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Services

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File: LIN-03-239-50701 Office: NEBRASKA SERVICE CENTER Date: JUN 27 2005

IN RE: Petitioner:   
Beneficiary:

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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska 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 its President 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 corporation organized in the State of Missouri that operates two convenience stores. The petitioner claims that it is the subsidiary of Fray's International, located in Tashkent, Uzbekistan. The beneficiary entered the United States as a B-2 visitor for pleasure, and the petitioner now seeks to change his status to L-1A and extend his stay for a three year period.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily executive capacity, and that the petitioner has submitted sufficient evidence to show that the beneficiary's subordinates will relieve him from performing day-to-day tasks. Counsel further asserts that the evidence of record establishes that the petitioner and the beneficiary's foreign employer possess a qualifying relationship. In support of these assertions, counsel submits a brief and previously submitted documents.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

As a preliminary matter, the petitioner indicated on Form I-129 that it is a new office. If a petitioner establishes that a 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 evidentiary requirements of 8 C.F.R. § 214.2(l)(3)(v) apply. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." As correctly noted by the director, the petitioner had been doing business for over one year at the time the present petition was filed, thus the petitioner cannot be considered a new office. Specifically, the petitioner purchased and began operating its first convenience store in September 2001. As the petition was filed on August 7, 2003, the petitioner had been operating for two or more years at the time of filing. Therefore, the law governing a petition involving a new office does not apply in the instant case.

The first issue in the present matter is whether the beneficiary will 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), 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.

With the initial petition filed on August 7, 2003, the petitioner submitted documents that describe the beneficiary's job duties. The petitioner indicated that it operates two convenience stores, namely a [REDACTED] acquired in September 2001, and a [REDACTED] acquired in December 2002. The petitioner provided an organizational chart reflecting that the beneficiary will have authority over both stores, each of which have three employees including a manager, a cashier, and a cashier/stocker.

On August 20, 2003, the director requested additional evidence. In part, the director requested: (1) the petitioner's Forms 941, Employer's Quarterly Tax Return, for the previous two quarters; and (2) a detailed job description for the beneficiary, including his routine, day-to-day duties and the percentage of weekly hours he will devote to each of his respective tasks.

In a response dated November 7, 2003, in part the petitioner submitted: (1) its Forms 941, Employer's Quarterly Tax Return, for the first, second, and third quarters of 2003; and (2) a job description for the beneficiary as follows:

**Supervision of the management branches (20% of weekly hours)**

- 1. Supervision of store managers
- 2. Day-to-day shift management
- 3. Overseeing vendor dealings
- 4. Reviewing ordering of merchandise
- 5. Overseeing contracts with merchandisers
- 6. Prices and terms negotiation
- 7. Negotiation of merchandising area, order amount and location of displays

**Financial Management (20% of weekly hours)**

- 1. Oversee accountant's work in determining current and future cash flow
- 2. Review future financial requirements and take steps to meet those requirements
- 3. Oversee the preparation of annual financial documents and tax returns

**Marketing Management (20% of weekly hours)**

- 1. Overseeing the general store set-up and environment
- 2. Overseeing the placement of merchandise in an orderly manner

3. Managing placement of advertisements in newspapers and mail-in coupons
4. Overseeing the placement of signage within and outside the store
5. Managing employee presentation

**Strategic Decision Making (20% of weekly hours)**

1. Assessment of external environment for threats and opportunities
2. Assessment of internal environment for strengths and weaknesses in management, finances, marketing and HR
3. Establishing long term and short term objectives for company
4. Defining management, financial, marketing and HR strategies to accomplish corporate objectives

**Human Resource Management (10% of weekly hours)**

1. Hiring managers, cashiers and stockers
2. Evaluating employee performance
3. Negotiation of compensation
4. Keeping employees motivated

**New Business Development (for new stores) (10% of weekly hours)**

1. Searching of profitable locations for new stores
2. Negotiation of leases
3. Overseeing of the remodeling of locations to make all branches homogeneous
4. Execution of contracts with gasoline suppliers, wholesale grocers and other vendors
5. Hiring of potential employees and managers
6. Undertaking of strategic steps in management, marketing and finance to make branch successful

On November 21, 2003, the director issued a second request for additional evidence. In part, the director requested: (1) a description of the beneficiary's proposed duties in the United States; and (2) an organizational chart showing in detail the routine, day-to-day tasks to be performed by the beneficiary, identifying the percentage of weekly hours devoted to his tasks, and showing the number of employees he will supervise.

In a response dated February 5, 2004, in part the petitioner submitted: (1) eight charts showing the petitioner's organizational structure and subdividing the beneficiary's duties; and (2) a letter from counsel providing more detail regarding the beneficiary's duties. In the letter, counsel stated the following:

From [the petitioner's organizational] chart it is clear the Beneficiary . . . will function as President and directly supervise the managers below him and, through those managers direct the cashier/clerks – in order to effectuate the high-level goals of the organization.

It should be noted that the Beneficiary has exercised keen business sense, having judiciously sold the [REDACTED] store for a net profit of over \$50,000. The Beneficiary is now in the process of negotiating the prospective purchase of two other stores[.]

On February 20, 2004, the director denied the petition. In part, the director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director stated the following:

The evidence of record reflects the petitioner's business standing during 2001 and 2002. However, the circumstances appear to have changed since the filing of the petition in August 2003. Based on the information provided by the petitioner as a response to a request for additional evidence, it is determined there have been material changes in the petition due to the sale of the Zip Trip store.

\* \* \*

There is no evidence to establish that the U.S. entity employs a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily executive capacity, and that the petitioner has submitted sufficient evidence to show that the beneficiary's subordinates will relieve him from performing day-to-day tasks. Counsel cites the regulatory requirements for managerial capacity, and asserts that the beneficiary is not required to supervise subordinate employees in order to qualify as a manager. Counsel provides that the beneficiary will act as a functional manager. Counsel asserts that the petitioner's organizational chart shows that the beneficiary will manage the petitioner's entire organization, and he will have at least two layers of personnel below him. Counsel further claims that the director erroneously required the beneficiary to perform exclusively qualifying duties, and disregarded the regulatory provision that the beneficiary can perform non-qualifying tasks so long as he is employed in a primarily managerial or executive capacity. Counsel states that the beneficiary's duties also meet the regulatory requirements for executive capacity.

Upon review, counsel's assertions are not persuasive. 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(1)(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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant matter, the petitioner does not clarify whether it claims the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Counsel refers to the statutory definitions of both managerial capacity and executive capacity, thus, it appears that counsel intends to represent that the beneficiary will be primarily engaged in both managerial duties and executive duties. To sustain such an assertion, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

The petitioner initially represented that the beneficiary's duties would involve managing two convenience stores, the petitioner's [REDACTED] and [REDACTED]. The petitioner described the beneficiary's proposed duties based on an organizational chart that illustrates the beneficiary's supervisory authority over two stores with three individuals employed in each. Yet, in response to the director's second request for evidence, counsel stated that the beneficiary sold the petitioner's [REDACTED] convenience store. The organizational chart submitted with the response reflects that the petitioner sold the [REDACTED] on August 22, 2003, two weeks after the petition was filed, though the petitioner failed to reveal this fact in responding to the director's first request for evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The fact that the petitioner sold one of its two convenience stores would undoubtedly have a substantial impact on the beneficiary's duties in the United States. For example, the beneficiary's subordinate staff would be reduced to half that described in the initial petition. It is assumed that the percentage of time the beneficiary would devote to his various tasks would necessarily change. However, the petitioner has provided no explanation regarding the resulting effect the sale of one of its stores will have on the beneficiary's proposed duties.

Further, the petitioner submitted an organizational chart in the same letter in response to the director's second request for evidence. The chart shows that the beneficiary will oversee the [REDACTED] store, and supervise its manager and other two staff members. This representation is in direct contradiction to counsel's statement that the petitioner sold the [REDACTED] store. In counsel's attached letter, counsel stated that the beneficiary will "directly supervise the *managers* below him," yet without the [REDACTED] the petitioner employs only one individual below the beneficiary with the title "manager." (Emphasis added). 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). 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. *Id.* at 591. The petitioner has failed to address or resolve these material inconsistencies.

As the petitioner has provided inconsistent information and made material changes to the beneficiary's job duties since filing the petition, the petitioner has not provided an accurate and reliable account of what the beneficiary's true duties in the United States would be. Thus, the petitioner has not established that the beneficiary's duties will be primarily managerial or executive in nature.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to open additional stores and hire additional managers and employees in the future. 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).

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i).

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

- (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.
- (H) *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.
- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
  - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
  - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or
  - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In the initial petition, on Form I-129 the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer, as the foreign entity owns 51 percent of the petitioner's stock. As evidence of this relationship, the petitioner submitted: (1) its articles of incorporation; (2) a corporate resolution, dated March 18, 2002, reflected that the foreign entity entered into a subscription agreement for 51 percent of the petitioner's stock; and (3) copies of two stock certificates, showing that on March 18, 2002 the foreign entity acquired 510 shares of the petitioner's stock, and an individual acquired 490 shares of the petitioner's stock.

In the director's initial request for additional evidence, in part he requested: (1) copies of the subscription agreements for the petitioner's stock; (2) evidence that the foreign entity and the petitioner's other stock holder paid for the ownership of the petitioner, such as copies of wire transfers, cancelled checks, or deposit receipts detailing the monetary amounts for the stock purchases; and (3) the petitioner's 2001 and 2002 IRS Forms 1120, U.S. Corporation Income Tax Return.

In response, in part the petitioner submitted: (1) the requested stock subscription agreements, dated March 18, 2002; (2) evidence of a wire transfer for \$10,000, dated August 6, 2001; (3) a copy of the petitioner's IRS Form 1120X, Amended U.S. Corporation Income Tax Return, showing that the petitioner inadvertently filed as an S corporation for 2001; and (4) a copy of the petitioner's 2002 IRS Form 1120S, U.S. Income Tax Return for an S Corporation.

The director's second request for evidence did not request documentation regarding the petitioner's relationship to the beneficiary's foreign employer.

In the director's denial, he found that the petitioner did not establish that it has a qualifying relationship with the beneficiary's foreign employer. The director stated that the petitioner's documentation shows that the foreign entity is owned by two individuals, each owning 50 percent of the business. The director discussed the two subscription agreements for the petitioner's stock, and noted that 510 shares were to be transferred to the foreign entity, and 490 shares were to be transferred to a separate individual. The director stated the following:

The relationship between the foreign and US entities is not that of a parent and subsidiary, as it has not been established who controls the foreign company. The relationship between the foreign and US entities does not appear to be that of affiliates, as the US entity is not one of two legal entities entirely owned and controlled by the same parent or individual. Further, the US entity is not one of two legal entities entirely owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity.

On appeal, counsel asserts that the evidence of record establishes that the petitioner and the beneficiary's foreign employer possess a qualifying relationship. Counsel states that the petitioner has established that the foreign entity is owned by two individuals in equal shares. Counsel further states that:

In any event, the foreign entity controls the U.S. entity (via 51% ownership and control). Who controls the foreign entity is not an issue in a parent-subsidiary qualifying relationship

....

The issue of who owns the parent would be relevant only if attempting to establish an affiliate relationship, which the Petitioner never raised.

Upon review, counsel's assertions and the submitted documentation do not establish that the petitioner and the foreign entity possess a qualifying relationship. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and

authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, Citizenship and Immigration Service (CIS) is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Counsel correctly notes that the ownership and control of the foreign entity is not material to whether the petitioner is a subsidiary of the foreign entity. The pivotal question in this regard is whether the petitioner has established that the foreign entity has sufficient ownership and control of the petitioner. 8 C.F.R. § 214.2(l)(1)(ii)(K).

The petitioner claims that the foreign entity owns 51 percent of its outstanding stock, pursuant to a stock subscription agreement dated March 18, 2002. The agreement states that the foreign entity will purchase 510 shares of the petitioner's stock for \$510. In response to the director's request for evidence of consideration that the foreign entity provided for such shares, the petitioner submitted documentation of a wire transfer, dated August 6, 2001, in the amount of \$10,000. As the wire transfer predates the stock subscription agreement by seven months, it is illogical that these funds were in satisfaction of the agreement. Further, the agreement indicates that the foreign entity is to pay \$510, while the wire transfer is for \$10,000, calling into question whether the wire transfer was part of the alleged stock purchase. Thus, the petitioner has not sufficiently documented that the foreign entity paid funds for the petitioner's stock. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, the petitioner submitted a copy of its IRS Form 1120X, Amended U.S. Corporation Income Tax Return, showing that the petitioner inadvertently filed as an S corporation for 2001. Yet, the petitioner

submitted a copy of its 2002 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, showing that it again filed as an S corporation in 2002. The petitioner has provided no explanation or documentation to show that its 2002 filing was in error. Thus, the record shows that the petitioner operates as 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. Accordingly, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. 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. at 591-92.

Thus, the petitioner has failed to show that it is a subsidiary of the foreign entity. As the foreign entity and the petitioner are allegedly owned by different individuals or organizations, the petitioner has not shown that they are affiliates. *See 8 C.F.R. § 214.2(I)(1)(ii)(L)*. Based on the foregoing, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity. *See 8 C.F.R. § 214.2(I)(3)(i)*. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, it is noted for the record that the beneficiary is not eligible for a change of status and extension of stay, as the present petition was filed after his B-2 nonimmigrant status expired.

The regulation at 8 C.F.R. § 214.1(c)(4) states the following:

An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of [CIS] and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and [CIS] finds the delay commensurate with the circumstances;
- (ii) The alien has not otherwise violated his or her nonimmigrant status;
- (iii) The alien remains a bona fide nonimmigrant; and
- (iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

Further, the regulation at 8 C.F.R. § 248.1(b) states the following:

[A] change of status may not be approved an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of [CIS] and without separate application, where it is demonstrated at the time of filing that:

- (1) The failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner, and [CIS] finds the delay commensurate with the circumstances;
- (2) The alien has not otherwise violated his or her nonimmigrant status;
- (3) The alien remains a bona fide nonimmigrant; and
- (4) The alien is not the subject of deportation proceedings under 8 CFR part 240.

The record shows that the beneficiary entered the United States on March 23, 2001 as a B-2 visitor for pleasure. His status was valid until September 22, 2001 (Form I-94 [REDACTED]). The beneficiary subsequently was approved for an extension of his B-2 status, valid until March 22, 2003 (LIN-01-274-50919.) On March 21, 2002, the petitioner filed a Form I-129 petition (LIN-02-141-51314) seeking to classify the beneficiary as an L-1A intracompany transferee. The Citizenship and Immigration Services (CIS) Nebraska Service Center denied the petition on October 3, 2002. On November 29, 2002, counsel for the petitioner filed an appeal seeking review of the director's decision. After reviewing the record, the director rejected the appeal as the appeal had not been filed in a timely manner, and that the appeal failed to meet the requirements of a motion to reopen or a motion to reconsider. On March 18, 2003, the petitioner filed a second appeal, seeking review of the director's decision to reject the first appeal as untimely filed. The second appeal was pending with the AAO at the time the present petition was filed.

The petitioner filed the present petition on August 7, 2003, 10 months after the director denied the first petition and the request for a corresponding change of status. The record reflects that the beneficiary has not left the United States.

The petitioner has not shown that "[t]he delay was due to extraordinary circumstances beyond the control of the . . . petitioner." 8 C.F.R. § 214.1(c)(4)(i); 8 C.F.R. § 248.1(b)(1). The petitioner indicated on Form I-129 that the beneficiary's status is "L-1A Appeal Pending," yet this is not a legal immigration status recognized under the Act or regulations. There is no appeal for the denial of a change of status. See 8 C.F.R. § 248.3(g). A pending appeal on behalf of a beneficiary does not create a new status or suspend the expiration of the beneficiary's prior status.

Based on the foregoing, the beneficiary's prior nonimmigrant status had expired as of the date of filing the present petition, and therefore it is noted that the beneficiary is ineligible to change his status or extend his stay. See 8 C.F.R. § 214.1(c)(4) or 8 C.F.R. § 248.1(b).

Beyond the decision of the director, it is noted that the petitioner indicated under penalty of perjury in Part 4 of the Form I-129 petition that the beneficiary had never been denied the requested classification. This petition was filed on August 7, 2003. As noted in the recitation of the procedural history of this matter, the beneficiary's previous L-1 petition (LIN-02-141-51314) was previously denied by the director on or about October 3, 2002. The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that "[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition." As the petitioner indicated on the form that the beneficiary had never been denied the requested classification, and the petitioner failed to fully disclose the previously filed petition, this petition will be denied as a matter of discretion.

Also beyond the decision of the director, the petitioner has not shown that the beneficiary "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," as required by 8 C.F.R. § 214.2(l)(3)(iii). The beneficiary has been present continuously in the United States since March 23, 2001, in B-2 status and out-of-status. The present petition was filed on August 7, 2003, approximately two years and four months after the beneficiary's entry. As the beneficiary was present in the United States for over two years prior to filing the petition, he has not been employed abroad for one continuous year out of the last three years. Thus, he is ineligible for L-1A classification. 8 C.F.R. § 214.2(l)(3)(iii). For this additional reason, the petition may not be approved.

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. The petitioner has not met this burden.

**ORDER:** The appeal is dismissed.