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U.S. Citizenship
and Immigration
Services

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JAN 31 2005

FILE: SRC 03 084 50689 Office: TEXAS SERVICE CENTER Date:

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)

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, Texas 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 § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that operates both a combination convenience and pizza store and an investment company. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Kathmandu, Nepal. The petitioner now seeks to employ the beneficiary as its executive director for three years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director specifically noted that the beneficiary would not be supervising managerial or professional employees, and would likely be engaged in the daily activities of the business due to the petitioner's limited number of personnel.

On appeal, counsel claims that the beneficiary would be employed in the United States in both a managerial and an executive capacity. Counsel notes that the applicable statute restricts Citizenship and Immigration Services (CIS) from relying solely on a petitioner's staffing levels when determining employment in a managerial or executive capacity. Counsel submits a brief and additional documentation 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 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.

The issue is whether the beneficiary would be employed by the United States 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the nonimmigrant petition on January 29, 2003, noting that as executive director of the United States entity, the beneficiary would:

Confer with the Nepal Company and develop long range goals and objectives of the US Company. Direct and coordinate activities of the organization and formulate and administer

company policies: Direct and coordinate activities relating to purchasing, production, operations and sales for which responsibility is delegated and targeted to further attainment of goals and objectives. Review and analyze activities, costs, operations, and forecast data to determine progress toward stated goals and objectives. Discuss with employees to review achievements and discuss required changes in goals or objectives of the company.

Included in the accompanying documentation was a business resolution by the foreign corporation appointing the beneficiary as executive director and outlining the following tasks of the beneficiary's proposed position:

- Make investment decisions related to the proposed diversification.
- Make decisions relating to the establishment of a subsidiary and business presence for the subsidiary.
- To act as the Director/Executive Officer of the new business in the USA.
- To execute all documents on behalf of [the foreign organization] in Nepal and the new subsidiary in the USA.

The director issued a request for additional information on February 7, 2003 asking that the petitioner provide a statement explaining the beneficiary's employment in the United States, including: (1) the number of subordinate employees supervised by the beneficiary; (2) a description of each subordinate's job duties and educational background; (3) the dates of employment for each employee; and (4) the qualifications necessary for each position.

Counsel responded in a letter dated April 28, 2003, explaining that the beneficiary presently supervised two employees, a store manager and a cashier. The store manager, who counsel stated was employed since October 2002, is responsible for purchasing, maintaining and stocking the store's inventory, fixing prices, performing business transactions related to funds received and disbursements, and ensuring employees' compliance with security, sales and record keeping procedures. Counsel stated that the cashier was responsible for the petitioner's cash and bank transactions. Counsel submitted the petitioner's organizational chart identifying the beneficiary as a direct subordinate of the president of the company. The organizational chart also identified the store manager and cashier as lower-level employees and further identified the president of the company as an additional subordinate employee of the beneficiary in the position of acting international trade specialist. Counsel did not indicate the educational backgrounds of the store manager or cashier, but stated that these positions require a high school diploma.

On May 9, 2003, the director issued a notice of intent to deny requesting information related to the beneficiary's employment abroad. The director issued an additional notice of intent to deny on June 21, 2003. The director noted that the record did not demonstrate that the beneficiary would be employed in the United States in a qualifying capacity, as he would likely participate in daily functions of the business. The director asked that the petitioner describe how the beneficiary meets the requirements of an executive, and explain how the beneficiary would not be engaged in the petitioner's day-to-day operations. The director also asked that the petitioner explain the duties and educational background of any other workers employed by the petitioner.

Counsel responded in a letter dated July 18, 2003, and provided the following with respect to the beneficiary's proposed employment as an executive:

i) *Directs the management of the organization or a major component or function of the organization;*

The beneficiary has been assigned the position of an Executive Director to assist with the establishment of the second subsidiary operation. . . . Among others, he will be responsible *primarily* for the management of [the petitioning organization] such as business promotion and expansion, legal and institutional development of the company, reviewing contractual issues, reviewing agreements and contracts done by outside agencies, overseeing duties performed by the store manager and Finance Manager/Cashier. He will direct and coordinate activities of the organization and formulate and administer company policies. In addition he will also provide the main company, Global Crafts Inc, advice on the import of goods from Nepal and oversee International Trade and business legal issues. He will also consult with the management of the parent company to develop long-range goals and objectives of the company. These are essential managerial and executive functions.

* * *

ii) *Establishes the goals and policies of the organization, component or function;*

We submit that in the current scenario, the stage of development of the organization should be taken into account. [The petitioning organization] is a new organization. It is part of a diversification effort of Global Crafts Inc. The number of employees the corporation employs should not be an issue at this early stage of development of this corporation. It is important to note that the beneficiary is responsible for establishing the overall goals and policies of the organization. He is also responsible for overseeing the legal and contractual issues required to set up a new operation and to make it into a successful operation. We submit that the petitioning company is currently performing well and is therefore poised to increase its profit further and requires the supervision of the beneficiary to make it an even more successful operation.

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.*

The beneficiary functions at a senior level within the organizational hierarchy. . . . He will report only to the President and receive general supervision and direction from only the President and higher-level executives. Accordingly, he exercises wide latitude in discretionary decision making for the corporation.

(Emphasis in original).

Counsel also provided the following with regard to the beneficiary's employment in a managerial capacity:

To perform in a managerial capacity as defined by the regulations stated above, the beneficiary needs to *primarily* manage the organization or department. We have already indicated above that the beneficiary will be primarily responsible for managing the work done

by the petitioning company. In addition, we have also indicated that he will supervise and control the work of three other persons. He also has the authority to hire and fire and recommend personnel actions and if the number of employees is an issue, (though it should not be), the beneficiary will function at a senior level within the organizational hierarchy. The beneficiary also exercises discretion over the day-to-day operations of the company. He does not perform the day-to-day operations as he has the store manager and cashier/finance manager to perform those duties. We also wish to point out that the key term to define managerial or executive capacity is that the person should be "*primarily*" performing the above stated duties. We have indicated above that he will primarily function in an executive and managerial capacity as defined under Title 8, Code of Federal Regulations; Section 214.2 (1)(1)(ii).

(Emphasis in original).

Counsel again outlined the job responsibilities of the beneficiary's two subordinate employees. As the job descriptions were previously outlined above, they will not be repeated. Counsel stated that the store manager holds a master's degree in business management, while the cashier/finance manager possesses a master's degree in economics and culture. Counsel stated that in addition to supervising these two employees, the beneficiary would review the work of the petitioner's president, who would be acting as the company's international trade specialist. Counsel noted that the company president has a bachelor's degree in business administration.

In a decision dated July 29, 2003, the director determined that the petitioner failed to establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted that the petitioning organization, which has been doing business for more than one year, employed two workers. The director concluded that the beneficiary would not be employed in a qualifying capacity as the beneficiary would not be managing professional or managerial employees. The director further noted that the beneficiary would participate in the daily operations of the company "since two employees cannot perform all the day to day activities of the company." Accordingly, the director denied the petition.

In an appeal filed on September 2, 2003, counsel stated that the petitioner "extensively outlined" the beneficiary's proposed employment in an executive and managerial capacity and the petitioner's need for the beneficiary's services. Counsel challenges the director's finding that the beneficiary would perform non-executive and non-managerial duties as a result of the petitioner's limited personnel. Counsel claims that instead this represents the petitioner's "need for more qualified employees," and states that the beneficiary's services are needed to hire additional employees and to aid in the company's expansion. Counsel further states that with regard to the beneficiary's employment as an executive, the beneficiary would be responsible for establishing the overall goals and policies of the organization and for overseeing the legal and contractual issues of setting up the organization. With regard to the beneficiary's employment in a managerial capacity, counsel provides the following:

- Performing at a senior level in the organization, the beneficiary will manage the organization and supervise and control the work of *three* other professional and educated employees. These three employees are a *Store Manager* who has a Masters degree in Business Administration, a *Finance Manager* who has a Masters degree in Economics and

Culture and an *International Trade Specialist* who has a Bachelor's degree in Business Administration. The duties performed by these individuals have been outlined in our last response attached as *Exhibit A*.

- The beneficiary will manage the "legal functions" of the organization. The beneficiary has a Masters of Laws degree from the University of Kent, U.K. and many years of legal experience. Accordingly, he will oversee all the legal and contractual issues faced by the firm as well as the investment and export/import related work performed by the main subsidiary operation, Global Craft Imports, Inc. and the duties performed by the International Trade Specialist.
- The beneficiary has the authority to hire and fire the employees and exercise discretion over the day-to-day operations of the organization. He not only has professional employees performing the day-to-day operations but is also going to hire more employees to expand the business.

(Emphasis in original). Counsel references an unpublished AAO decision in support of his claim that a beneficiary may be considered an executive if his primary function is to plan, organize, direct and control the corporation's major functions through other employees. Counsel states that the number of workers employed by the petitioner should not be an issue. Counsel also states that section 101(a)(44)(C) of the Act prohibits CIS from relying solely on staffing levels when determining the employment capacity of the beneficiary. Counsel claims that the petitioner's stage of development as "a new organization" should instead be considered.

Counsel also references a 2002 memorandum from CIS Associate Commissioner of Service Center Operations, in which the Associate Commissioner notes that CIS should consider all elements of managerial capacity when determining whether a beneficiary is a manager.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. As correctly noted by the director in her decision, the petitioner is not considered to be a new office as it has been doing business in the United States for more than one year. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). Therefore, despite counsel's claims on appeal that the petitioner is a new organization, the petitioner is required to demonstrate that it is capable of supporting the beneficiary in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii). When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *Id.* As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.*

While the petitioner provided a sufficient description of the beneficiary's job responsibilities as executive director, it does not establish that the beneficiary's employment would satisfy the requirements of both managerial and executive capacity, as claimed by counsel. If the petitioner is representing the beneficiary is both an executive and a manager, the petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Here, counsel states that the beneficiary would be employed as a manager because: (1) he will be responsible for the managing the work of the petitioning organization; (2) he will supervise and control three professional employees; (3) he will manage the petitioner's legal functions, including all legal and contractual issues; and

(4) he has the authority to hire and fire employees and exercises discretion over the daily operations of the business. Counsel's claims, however, fail to satisfy employment in a managerial capacity.

The record does not demonstrate that the beneficiary is supervising professional or managerial employees as claimed by counsel. At the time of filing the petition, the petitioner employed the president and store manager. Therefore, the claim that the beneficiary supervises the petitioner's international trade specialist, which is a position filled by the petitioner's president, and cashier will not be considered. 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).

Counsel stated in his April 28, 2003 response to the director's request for evidence that the position of store manager requires a high school diploma, yet subsequently claims on appeal that the store manager holds a masters degree in business administration. Counsel does not submit copies of the store manager's diploma evidencing his completion of a master's program. Absent this relevant documentation, it is questionable whether counsel's subsequent claim regarding the store manager's advanced degree is genuine or whether counsel is attempting to match the credentials of the petitioner's personnel to the regulatory requirements. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Nevertheless, in evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate's position requires a baccalaureate degree as a minimum entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. In a letter dated April 28, 2003, counsel for the petitioner indicated that the store manager position requires a high school diploma and one to four years of management experience. Accordingly, the petitioner has established that this is not a professional position.

Moreover, the record does not demonstrate that the store manager is actually performing in a managerial position as he is not managing any lower-level employees. As noted in the regulation at 8 C.F.R. § 214.2(I)(1)(ii)(B)(4), a first-line supervisor is not considered to be acting in a managerial capacity merely because of the supervisor's supervisory duties, unless the employees supervised are professionals. The AAO acknowledges counsel's claim that the petitioner anticipates hiring an additional two employees in response to the expansion of the United States business. However, as noted above, the beneficiary's employment capacity is analyzed according to the petitioner's staff at the time of filing the petition. Accordingly, the petitioner's proposed personnel will not be considered. 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 249. Accordingly, the petitioner has failed to satisfy the crucial element that the beneficiary supervise professional, managerial or supervisory employees.

Despite counsel's claims, the petitioner has also failed to demonstrate that the beneficiary is managing the legal function of the business. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. Here, counsel states merely that the beneficiary would "oversee all the legal and contractual issues faced by the firm," and fails to provide a detailed explanation as to how the beneficiary would actually manage the function. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, counsel's reference to an unpublished AAO decision involving an employee of the Irish Dairy Board does not establish that the beneficiary manages the petitioner's legal functions. In the unpublished Irish Dairy Board decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The record also fails to support counsel's claim that the beneficiary would be employed as an executive by the United States entity. Counsel stated in both his July 18, 2003 response to the director's intent to deny and his brief on appeal that the beneficiary "directs the management of the organization or a major component or function of the organization" as he is responsible for promoting and expanding the United States business, reviewing legal and contractual issues of the company, and overseeing the duties performed by the store manager and the finance manager/cashier. As noted previously, the store manager was the beneficiary's sole subordinate employee at the time of filing the petition, and, regardless of his title, is not considered to be "management." Moreover, it appears from counsel's description that the beneficiary would actually be performing the legal functions of the business, as he would be responsible for reviewing legal and contractual issues. As counsel has not documented what portion of the beneficiary's time would be spent performing these non-qualifying duties, the beneficiary cannot be considered to be primarily employed as an executive. 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).

Also, counsel merely paraphrases the remaining elements of executive capacity in an attempt to establish the beneficiary's proposed employment as an executive. Specifically, counsel states in his July 2003 response that the beneficiary "functions at a senior level within the organizational hierarchy," "will report only to the President and receive general supervision and direction from only the President and higher-level executives," and "exercises wide latitude in discretionary decision making for the corporation." Counsel references the

petitioner's organizational chart as evidence of these claims. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

At the time of filing, the petitioner was a two-year-old retail and investment company that employed a president and a store manager. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning entity, which is operating as both a convenience store and investment company, might plausibly be met by the services of the petitioner's president, the store manager, and the beneficiary as executive director. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, the AAO cannot conclude that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the petitioner demonstrated the existence of a qualifying relationship between the beneficiary's foreign employer and the petitioning organization as required in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The regulations and case law further confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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.

Here, the petitioner stated on the nonimmigrant petition that it is the subsidiary of the beneficiary's foreign employer, and submitted only two stock certificates, numbered 12 and 13, identifying the petitioner's two shareholders as the beneficiary's foreign employer and the beneficiary, holding 550 shares and 150 shares, respectively. According to the petitioner's Form SS-4, Application for Employer Identification Number, the petitioner is an S corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any

non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. The record represents that a majority of the petitioning organization's stock is owned by the foreign entity. 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). Accordingly, the petitioner has not established the requisite qualifying relationship between the two organizations. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.