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File: WAC 03 205 51861 Office: CALIFORNIA SERVICE CENTER Date: **AUG 26 2005**

IN RE: Petitioner: 
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:



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 seeks to employ the beneficiary temporarily 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 corporation organized in the State of California that is engaged in importing and exporting services, seeks to employ the beneficiary as its president. The petitioner claims that it is the subsidiary of Sphere Brokerage Corporation, located in Manila, the Philippines.

The director denied the petition concluding that the petitioner did not establish that (1) the petitioner will support an executive or managerial position within one year of the approval of the petition since the petitioner lacked the finances necessary to operate a viable business; or that (2) a qualifying relationship existed between the U.S. entity and a foreign entity at the time the petition was filed.

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 the evidence submitted with the initial petition and in response to the director's request for additional evidence clearly established that the beneficiary was employed in a primarily managerial or executive capacity as defined by the regulations and that the requisite qualifying relationship existed between the petitioner and a foreign entity. In support of this assertion, counsel submits a brief and additional evidence.

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(1)(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 (1)(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 (1)(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 first issue in this matter is whether the petitioner will support an executive or managerial position within one year of the approval of the petition.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) provides that if 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 must submit evidence establishing: (1) [t]he proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals; (2) [t]he 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) [t]he organizational structure of the foreign entity.

Furthermore, section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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;
- (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
- (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), defines the term "executive capacity" as 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.

In the initial petition, the petitioner stated that the beneficiary would be employed in a primarily executive capacity as its president. In a letter dated June 30, 2003, the beneficiary's duties were described as follows:

We would like to employ [the beneficiary] with our US entity in the aforesaid capacity where he will be privy to direct and coordinate through supervisory personnel all

activities concerned with the setup of our service systems, to achieve maximum operational efficiency and economy. He will be the individual responsible for planning and directing the initial cargo detail activities, establishing time frame priorities to get our business up and running and thereafter in keeping with effective operations and cost factors. He will assign tasks to the supervisory personnel who will supervise the day to day operations workers. [The beneficiary] will also develop budgets and cost control for all operational activities. We anticipate that it will take several months to get the business up to full operation and at that stage [the beneficiary] will be responsible for the executive decisions of the company and if full functionality is ongoing he will look into other investment ventures for our Philippine business.

[The beneficiary] will have the sole authority to hire and fire all supervisory personnel of the business. He will also institute training programs for staff and have the appropriate manager supervise such infrastructure.

When necessary, [the beneficiary] will negotiate, arrange and sign all contracts on behalf of the business in the USA. [The beneficiary] will report to the Board of Directors from time to time on the progress of the business.

In his executive capacity with our business [the beneficiary] will have full control of the direction of the corporation and will be responsible for decisions as regards to all of the aforementioned as well as the service plans extent and scope the corporation will be involved in.

The petitioner omitted financial documentation regarding the costs of the U.S. business in the initial petition.

On October 11, 2003, the director requested additional evidence establishing that the petitioner had established its eligibility for the benefit sought. Specifically, with regard to the managerial and/or executive position in which the petitioner sought to employ the beneficiary, the director requested evidence demonstrating the petitioner's hiring plan, including the number of employees under the beneficiary's direct supervision within the coming twelve months, as well as the projected wages per hour that the employees would receive. Additionally, the director requested a time frame during which the positions would be filled.

With regard to the viability of the newly-formed U.S. office, the director requested documentation which set forth the projected total investment in the U.S. entity within its first twelve months of operation, as well as verification of the costs associated with the general operation of the U.S. business. The director further requested a projected income statement for the first four quarters of the U.S. entity's operations.

In a response dated January 2, 2004, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response explained the petitioner's hiring plan as follows:

Initially with the cargo operations two workers aside from the beneficiary are immediately required. Two commission based sales associates will also be required shortly thereafter.

The proposed number and types of positions required in the first twelve months of operations are:

[The beneficiary], President

General Manager; \$18 per hour. This position will be filled in two to three weeks after securing the employment of [the beneficiary].

Utility and Delivery Man; \$8.00 per hour. This position will be filed [sic] two to three weeks after securing the employment of [the beneficiary].

Commission based Salespersons; Will be paid 10-99 basis according to productivity. These two individuals will be hired in roughly one to two months from the time of petition approval.

With regard to the financial issues raised by the director, the petitioner submitted some documents along with a detailed explanation. Counsel for the petitioner advised that it was unable to submit a balance sheet as such a document was premature at this stage, since the U.S. entity was waiting to open its doors upon approval of the petition. The petitioner submitted copies of two wire transfers dated November 7, 2003 and December 22, 2003, which showed the transfer of funds in the amounts of \$9,976 and \$10,026, respectively. Furthermore, the petitioner claimed that a minimum of \$30,000 was to be invested in the U.S. entity within the first twelve months of operation. Finally, with regard to the operational costs of the newly formed business, the petitioner explained that its overhead was relatively low, since the renting of containers to ship its goods was only undertaken when enough parcels and/or orders were received. Thus, the petitioner concluded that the employee salaries would be its biggest liability during the first year of operations.

After reviewing the newly-submitted evidence for compliance with the regulations, the director denied the petition. With regard to the beneficiary's qualifications, the director determined that the evidence in the record did not establish that the beneficiary would be primarily employed in either a managerial or an executive capacity while in the United States. Specifically, the director concluded that the duties of the beneficiary, as presented by counsel, were vague and general, and noted that the proposed duties appeared to merely summarize the regulatory definitions. Furthermore, the director concluded that the beneficiary's role in the U.S. organization appeared to require his participation and involvement in the day-to-day tasks essential to the operation of the business.

With regard to the financial aspect of the petition, the director concluded that the petitioner had failed to substantiate that the foreign corporation had made a concrete investment in the U.S. organization and that it had further failed to establish its intent to commence business. The director noted that the foreign entity

had only invested \$10,000 to date in the U.S. entity, and that such a figure did not seem sufficient to compensate for all of the related expenses and salaries the petitioner would be required to cover.¹

On appeal, counsel for the petitioner claims that the director misinterpreted the regulations and asserts that the director erroneously examined the beneficiary's managerial and/or executive capacity at the beginning of the one-year period, and not at the projected position he would hold at the end of the initial twelve months. Counsel asserts that at the end of the first year, the beneficiary would in fact be functioning in a primarily managerial and/or executive capacity, once the hiring plan was implemented and business was underway. With regard to the business aspect of the new enterprise, counsel contended that the initial capital investment of approximately \$10,000 was sufficient to cover the petitioner's start-up costs, since such funds represented approximately 87.7% of the projected overhead expenses. Furthermore, counsel points out the secured lease for the business premises and the filing of the petitioner's article of incorporation with the Secretary of State, and claims that both are persuasive indicators of the petitioner's intent to commence a viable and active business.

The AAO, upon review of the record of proceeding, ultimately concurs with the director's findings that the petitioner will not support a managerial or executive position at the end of the one-year period.

The record indicates that the U.S. entity was incorporated in May 2003. The petition, filed on July 3, 2003, indicates that the beneficiary is to be transferred to the United States to open a new office and to serve in the capacity of president. The petitioner provided a detailed description of the beneficiary's proposed duties, in addition to a detailed hiring plan which outlined the anticipated timeline for hiring new employees and the manner in which these employees would relieve the beneficiary from performing non-qualifying tasks. In this respect, the AAO believes that the overall duties proposed for the beneficiary appear to be acceptable given the current state of the petitioner, and thus the AAO disagrees in part with the director's conclusion that the beneficiary will only be performing the day-to-day tasks of the business and that the description provided is too vague. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed.

However, in discussing the petitioner's anticipated expenses, the petitioner indicates that "the overhead for our cargo business is very low as we do not rent a container for shipment until such time as we have received enough orders/parcels from our customers who must prepay." In addition, the petitioner continued to state that "[a]s soon as we send our first container we will earn incomes that will be used to pay the liabilities." In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or

¹ Although the petitioner submitted copies of two wire transfers, it appears that approximately \$10,000 of those funds were intended as payment for the foreign entity's shares, and that the amount leftover represented its initial capital investment.

managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's staffing requirements and contain a timetable for hiring, as well as a job description for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

The petitioner's statement above indicates that the petitioner's business is contingent on receiving enough orders and/or parcels to warrant the rental of a container for transport of such goods. The petitioner indicates that the income received in advanced from its customers will thus cover its liabilities. This statement is insufficient to establish that the petitioner has a viable business plan. For example, the petitioner indicates that after the petition's approval and the beneficiary's entry into the United States, it will hire a general manager and a utility and delivery man. However, the petitioner appears to rely solely on the uncertain presumption that it will receive enough orders to allow it to compensate these employees and remain ahead of its expenses. It is likely, therefore, that if business is slow to start, the petitioner will not hire the proposed employees as the hiring plan indicates, particularly if it is not generating any revenue. The assumed but improbably success of this business plan, coupled with only \$10,000 of investment capital, is insufficient to warrant approval of the petition, since there is no evidence of a concrete undertaking to commence business in the United States. For example, the petitioner is a new enterprise, and will be relying on income solely generated by the prepayment of customers for their orders. The petitioner has submitted no evidence of advertising efforts or of the manner in which it expects to reach customers and receive business, nor has it discussed how it will cover the salaries of the beneficiary, the general manager, the utility driver, and any additional expenses related to the performing of the commission-based sales positions if the business encounters difficulty. If this is the case, the AAO concludes that the petitioner is likely to abandon the proposed hiring plan as a way to cut expenses, and

thus the idea that it will be able to fully support a managerial position at the end of the first twelve months is unlikely, particularly with an initial capital investment of only \$10,000.

The petitioner has failed to submit sufficient evidence that it will support a managerial or executive capacity at the end of the first year, particularly in light of the limited capital investment. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner and the foreign organization are qualified 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 claims that the U.S. entity is the subsidiary of the foreign entity. At the time of the filing of the petition, the record contained two stock certificates indicating that the foreign entity owned 51% of the petitioner, with the beneficiary owning the other 49% of the outstanding shares. Furthermore, in the petitioner's letter dated June 30, 2003, the petitioner stated that the shares were sold at \$1 per share, and that "[t]he money transfers are expected any day now." Although the director did not specifically address this issue in the request for evidence issued on October 11, 2003, he requested evidence of all monetary investment by the foreign company in the U.S. petitioner by way of wire transfers, deposit receipts, and business bank statements. In the response dated January 2, 2004, the petitioner submitted evidence that two deposits, in the amounts of \$9,976 and \$10,026 had been received from the foreign entity via wire transfer on November 7, 2003 and December 22, 2003, respectively.

The director concluded that the U.S. entity was not the subsidiary of the foreign entity based on the documentation submitted. Specifically, the director found that the petitioner had failed to substantiate its claim that the foreign entity owned a 51% interest in the U.S. entity and concluded that the submission of the wire transfers as evidence of consideration rendered for the shares after the fact was a material alteration of the petition.

On appeal, counsel for the petitioner contends that the foreign entity did in fact own the proportion claimed and alleges that the submission of the wire transfers did not constitute a material change in the petition as claimed by the director. Upon review, the AAO concurs with the director's conclusion but agrees with counsel's assertion that the submission of the wire transfers was not a material alteration of the petition.

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.

In this case, the petitioner provided two stock certificates, both dated July 1, 2003, which allocates 51% of the ownership of the petitioning entity to the foreign entity and the remaining 49% to the beneficiary. The petitioner failed to provide any additional documentary support, such as the corporate stock ledger, articles of incorporation, or minutes of the shareholders meetings. 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.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Furthermore, the letter accompanying the petition indicates that the petitioner was expecting the wire transfers, which would serve as payment for the foreign entity's shares, "any day now." It is clear, therefore, that at the time of the petition's filing, consideration for these ownership interests had not yet been received. The wire transfers provided by the petitioner in response to the request for evidence indicate that consideration was finally received in November and December of 2003, four to five months after the petition's filing. Counsel on appeal indicates that "[a]lthough [the petitioner] did not receive money for the shares until after filing the petition, this action did not constitute a material change in the petition"

Therefore, it is undisputed that at the time of the petition's filing, the foreign entity did not own its claimed 51% interest in the U.S. petitioner. Counsel's main assertion on appeal is that the presentation of the wire transfers merely confirmed that payment had been rendered and did not materially alter the petition. Generally, a material change is considered to be present when a petitioner attempts to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Normally, a petitioner alters a material fact or presents a new position for the petitioner to overcome a CIS objection. As counsel correctly asserts, the wire transfers do not constitute a material change for they serve to prove the financial investments of the foreign entity in the U.S. entity. The petition, however, remains deficient not due to a material change but due to the fact that the petitioner did not establish its eligibility at the time the petition was filed.

The stock certificate evidencing the foreign entity's ownership of the petitioner was dated July 1, 2003. The petition was filed on July 3, 2003. In both the petitioner's letter of support dated June 30, 2003 and on appeal, the petitioner and counsel confirm that, at the time of the petition's filing, the petitioner had not received consideration for the shares the foreign entity claimed to own. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Although the petitioner continually alleged that the money transfers would be received "any day now," payment for the outstanding shares was not rendered until November 2003, at least four months after the filing of the petition. The petitioner must

establish eligibility *at the time of filing* the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248.

Since the petitioner failed to establish that the foreign entity owned and controlled the U.S. entity at the time of the petition's filing, the petitioner has failed to establish that it had a qualifying relationship with the foreign entity. For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.