U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

D7

PUBLIC COPY

[redacted]

File: WAC 06 012 50297 Office: CALIFORNIA SERVICE CENTER Date: SEP 25 2007

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, Chief
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 seeks to employ the beneficiary temporarily in its new office in the United States 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 U.S. petitioner, a limited liability company organized in the State of California, proposes to operate a restaurant called [redacted] The petitioner seeks to employ the beneficiary as its president and treasurer, and claims that it is the affiliate of [redacted] Philippines.

The director denied the petition, determining that the petitioner had failed to establish that the petitioner and the organization which employed the beneficiary abroad were qualifying organizations.

Counsel for 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, the petitioner submits a letter and additional evidence which seeks to clarify the petitioner's relationship with the foreign entity.

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.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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; 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 issue in the present matter is whether the petitioner and the foreign organization are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

(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, or

(3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner originally claimed that the two entities formed a joint venture. Noting that the petitioner had not submitted a joint venture agreement or other persuasive evidence to support this claim, the director issued a request for evidence on November 10, 2005. In the request, the director asked for the petitioner to produce evidence of the joint venture or, if a joint venture was not the proper relationship, to submit evidence that it maintained another qualifying relationship with the foreign entity. In a response dated January 31, 2006, claimed that the two parties were affiliates, and produced new ownership information for the foreign entity. Specifically, the petitioner claimed that by way of the beneficiary and his wife's combined majority ownership interest in both companies, the definition of affiliate was satisfied.

Upon review of the evidence submitted, the director concluded that the record owners of both the U.S. and foreign entities did not own the same share or proportion of both entities as required by the regulations. The director subsequently concluded that the petitioner's claim of affiliation with the foreign entity was invalid, and as a result, the petition was denied on September 29, 2006. Although the petitioner had replaced its claimed joint venture with a claim of affiliation, the director also analyzed the relationship for compliance with the definitions for "joint venture" and "subsidiary" pursuant to 8 C.F.R. § 214.2(l)(1)(ii).

The petitioner appealed the decision, asserting that an oversight by the director with regard to the change in ownership of the foreign entity led to the wrong conclusion regarding the disproportionate distribution of shares in both entities among the beneficiary and his wife. In support of this contention, counsel resubmits the previously submitted documents, and also provides updated corporate documents, which purportedly establish the correct percentages of ownership interests in the foreign entity. The AAO will first examine the record of proceeding and the director's decision prior to examining the petitioner's claims on appeal.

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*, 19 I&N Dec. at 595.

Upon review of the record of proceeding, the petitioner has not established that it has the required qualifying relationship with the foreign entity.

In this case, the petitioner has provided documentary evidence outlining the shareholder interests in the U.S. and foreign entities, and has supplemented this evidence with explanatory statements which discuss the percentages of shareholder ownership. The documentation regarding the U.S. petitioner confirms that the owners of the company are as follows:

Beneficiary:	50%
[redacted] San Diego (Wife of Beneficiary):	11%
[redacted] San Diego:	29%
[redacted] San Diego:	09%
[redacted]	01%

With regard to the foreign entity, the petitioner submitted its Articles of Incorporation, dated March 31, 1998, which stated that 2,500 shares had been issued and outlined the ownership interests of the company as follows:

[redacted] San Diego:	500 shares
[redacted] San Diego:	499 shares
Beneficiary:	1 share
[redacted] San Diego	500 shares
Lombard Realty:	500 shares
[redacted] Diego:	500 shares

Also included with the petition, but overlooked by the director, was a letter from [redacted] San Diego dated October 11, 2005. This letter stated that he acquired 35% ownership of the foreign entity in September 2001, and that in March 2005, he transferred 32% of his shares to the beneficiary.

In response to the director's request for evidence dated November 10, 2005, the petitioner provided a General Information Sheet (also overlooked by the director), which provided a new breakdown of the foreign entity's ownership as of October 27, 2005:

[redacted] San Diego:	500 shares
Beneficiary:	800 shares
[redacted]. Inc.:	100 shares
JNL Corporation:	100 shares
[redacted] Inc.	500 shares
[redacted]	500 shares

The petitioner also submitted a secretary's certificate dated January 23, 2006, which confirmed that Bartolome San Diego transferred 32% of his shares to the beneficiary sometime in March 2005.

The definition of affiliate requires that two entities be owned and controlled by the same parent or individual, or owned and controlled by the same group of individuals who own approximately the same amount of shares in each entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L). The record clearly indicates that at the time of the filing of the petition, the petitioning enterprise did not maintain a qualifying "affiliate" relationship with the overseas company.

The U.S. entity is owned by 4 individuals and one company, and the foreign entity is owned by three individuals and three companies. When strictly reviewing the numbers provided on the GIS sheet and the articles of association, and presuming they were correct, it does appear, as counsel claims, that the beneficiary and his wife own a combined majority interest in both companies. However, 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 (in this case, the beneficiary and his wife) control both entities. Although counsel claims that the petitioning company and the overseas company are majority owned by the husband and wife due to the spousal relationship, this familial relationship does not constitute a qualifying relationship under the regulations. By simply reviewing the ownership structure of the two entities in context of the regulatory definition, it is impossible to find that the two companies were affiliates at the time of the petition's filing

The record clearly indicates that the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity . . . ." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2)(emphasis added). In addition, there is no parent entity or individual with ownership and control of both companies that would qualify the two as affiliates. 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. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO notes that the ownership percentages, as claimed on the GIS sheet and by counsel on appeal, are not supported by documentary evidence. Furthermore, there are many discrepancies and unexplained inconsistencies in the record. While the documentation in support of the U.S. company's ownership is in order, the documentation submitted with regard to the foreign entity is confusing and contradictory. The initial articles of incorporation, filed in March of 1998, list five owners:

[redacted] San Dieg[redacted] San Diego, the Beneficiary, [redacted] San Diego, and [redacted]. A letter dated October 11, 2005, written by [redacted] San Diego, claims that he acquired a 35% ownership of the foreign entity in September of 2001. This, however, directly contradicts the articles of incorporation, which demonstrate that as of March 1998, he owned 500 shares, or 25% of the company. No explanation regarding the 35% figure is provided, nor has the petitioner provided the corporate stock ledger as evidence of any transfers in ownership of [redacted] San Diego's interests in the foreign entity between March 1998 and September 2001.

Furthermore, the GIS sheet, prepared on October 27, 2005, lists only three of the six original owners. There is no discussion as to how the newly-identified owners acquired their shares, and there is no explanation as to how the beneficiary acquired 800 shares when in 1998, he only owned one share. While the October 11, 2005 letter from [redacted] San Diego and the Secretary's Certificate dated January 23, 2006 both claim that [redacted] transferred 32% of his 35% ownership interest to the beneficiary, this claim again is confusing and without merit. The record indicates that in 1998, [redacted] San Diego owned 500 shares and the beneficiary owned one share. Even if [redacted] San Diego transferred all of his shares to the beneficiary, and not just 32%, in March of 2005, the beneficiary would, at most, own 501 shares. It is evident that other stockholders originally listed in the 1998 articles, but no longer named as owners in the GIS sheet, must have sold or transferred their shares to the beneficiary or the other newly-listed members at some point between 1998 and 2005. However, no documentation evidencing such a transfer is submitted.

Finally, the GIS sheet itself presents two problems. First, it was created on October 27, 2005, 13 days after the petition was filed. Therefore, despite its deficiencies and the fact that it would not be deemed a credible document for determining ownership of the foreign entity, it would likewise not be accepted, for it appears that it was created in response to the director's request for evidence supporting the claimed qualifying relationship between the parties. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot alter its original claim. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original documents submitted, but rather added new claims not previously articulated (i.e., new owners not previously identified).[1]

Second, the instructions on the GIS sheet specifically state that "the SEC should be timely apprised of relevant changes in the submitted information as they arise." It continues to state that the updated page of the GIS sheet and a cover letter identifying the change should be submitted within seven days of the change occurring, should such changes occur between annual meetings. The AAO finds it dubious that the beneficiary's alleged acquisition of [redacted] San Diego's shares in March of 2005 was not recorded as required, and that a copy of this change was not submitted provided to the AAO in support of the

[1] It is noted that the petitioner's GIS sheet is routinely filed in October after the company's annual meeting. It is possible, therefore, that this document was not fabricated to overcome the deficiencies noted by the director in the request for evidence. Nevertheless, if the change in the petitioner's ownership structure had in fact taken place prior to October 2005, the petitioner should have submitted the most current and accurate ownership information at the time of the petition's filing.

transfer. While the AAO cannot determine this beyond a doubt, it is curious that neither the secretary's certificate nor the letter from [redacted] San Diego can determine the exact date of transfer. This, coupled with the fact that no evidence of the other changes in ownership since 1998 was submitted, leads the AAO to seriously question the nature of the alleged relationship between the parties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, 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 subsidiary, 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.

In this matter, the stock certificates submitted on appeal raise further doubts with regard to the ownership structure of the petitioner. Specifically, the certificates submitted on appeal indicate that the beneficiary acquired 800 shares of the petitioner on April 4, 2005, and that his wife, [redacted] Diego, acquired 500 shares on the same date. This claim raises further doubts with regard to the credibility of the petitioner's claims, since the record demonstrates that [redacted] took possession of these same 500 shares in 1998. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). As discussed above, absent additional documentary evidence such as the stock ledger or meeting minutes, the AAO cannot determine the exact ownership structure of the petitioner.

Even if such documents had been submitted to support the current ownership structure of the foreign entity, the AAO still concurs with the director's finding that the petitioner did not meet the definition of affiliate as set forth in 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*). Additionally, since the foreign entity does not, as a corporate entity, own any shares in the U.S. petitioner, a subsidiary relationship does not exist between the parties. For this additional reason, the petition may not be approved.

Furthermore, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity. Although the beneficiary's resume and the petitioner's business plan indicate that the beneficiary has a strong background in business management, it appears that he was primarily engaged in operating a poultry farm while abroad. Despite the fact that he also performed various activities for the foreign entity, such as purchasing and inventory, there is insufficient detail with regard to his duties abroad to establish that he was employed in a qualifying capacity. 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)).

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.