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FILE: WAC 04 182 53296 Office: CALIFORNIA SERVICE CENTER Date: NOV 10 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

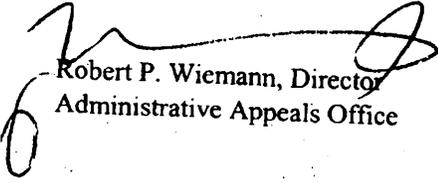
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 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 is a limited liability company organized in the State of California that intends to operate as an entertainment production company. The petitioner claims that it is a subsidiary of [REDACTED], located in Tokyo, Japan. The petitioner seeks to employ the beneficiary as executive vice president and creative director of its new office for a one-year period.

The director denied the petition concluding that the petitioner failed to establish that: (1) it has secured sufficient physical premises to house the new office; (2) the U.S. company has a qualifying relationship with the foreign entity; or that (3) the beneficiary was employed in an executive or managerial capacity with the foreign entity.

On appeal, counsel for the petitioner claims that: (1) the beneficiary performs executive duties overseas and will continue to perform executive duties for the United States entity; (2) the director mischaracterized the U.S. entity as a limited partnership rather than a limited liability company, and erroneously concluded that it is not controlled by the foreign entity; and (3) the petitioner provided evidence of an adequate office space for the U.S. company. Counsel submits a letter from the petitioner 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) 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 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 (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 proceeding is whether sufficient physical premises to house the new office had been secured at the time the petition was filed.

The petition was filed on June 15, 2004. In support of the petition, the petitioner submitted a month-to-month lease agreement with Global Business Centers under which the petitioner will receive telephone answering, voicemail, and mail receipt and forwarding services. Pursuant to the agreement, the petitioner has the ability to reserve conference rooms and/or offices on an hourly basis for an additional fee.

The director denied the petition on June 21, 2004 on the grounds that the petitioner had not secured adequate physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The director noted that the lease was on a month-to-month basis and did not provide the size of the premises. The director suggested that the failure to provide evidence of sufficient physical premises to house the new office raises questions as to whether the intended operation will support an executive or managerial position within one year of the approval of the petition.

On appeal, the petitioner claims that the lease submitted is a legitimate commercial lease and asserts that the space will only be utilized "to keep overhead to a minimum for the first few months while we establish ourselves." The petitioner notes that many new companies utilize a similar type of lease and claims that the company will look for larger office space after the beneficiary arrives in the United States and the company is able to ensure its investors that it can complete its planned projects.

The petitioner's argument on appeal is not persuasive. The "lease" agreement submitted provides the petitioner with only basic telephone and mail services and the right to reserve an office or conference room for an hourly fee. Although the petitioner has been given a suite number in an office building, there is no indication that an office had been assigned for the petitioner's regular and exclusive use. Accordingly, the petitioner has not established that it has secured adequate physical premises to house a production company. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. As alluded to by the director, the evidence submitted in support of a new office petition should show that the company is prepared to commence business operations and 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. To establish eligibility, the petitioner must provide evidence that it has acquired sufficient physical premises from which to carry out his business plan.

The petitioner claims on appeal that the company intends to locate a larger office space once it is prepared to move forward with its planned productions. However, 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. 248 (Reg. Comm. 1978). The petitioner did not submit evidence that it had acquired sufficient physical premises to house the new office at the time of filing. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has established that there is a qualifying relationship between the petitioner and the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(i). 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.

The petitioner indicated on Form I-129 that it is a subsidiary of the foreign entity. It also submitted an attachment explaining that the United States company is wholly owned by the foreign entity, and managed by the beneficiary and [REDACTED]. The petitioner provided: (1) the U.S. company's June 3, 2004 limited liability company management operating agreement indicating that the foreign entity is to become the sole member with 100 percent interest in the petitioner upon payment of a capital contribution of \$10,000; (2) its membership certificate number one issued to the foreign entity on June 3, 2004; and (3) evidence that the petitioner's checking account was opened with an initial deposit of \$10,000 on June 9, 2004. The petitioner submitted a receipt showing that the \$10,000 deposit included a check for \$7,000 and a check for \$3,000.

The director denied the petition in part concluding that the petitioner had not established a qualifying relationship with its claimed foreign parent company. In his decision, the director cited various excerpts from the petitioner's articles of organization including its management, membership, and general provisions, and concluded:

Although the Operating Agreement states that the petitioning entity will be initially classified as a Corporation, however, the Operating Agreement also waived all responsibilities and liabilities to members and assigned all management decisions to a nonmember managers. Therefore, the member in this entity is more akin to the limited partnership in a Limited Liability Partnership (LLP) organization, and that the manager is somewhat similar to the General Partner of a LLP.

Accordingly, the evidence of record clearly demonstrates that the foreign entity has no control over the day-to-day operation of the petitioning entity, and therefore fails to establish the qualifying relationships [sic].

On appeal, counsel for the petitioner asserts that the director erred in finding that the foreign entity does not have managerial control over the U.S. corporation and "mischaracterized the corporate entity as a limited partnership rather than a limited liability corporation." In a letter submitted in support of the appeal, the petitioner contends that the petitioner has been set up as a subsidiary of the foreign entity and that the

beneficiary "is the link between these two companies, has control over the day-to-day operation of the company, and will be in constant contact with [the foreign entity] in Tokyo." The petitioner asserts that the foreign entity will therefore have control over the day-to-day operations of the petitioning entity.

Upon review, the petitioner's arguments are persuasive, in part. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the 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. To establish the claimed parent-subsidiary relationship in this case, it must be shown that the foreign employer owns and controls the petitioning entity. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks, or in this case, membership interest, of the other entity. See, eg. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

The director, rather than focusing on the essential element of ownership, instead analyzed the petitioner's operating agreement, concluded that the foreign entity is "more akin to a limited [partner] in a [redacted] (LLP) organization," noted that the non-member manager actually controls the company, and determined that the foreign entity "has no control over the day-to-day operation" of the petitioner.

The director's decision with respect to this issue will be withdrawn. The petitioner presented evidence that it has been legally established and recognized by the State of California as a limited liability company. Accordingly, the director's attempts to characterize the company's structure as a partnership were inappropriate. The petitioner claims that the foreign entity owns a 100 percent interest in the United States company. Therefore, if this fact were established, the foreign entity would have "de jure" control over the petitioner and would meet the definition of a "parent" pursuant to 8 C.F.R. § 214.2(I)(1)(ii)(I) without submitting further evidence to establish actual control over the U.S. company.

Upon review, there is insufficient evidence in the record of proceeding to establish the claimed parent-subsidiary relationship. However, due to the director's incorrect focus on the terms of the operating agreement rather than on the actual ownership of the company, the petitioner did not have sufficient notice of the deficiencies in its evidence. The AAO will therefore note these deficiencies for the record, but is unable to conclude whether a qualifying relationship exists between the foreign and United States entities.

As noted above, the petitioner submitted evidence that the foreign entity agreed to pay the petitioner \$10,000 for its membership interest in the company, along with a copy of its membership certificate issued to the foreign entity. The petitioner also submitted evidence that the U.S. company opened its bank account with a deposit of \$10,000. However, the record does not contain evidence that the foreign entity actually paid for its ownership interest in the petitioner. The source and purpose of the \$10,000 deposited into the petitioner's account have not been documented. Absent evidence that these funds originated with the foreign entity, or other evidence that the foreign entity paid for its membership interest, the petitioner has not established that the two entities possess the claimed parent-subsidiary relationship. Evidence of this nature would include

documentation of monies, property, or other consideration furnished to the entity in exchange for membership. As the appeal will be dismissed based on the grounds discussed above, this issue will not be discussed further.

The third issue in this matter is whether the petitioner established that the beneficiary has been employed in a managerial or executive capacity with the foreign entity.

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.

On an attachment to the L Classification Supplement to Form I-129, the petitioner provided the following description of the beneficiary's duties for the past three years:

Wrote and produced three television series for Japanese television; Wrote two published novels; Lectured on screenwriting; Screenwriter for 2004 television series of 24 dramatic episodes airing beginning April 2004 and a television feature movie in 2004; Writer, three books to be published 2004-2005; Managed copyrights [sic] and all business affairs for the above.

In a June 10, 2004 letter, the petitioner described the beneficiary's current duties as:

As the President and Director of the Japanese company, [the beneficiary] has overall supervision for the direction of the company. In addition, because the company is based on management of [the beneficiary's] literary talent and film and television residuals, [the beneficiary] has control over the management of the company. She hires and fires personnel, makes financial determinations on the direction of the company, determines which productions and materials will be produced. She also executes contracts, manages copyrights and residuals from her literary and screen writing credits. In addition, [the beneficiary], as the President and Director is the sole representative of the company.

The petitioner noted that the beneficiary is a well-known author, novelist and screenwriter in Japan and provided a long list of her credits as a film screenwriter, television screenwriter, essayist, novelist, lecturer, journalist, and translator. The petitioner stated that the foreign company employs five full-time and two part-time employees, and specializes in production and planning of movie and television scripts, producing movie and television films and programs, literary reviews, managing copyrights for the beneficiary's novels and song lyrics, and managing the proceeds from the beneficiary's novels, film and television work.

The director denied the petition concluding that the petitioner had not established that the beneficiary is employed in a managerial or executive capacity with the foreign entity. The director noted the number of claimed employees, speculated as to the foreign entity's possible organizational structure, and concluded that "a significant part of the beneficiary's duties consist of the day-to-day functions" of the company.

On appeal, counsel for the petitioner states on the Form I-290B, Notice of Appeal: "The alien beneficiary performs executive duties overseas and will be continuing to perform executive duties." However, the petitioner does not address the beneficiary's duties in its accompanying letter, and instead emphasizes the beneficiary's proposed duties with the United States entity, an issue that was not specifically addressed by the director.

Upon review, counsel's argument is not persuasive. Although the director's conclusion that the beneficiary has not been employed in a primarily managerial or executive position will be affirmed, the director's analysis with respect to the foreign entity's organizational structure will be withdrawn. It is appropriate for the director to consider the foreign entity's staffing levels as a factor in determining whether the beneficiary is employed in a qualifying managerial or executive capacity. See section 101(a)(44)(C) of the Act, 8 U.S.C. 1101(a)(44)(C). However, it was inappropriate for the director to substitute speculation as to what positions or departments the foreign entity may have staffed in lieu of the required description of the organizational structure of the foreign entity. See 8 C.F.R. § 214.2(l)(3)(v)(C)(3). As the director did not properly issue a

request for evidence for the foreign company's organizational chart and a description of the duties performed by its seven employees, the AAO will confine its analysis of this issue to the beneficiary's job description.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary "has overall supervision for the direction of the company," "has control over the management of the company," "makes financial determinations on the direction of the company," and "manages copyrights and residuals from her literary and screenwriting credits." The petitioner has not, however, described what specific efforts the beneficiary takes to supervise and direct the company or manage copyrights and residuals. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the record indicates that the beneficiary is primarily a writer by profession, rather than a manager or executive as contemplated by the definitions at sections 101(a)(44)(A) and (B) of the Act. Specifically, the evidence submitted by the petitioner indicates that in the three years preceding the filing of the petition, the beneficiary had written two published novels, completed three novels to be published in the near future, translated *The Bell Jar* for a Japanese publisher, written 169 episodes for three different Japanese television series, was in the process of writing 24 episodes of an upcoming television series, and a screenplay for an upcoming television movie. The petitioner has not provided evidence that the beneficiary's role as a novelist and screenwriter is incidental to her performance of executive and managerial duties for the foreign entity. Rather, it is reasonable to conclude that the beneficiary's participation in these creative projects, while very impressive, prohibits her from serving in a managerial or executive capacity for the foreign entity on a full-time basis.

The AAO acknowledges that the beneficiary, as the majority shareholder and president of the foreign entity, exercises financial and creative control over her own work product and likely performs duties in a managerial or executive capacity intermittently, if not on a daily basis. However, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Accordingly, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of providing that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The word "primarily" is defined as "at first," principally, or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also

“principally” or “chiefly” perform managerial or executive duties. To make such a determination as to whether a beneficiary performs primarily managerial or executive duties, it is necessary for CIS to require a detailed description of the beneficiary’s duties and the time the beneficiary devotes to these duties. It is especially relevant when the beneficiary devotes a significant perform of her time to performing duties, such as writing novels and screenplays, that do not fall directly under traditional managerial or executive duties as defined in the statute. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice* 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In this matter, it is reasonable to assume that the beneficiary’s involvement in writing novels and screenplays requires more of her time than any duties related to overseeing the management of the finished works.

Based on the foregoing discussion, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity with the foreign entity. For this additional reason, the appeal will be dismissed.

Although the appeal will be dismissed, the petitioner may of course file a new visa petition on behalf of the beneficiary, with the required supporting evidence, in a more appropriate nonimmigrant visa classification.

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.