

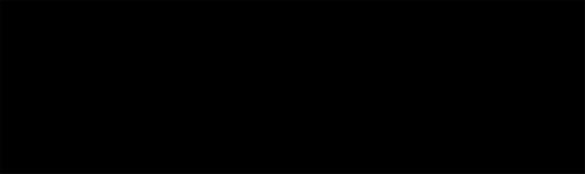
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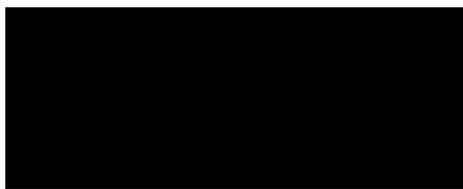
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FILE: EAC 02 268 53099 Office: VERMONT SERVICE CENTER Date: **AUG 01 2005**

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was established in 1998 and claims to be in the investment management and franchise gasoline station business. The petitioner claims to be an affiliate of Paramount Printing Press, located in Bombay, India. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as a vice-president for an additional three years, at an annual salary of \$42,000.00. The director determined that the petitioner had not submitted sufficient evidence to demonstrate that: (1) the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity; or that (2) a qualifying relationship exists between the U.S. and foreign entities. The beneficiary was initially granted a one-year period of its stay in the United States and the petitioner now seeks to extend the beneficiary's stay.

On appeal, counsel disagrees with the director's decision and asserts that the evidence submitted is sufficient to demonstrate that the duties performed by the beneficiary will be managerial or executive in capacity, and that a qualifying relationship exists between the U.S. and foreign entities.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary, or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (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.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily—

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (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), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and

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

In a letter dated August 15, 2002, the petitioner described the beneficiary's proposed duties as:

[The beneficiary] will assume the position of vice president and secretary in charge of business development, financial and inventory oversight, human resources, and general administration, for Poojapratima, Inc. . . . As vice president and secretary, [the beneficiary] will create and direct business growth initiatives to foster business development and expansion as well as work with the India based Partner, Ketan V. Sukhadia to develop Poojapratima, Inc.'s strategic goals and market objectives. . . .

As vice president and secretary of Poojapratima, Inc. . . , [the beneficiary] will manage—at a senior level—the supervision of functions critical to the success of our company's business development and marketing directives. The specific function [the beneficiary] will manage is the business development and general administration, including financial management and human resource administration, of Poojapratima, Inc. [The beneficiary] will establish all operational policies to ensure smooth administration of our three Exxon franchise retail locations. . . . [The beneficiary] will also explore further expansion within and beyond the area of motor fuel service and distribution. He will initiate extensive market research and identify new concepts and venues for further business expansion. Once these venues have been identified, [the beneficiary] will coordinate new site designs, permitting, construction and opening activities surrounding the expansion. [The beneficiary] will manage all aspects of Poojapratima, Inc.'s retail and wholesale sales for existing and future locations. He will also develop and maintain new corporate and institutional accounts and will prepare detailed sales and business development plans.

[The beneficiary] will also act as the key contact with our Indian affiliate, . . . in addition to expanding our U.S. market base and business development at [the foreign entity] . . . he will provide regular reports on the growth and development of Poojapratima, Inc., as well as determine avenues for expansion on the basis of market research. [The beneficiary] will also give guidance and direction regarding the international appeal of business development concepts established by Poojapratima, Inc. for possible implementation by [the foreign entity] in India.

In addition to overseeing the formation of service concepts and management guidelines, [the beneficiary] will be responsible for overseeing a skilled and knowledgeable sales staff. . . . [The beneficiary] conducts a high degree of daily autonomy, discretionary decision making and responsibility for taking or recommending personnel actions such as hiring, promotion, leave authorization, and firing. [The beneficiary] will report to the president, however, he will only receive minimal supervision from [the president].

In response to the director's request for evidence on this subject, counsel stated in part: "[The beneficiary] will also initiate extensive market research and identify new concepts and venues for further business expansion." The petitioner also stated:

As Vice-President and Secretary of Poojapratima, Inc. . . [the beneficiary] will manage—at a senior level—the supervision of functions critical to the success of our company’s business development and marketing directives. The specific function [the beneficiary] will manage is the business development and general administration, including financial management and human resource administration, of Poojapratima, Inc. Please note that [the beneficiary] is a senior level person within the U.S. organization responsible for directing, organizing, expanding and developing the capabilities of our motor fuel franchises and ultimately increase business activities for Poojapratima, Inc. . . .

The petitioner also stated in part:

The specific and essential functions [the beneficiary] manages include evaluating business opportunities and formulating corporate strategies for continued business development and the marketing of our products to the local community for each of our establishments. . . In the morning hours he performs his non-executive functions such as overseeing work completed by managers and cashiers and follows up with them for any pending business issues. He evaluates the performance according to our company’s policies and missions and takes the appropriate steps for further improvement. In the afternoon hours, [the beneficiary] normally devotes to his executive functions. . . . The degree of discretionary authority in day-to-day operations that [the beneficiary] has is the authority to hire and terminated, as well as promote and grant leave of absences, to the entire staff. He has wide latitude in making decisions about the goals and management of the organization. As a high level manager, he has a very high degree of authority within our organization.

The petitioner stated that the beneficiary's job duties and percentage of time he would spend performing them included: general administration 25 percent, finance management 20 percent, human resource management 10 percent, purchase and inventory management 10 percent, continuous quality improvement 25 percent, and exploring new ventures 10 percent.

The petitioner continued by listing the duties of the entity’s managers including preparing daily transaction reports, preparing weekly orders, checking delivery of goods, and helping management with training and with quality improvements. The cashier’s duties included running the cash register and consolidating cash balances at the end of each shift, and handing over the shift to the next employee. The petitioner also listed their basic skill requirements as “work experience of 1 to 2 years in the retail field, strong communication and speaking skills, strong customer interaction skills, and a pleasant personality.” The petitioner submitted copies of the U.S. entity’s Payroll Summary and Payroll Register for the months of June, July, and August of 2002, and Employer’s Quarterly State Report of Wages for June and September of 2002.

The director determined that the evidence submitted was insufficient to establish that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director stated that there was nothing in the record that demonstrated that either the manager or cashier positions required the services of professional-level employees. The director noted that the nature of the manager’s duties, coupled with their low rate of pay, brought into question whether they relieve the beneficiary from performing the day-to-day business activities of the organization. The director further noted that based upon the description of the beneficiary’s as well as his subordinates job duties, it appeared that the beneficiary was performing the day-to-day tasks associated with the daily operation of a gas station franchise. The director noted that it appeared from the U.S. entity's organizational chart that the president of the company would perform managerial or

executive duties to a greater extent than the beneficiary. The director concluded by noting that it was unlikely that the U.S. entity would require the services of two employees in a primarily managerial or executive capacity.

On appeal, the petitioner argues that the beneficiary's position satisfies the managerial and executive requirements in that he manages the organization, controls the work of supervisors, has power to hire and fire and execute other personnel decisions, exercises discretionary authority over the operation, and is not a first line supervisor. The petitioner also argues that although the beneficiary's title is "vice-president" he functions as the "general manager" of the business. The petitioner asserts that the president of the U.S. entity only holds an office within the company and does not work on a daily basis for the entity. The petitioner also asserts that the beneficiary only consults with the president of the company on business policy and long-term strategies, and otherwise, has complete discretionary authority over the operation of the gasoline franchise. The petitioner contends the station manager's salaries are actually \$16,664 per year, and that they are responsible for the basic day-to-day supervision of their respective gas stations. The petitioner further contends that the managers relieve the beneficiary from performing non-qualifying duties. The petitioner submitted copies of the U.S. entity's payroll records for June, September, October, and November of 2002. The petitioner also submitted a letter written by Piyush Rambhia, dated December 10, 2002, in which he states: "...[A]lthough I am the President [REDACTED], all the day to day [sic] management and decision making responsibility rests with [the beneficiary]. I am a minority shareholder in the business, but I am not actively working in the business." The petitioner also submitted a letter of reference, dated December 19, 2002, from McGann Associates, a management consultant business.

The petitioner has not established that the beneficiary has been employed in a managerial or executive capacity. In evaluating whether the beneficiary is employed in a primarily managerial capacity, the AAO will look first to the petitioner's description of the beneficiary's 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.* In the instant matter, the record demonstrates that the beneficiary will perform various job duties while employed by the U.S. entity. Here, the petitioner has failed to distinguish the beneficiary's role in the operation of its business. For example, the petitioner describes the beneficiary's duties as managerial in that he manages the business development function of the organization, executive in that he exercises a wide latitude in discretionary decision-making, and administrative in that he will be marketing the company's services and performing human resource, purchase and inventory, and finance management functions. Further, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions, and that he *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Based upon duty descriptions contained in the record, it appears that the beneficiary will primarily perform the business development, marketing, general administration, and human resource functions of the organization. Consequently, there is insufficient evidence to show that the beneficiary will perform the high-level responsibilities as defined, or that he will primarily perform those duties rather than spending the majority of his time performing the day-to-day functions of the organization.

In addition, the petitioner described the beneficiary's duties as marketing the petitioner's product, initiating research, and general administration. Since the beneficiary actually performs administrative work, markets the petitioner's product, and initiates research, he is performing tasks necessary to provide a service or product and these duties will not be considered managerial or executive in nature. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a

managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner asserts that the beneficiary's title is "vice-president" although he functions as a "general manager." However, the petitioner fails to present a plausible explanation for such a contrast. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, although the petitioner contends the president of the U.S. entity only holds an office within the U.S. entity and does not perform in a managerial or executive capacity, payroll records submitted by the petitioner demonstrate that the president of the organization has been compensated for 40 hour work weeks during the months of January, February, March, and April of 2002. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner contends the station manager's salaries are greater than that initially cited by the director, and that they are responsible for the day-to-day activities of their designated gasoline stations, however, there has been insufficient evidence submitted to show that their activities are sufficient to relieve the beneficiary from performing non-qualifying duties.

The petitioner asserts that the beneficiary will be managing three managers of three gasoline stations and six cashiers, however, the record does not establish that the subordinate staff is composed of supervisory, professional, or managerial employees. See section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary will primarily be supervising a staff of non-professional employees, the beneficiary cannot be deemed to be serving in a primarily managerial capacity.

Although the petitioner claims that the beneficiary directs and manages the petitioner's business development and general administration activities, it does not claim to have anyone on its staff to actually perform the business development and general administrative functions. Thus, either the beneficiary himself is performing these functions or he does not actually manage the business development and general administration function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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, supra*. If the beneficiary is performing the business development and general administrative function, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra*. For this reason, the petition may not be approved.

The second issue in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

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 (I)(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.

The regulations at 8 C.F.R. §§ 214.2(l)(1)(ii) define, in pertinent part, "parent," "branch," "subsidiary," and "affiliate" as:

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operation 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.

In a letter dated August 15, 2002, the petitioner claimed that nine individuals owned 100 percent of the foreign entity and 59.4 percent of the U.S. entity, making the relationship between the two companies that of an affiliate. The petitioner further claimed that the nine individuals who owned 100 percent of the foreign entity also owned 99 percent of S-Cube International LLC (S-Cube) and that therefore, S-Cube was the American affiliate of the foreign entity. The petitioner stated that on August 31, 2001, the owners of the foreign entity and S-Cube acquired shares of stock in the U.S. entity, now totaling 60 percent of all shares. The petitioner submitted a company business plan, which demonstrated that the foreign entity was owned by nine individuals, 99 percent of S-Cube was owned by the foreign entity, and 60 percent of the U.S. entity was owned by S-Cube, 15 percent by [REDACTED] and 25 percent by [REDACTED]. The petitioner submitted a copy of the U.S. entity's stock certificate number 1 which stated that sixty (60) shares of stock in the

corporation had been issued to S-Cube. The petitioner submitted copies of the U.S. entity's IRS Form 1120, U.S. Corporation Income Tax Return for the year 2001 Schedule K, Question 5, Statement 3 which demonstrated that [REDACTED] owned 25 percent, [REDACTED] owned 20 percent, [REDACTED] owned 40 percent, and S-Cube owned 15 percent of the shares of stock in the U.S. corporation. The petitioner also submitted copies of a Stock Purchase Agreement, dated June 29, 2001, in which it is stated that the former shareholders, [REDACTED] percent shareholder and [REDACTED] 50 percent shareholder, sold their shares of stock in the U.S. entity to [REDACTED], S-Cube, and [REDACTED] all of whom signed the agreement as buyers.

In response to the director's request for additional evidence on this subject, the petitioner stated in part:

- As additional evidence demonstrating the qualifying L-1 relationship between Poojapratima, Inc., S-Cube International, LLC, and Paramount Printing Press, please accept the following:
 - ◀ A timeline of events showing all relevant transactions involving the formation of S-Cube and the purchase of Poojapratima, Inc.:
 - June 23, 2001 – Nine partners of Paramount Printing Press form S-Cube International, LLC.
 - August 31, 2001 - S-Cube International, LLC acquires fifteen shares of Poojapratima, Inc. (15% of the company)
 - January 1, 2002 – S-Cube International, LLC acquires an additional forty five shares of Poojapratima, Inc. for a total of sixty shares (60% of the company)

As evidence of ownership of S Cube and the foreign entity, the petitioner submitted a copy of a Partnership Deed in Constitution for Paramount, as of April 1, 2000, and a copy of the Operating Agreement of S Cube, dated June 23, 2001. The petitioner also submitted a copy of the U.S. entity's Articles of Incorporation, dated June 27, 1998, in which it is stated, "[t]he aggregate number of shares authorized is 200." The petitioner submitted a copy of the U.S. entity's Record of Certificates Issued and Transferred which indicated that 50 shares of stock was transferred from [REDACTED] and 50 shares of stock was transferred from [REDACTED] to [REDACTED] and S. Cube International, LLC on August 31, 2001. The petitioner also submitted copies of the U.S. entity's stock certificate number three (3) made out to [REDACTED] for twenty-five (25) shares, stock certificate number four (4) made out to [REDACTED] for twenty (20) shares, stock certificate number five (5) made out to [REDACTED] for forty (40) shares, and stock certificate number six (6) made out to S. Cube Int'l, LLC for fifteen (15) shares. All stock certificates were dated August 31, 2001. The petitioner submitted copies of the U.S. entity's Stock Purchase Agreement signed and dated June 28, 2001, and an Amendment to Stock Purchase Agreement, signed and dated August 31, 2001. The petitioner submitted copies of U.S. entity stock certificates dated January 1, 2002, which indicated stock certificate number one (1) was issued to S-Cube International, LLC for sixty (60) shares, stock certificate number two (2) was issued to [REDACTED] for seven (7) shares, and stock certificate number three (3) was issued to [REDACTED] for eight (8) shares. The petitioner submitted a copy of a First Union cashier's check made out to [REDACTED] in the amount of \$100,000.00. The petitioner also submitted a copy of a canceled check dated June 28, 2001, from S-Cube International, LLC to Tannenbaum & AACOK in the amount of \$60,000.00.

The director determined that the evidence of record showed that the foreign entity and S Cube were affiliated in that they were both owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. The director stated that although the petitioner claims to have an affiliate relationship with the foreign entity through the S Cube company, the single stock certificate submitted to show 60 percent ownership of the U.S. entity by S Cube was insufficient, without corroborative evidence, to show that S Cube actually owned the shares of stock as claimed. The director noted that there was no record of transfer or purchase of additional shares of the U.S. entity's stock by S Cube in the stock ledger, stock purchase agreement, amendment to stock purchase agreement, or any other business document submitted by the petitioner. The director also noted that there was no evidence submitted of the consideration paid by S Cube to purchase additional shares of stock in the U.S. entity. The director further noted that the checks submitted as evidence of consideration paid for the purchase of U.S. entity's stock by S Cube were dated six and four months prior to the alleged January 1, 2002, transaction. The director noted that the checks were dated during the same period in which S Cube purchased 15 shares of the U.S. entity's stock. The director also questioned the legitimacy of the U.S. entity's stock certificates numbered 1, 2, and 3 issued January 1, 2002. The director noted that it was unusual practice for a corporation to reuse stock certificate numbers, and also recognized that the stock certificates had not been recorded in the U.S. entity's stock ledger. The director concluded that the evidence of record did not clearly show that S Cube owned a majority of the U.S. entity's stock and that since S Cube linked the relationship between the foreign entity and the U.S. entity, the petitioner had failed to establish the existence of a qualifying relationship.

On appeal, the petitioner argues that the U.S. entity stock certificate showing 60 shares issued to S Cube was sufficient to establish a qualifying relationship between the U.S. entity and the foreign entity. The petitioner further argues that the original stock certificate numbers 1, 2, and 3 were lost and replaced on or about April 2002, and that at that time the numbers were mistakenly reused to number the stock certificates that had been issued in January of 2002. The petitioner also argues that it had been agreed among [REDACTED] and [REDACTED] that if and when the beneficiary obtained permission to manage S Cube, S Cube would become the majority shareholder in the U.S. entity, in that it had provided the bulk of the money for the initial purchase. The petitioner contends that the redistribution of shares of stock in the U.S. entity took place in January of 2002, after the beneficiary's L-1 status had been approved and in accordance with the original agreement. The petitioner asserts that the loss and replacement of the share certificate book caused confusion in the documentation of the January 2002 transactions. The petitioner further asserts that in May 2002, when the lost certificates issued in January 2002 were replaced, the original dates were used, however, the first certificates from the new share certificate book were used rather than the certificates numbered 7, 8, 9, and 10, which corresponded to the numbers of the lost certificates. On appeal, the petitioner submits copies of a Shareholder's Agreement, dated August 16, 2001, between [REDACTED] and [REDACTED]; a Shareholder's Agreement, dated September 17, 2001, between the U.S. entity and its shareholders; an Amended Shareholder's Agreement, dated December 20, 2001, between the U.S. entity and its shareholders; a Shareholder's Resolution Authorizing Amendment of Shareholder Agreement, dated December 4, 2001; four Statements as to Loss of Share Certificates; a Shareholder's Resolution Authorizing Issuance of New Certificates; and a memo, dated December 19, 2002, from Pandya, Kapadia & Associates, an accounting firm.

On reviewing the evidence and the petition, the petitioner has failed to establish that a qualifying relationship existed between the U.S. and a foreign entity at the time the petition was filed. 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 U.S. and foreign entities for purposes of a nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289

(Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (in immigrant visa proceedings). There have been no company by-laws, tax records, stock certificate registry, purchase of shares agreements, bank statements, canceled checks or any other business documents presented to demonstrate the purchase of the U.S. entity's stock by S Cube on January 1, 2002. The two checks submitted by the petitioner in the amount of \$100,000 and \$60,000 respectively, were dated prior to January 1, 2002, and made no reference to future purchase of U.S. entity stock by S Cube. The evidence as presented demonstrates that at the time the petition was filed, S Cube owned only 15 percent of the U.S. entity's stock, an insufficient amount to qualify as an affiliate relationship.

On appeal, counsel relies on evidence that was requested by the director in the request for evidence but not produced until after the initial decision to deny the petition had been made. The petitioner submitted copies of a Shareholder's Agreement, dated August 16, 2001; a Shareholder's Agreement, dated September 17, 2001; an Amended Shareholder's Agreement, dated December 20, 2001; a Shareholder's Resolution Authorizing Amendment of Shareholder Agreement, dated December 4, 2001; four Statements as to Loss of Share Certificates, dated May 2, 2002; a Shareholder's Resolution Authorizing Issuance of New Certificates, dated December 4, 2001; and a letter from an accounting firm, dated December 19, 2002.

Although the documents submitted on appeal were requested prior to the director's decision, they were only submitted after the director noted the numerous inconsistencies in the petitioner's evidence. There has been no evidence submitted to demonstrate that the shareholder's agreements, the resolutions, and the amendments thereto have been accurately dated or properly recorded with state corporate officials. There has been no evidence submitted to substantiate the claim made by the accounting firm in its letter dated December 19, 2002. 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). Evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Further, the record contains a number of inconsistencies regarding the claimed purchase of U.S. entity stock by S Cube. As is noted by the director, there was no record of transfer or purchase of additional shares of stock by S Cube in the stock ledger, stock purchase agreement, amendment to stock purchase agreement, or any other business document submitted by the petitioner. There was no mention of the January 1, 2002, stock purchases in the stock ledger that was submitted by the petitioner as evidence. Further, there was no evidence submitted of the consideration paid by S Cube to purchase additional shares of stock in Poojapratima. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, *supra*. at 190. Further, there has been no plausible explanation given for the loss of the original "share certificate book" and "share certificates" sufficient to overcome the director's denial. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, at 591-92. For this additional reason, the petition may not be approved.

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. The petitioner has not sustained that burden.

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Page 12

ORDER: The appeal is dismissed.