day-to-day activities of the other, (ii) constitute the parties as partners, joint venturers, co-owners or otherwise, or (iii) allow Representative to create or assume any obligation on behalf of Company for any purpose whatsoever. . . .

The director issued a notice of intent to deny the petition on July 28, 2004. The director observed that the evidence submitted showed that three individuals owned the foreign entity, but suggested that the U.S. entity is 100 percent owned by [redacted] a minority owner in the foreign entity. The director noted that the petitioner does not qualify as a branch of the foreign entity because it is owned by an individual, and does not qualify as an affiliate of the foreign entity, because both entities had not been shown to be owned by the same group of individuals in approximately the same proportion.

The director also referenced the sales representative agreement submitted in support of the petition, noting that the agreement refers to the foreign entity as an independent contractor. The director observed that it is evident from a review of the agreement that the two companies are completely independent and have only a contractual relationship that is subject to termination, rather than the common ownership and control required to establish a qualifying relationship for purposes of the L-1 visa classification. The director informed the petitioner that it would be afforded 30 days in which to submit additional information, evidence or arguments to support the petition.

In a response dated August 23, 2004, counsel for the petitioner asserted:

> [T]he Service misinterprets four of the documents submitted by petitioner in support of his application to erroneously conclude that "the U.S. entity is not a 'branch' of the foreign entity . . . ." One such documents [sic] is the Sales Representative Agreement (SRA). The SRA was only a temporary agreement that was limited to sales made by the U.S. entity in the "territory of the United Arab Emirates (See Article 1B of SRA) where the foreign entity is located. The SRA has bore [sic] only three signatures. The three partners – who are the same partners for both entities – signed each only once, the document bearing no different signatures for owners/partners of two different entities. . . . Furthermore, after the official documentation for creation of the U.S. entity were [sic] filed with the California Secretary of State on October 3, 2003 (naming the partners who are also managers of the corporation) the partners terminated the Sales Representative Agreement. A copy of the Termination of Sales Representative Agreement is attached. . . .
>
> The second document is a "Business Profile" from the Bank of America carrying the name of [redacted] as "owner/president", and under "contact" the names of the other two partners,

> [the beneficiary] and Fathima Gosham. However, having the name of [redacted] as "president" on such a document does not constitute evidence that the U.S. entity has only one owner. In fact, the agreement made by the three partners and the official documentation filed for the creation of the U.S. entity clearly shows that the California company is a partnership. The three partners signed a statement showing "Under the direction of [the beneficiary], [the foreign entity] will start the company in the United States. . . ." The Articles of Organization endorsed by the California Secretary of State on August 23, 2003. . .indicate that the U.S. entity "will be managed by more than one manager" and the State [sic] of Information filed with the California Secretary of State on October 3, 2003 names the same three partners as the managers of the corporation. . . . Moreover, the I.R.S. Form SS-4 filed by the U.S. entity clearly shows under paragraph 8a "Type of entity" that the company is a "Partnership."

In support of its response to the notice of intent to deny, the petitioner submitted copies of previously submitted documentation and an undated statement signed by the partners of the foreign entity titled "Termination of Sales Representative Agreement" which states:

> Based on Art 15A of our Sales Representative Agreement that commenced on October 1, 2003 and following the filing on October 3, 2003 of [the petitioner's] (Secretary of State File Number [redacted] Statement of Information, naming the partners who are also managers of our branch in California, we – the partners – are terminating the Sales Representative Agreement (for the territory of the United Arab Emirates; see Art 1B of the agreement).

The director denied the petition on September 25, 2004, concluding that the petitioner did not submit sufficient evidence to establish a qualifying relationship with the foreign entity. The director acknowledged the petitioner's response to the notice of intent to deny, but observed that none of the formal documents related to the establishment of the petitioning company clearly show the partners' names and percentage interest owned by each partner. The director determined that the U.S. company is not a branch of the foreign entity as claimed, because the U.S. entity is organized as a limited liability company partnership. The director further concluded that the petitioner had not established that it is an affiliate of the foreign entity because it submitted insufficient evidence to demonstrate that both entities are owned and controlled by the same group of individuals.

On appeal, counsel for the petitioner makes essentially the same assertions submitted in response to the notice of intent to deny. Counsel emphasizes that the three individuals who own the foreign entity filed official documentation for the creation of the U.S. entity, that the two entities are both partnerships, and that the two entities have the same name. Counsel asserts that the petitioner submitted sufficient evidence to establish that the U.S. entity is a branch of the foreign entity. The petitioner submits copies of previously submitted documents in support of the appeal.

Upon review, the petitioner has not established that the U.S. entity and the foreign entity have a qualifying relationship as required by 8 C.F.R. § 214.2(l)(3)(i). 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.

The AAO will first address the petitioner's claim that the U.S. entity is a "branch" of the foreign entity. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, *supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies of IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

In this matter, the petitioner has submitted evidence that it filed articles of organization with the California Secretary of State on August 25, 2003. As a limited liability company, the petitioner cannot meet the definition of a branch office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(J). Therefore, the AAO must examine the ownership and control of each company in order to determine whether an affiliate relationship exists between the two companies.

As evidence of the ownership of the foreign entity, the petitioner has submitted various documents which establish that the foreign entity is a partnership registered as a limited liability company, and is owned by three individuals. The only evidence provided to establish the percentage interest owned by each partner is an English translation of a single page of the foreign entity's memorandum of association indicating that one individual owns a 51 percent interest in the foreign entity, one individual owns a 25 percent interest, and one individual owns a 24 percent interest. The petitioner did not provide the remainder of the document, nor did it provide a copy of the original document from which the translation was made. Absent a complete signed and dated copy of the foreign entity's memorandum of association, with English translation, or other evidence of the percentage interest owned by each partner in the foreign entity, the AAO cannot determine the essential elements of ownership and control. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With respect to the United States entity, the AAO acknowledges that the evidence suggests that the same three individuals are partners in both the U.S. and the foreign entities. However, in order to establish that the two entities are affiliates as defined at 8 C.F.R. § 214.2(l)(1)(ii)(L), the petitioner must establish either that one individual has majority ownership and control of both companies, or that both companies are owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

As discussed above, the petitioner has provided insufficient evidence to establish the percentage interest owned by each partner in the foreign entity. As noted by the director, the petitioner has provided no evidence to document the percentage interest owned by each partner or member in the petitioning company. Such documentation may have included the petitioner's memorandum of association, membership certificates, partnership agreement, evidence of monies transferred from each individual in exchange for their ownership interest in the petitioning company, and/or the petitioner's Form 1065, Return of Partnership Income for the 2003 year. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N at 165. Counsel's assertion that both entities are organized as partnerships and observation that the two entities use the same name is insufficient to establish an affiliate relationship between the two entities. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In order to determine whether two companies have a qualifying relationship, the AAO must examine all documentation related to the total number of shareholders, partners or members, the exact number of shares issued or percentage of interest issued to each shareholder, member or partner, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the company, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner's failure to provide evidence of the percentage interest owned by each claimed partner in each company makes it impossible for the AAO to determine whether the two entities have an affiliate relationship. Neither the petitioner nor counsel has submitted evidence on appeal to overcome the director's determination on this issue. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record contains no documentation to persuade the AAO that the beneficiary has been employed in a managerial or executive capacity with the foreign entity, or that the petitioner would support such a position within one year of approval of the petition. *See* 8 C.F.R. §§ 214.2(l)(3)(v)(B) and (C). The petitioner's descriptions of the beneficiary's current duties with the foreign entity and his proposed duties in the United States merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For example, the petitioner states that the beneficiary's duties have been and would be "directing the management of the organization, establishing goals and policies, exercising a wide latitude in discretionary decision-making." 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). In addition, the record does not contain adequate evidence: describing the scope of the U.S. entity, its organizational structure, and its financial goals; showing the size of the United States investment, the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; or depicting the organizational structure of the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(v). As the appeal will be dismissed on the grounds discussed, these issues need not be addressed further.

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.

ORDER: The appeal is dismissed.