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U.S. Citizenship
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File: WAC 05 150 54274 Office: CALIFORNIA SERVICE CENTER Date: DEC 05 2006

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

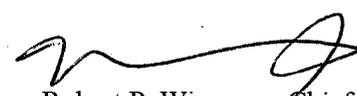
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the director for further action and entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it is engaged in food products manufacturing. It claims to be an affiliate of the beneficiary's current foreign employer, [REDACTED] located in Seoul, Korea. The petitioner seeks to employ the beneficiary as its chairman for a three-year period.

The director denied the petition concluding that the petitioner did not establish the existence of a qualifying relationship between the United States entity and the beneficiary's foreign employer. The director observed that the petitioner failed to submit sufficient evidence of common ownership and control between the U.S. entity and its claimed Korean affiliate, noting that the claimed common parent company owns only 30.82% of the petitioner and 40.32% of the foreign entity. The director found insufficient evidence to establish that the parent company exercises *de facto* control over the claimed affiliate companies.

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 director relied upon an overly restrictive standard in applying the regulatory definitions of "subsidiary" and "affiliate." Counsel emphasizes that the regulations permit two legal entities to qualify as affiliates if their common parent company owns less than 50 percent of each entity, so long as the parent company has control over both entities. Counsel asserts that the petitioner submitted sufficient evidence to establish that the two entities are in fact controlled by the same parent company and therefore qualify as affiliates pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Counsel submits a brief and evidence in support of the appeal.

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.

The sole issue discussed by the director is whether the petitioner has established that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

- (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.

The nonimmigrant petition was filed on May 3, 2005. The petitioner stated on Form I-129 that the petitioner is an affiliate the beneficiary's foreign employer, [REDACTED], noting that both companies are effectively owned and controlled by a common parent company, [REDACTED], of Korea.

The petitioner submitted evidence in the form of its articles of incorporation, stock certificates, California Notices of Transaction Pursuant to Corporations Code Section 25102, and Certificates of Overseas Direct Investment issued by the Korean government, to establish that the U.S. company is a direct, wholly-owned subsidiary of [REDACTED] of Korea.

As evidence of the ownership of [REDACTED], the petitioner provided a list of shareholders as of December 31, 2004, issued by the Korea Securities Depository. The document indicates that the company has issued 5,771,358 shares and names the following individuals and entities as the largest stockholders:

1.	[REDACTED]	574,740 shares	9.96%
2.	[REDACTED]	32,897 shares	0.57%
3.	[REDACTED]	293,955 shares	5.09%
4.	[REDACTED]	89,389 shares	1.50%
5.	[REDACTED]	1,778,941 shares	30.82%

The stockholder list identifies eight additional shareholders who hold a total of 16.29% of the company's stock, with individual interests ranging between 1.06% and 4.79%. Finally, the stockholder list indicates that an additional 2,064,335 stocks, accounting for a total of 35.77% of the total number issued, are dispersed among 3,694 shareholders.

The petitioner provided a similar document as evidence of the ownership of the petitioner's claimed affiliate, [REDACTED], as of December 31, 2004, which indicates that the company has issued a total of 24,800,000 shares. The stockholder list identifies the following individuals and entities as the largest stockholders:

1.	[REDACTED]	10,000,000 shares	40.32%
2.	[REDACTED]	3,347,890 shares	13.5%

3.	[REDACTED]	1,508,560 shares	6.08%
4.	[REDACTED]	1,140,150 shares	4.60%
5.	[REDACTED]	59,100 shares	0.24%
6.	[REDACTED]	10,000 shares	0.04%

The stockholder list identifies seven additional shareholders who hold a total of 11.20% of the company's issued stock, and indicates that "small stockholders" hold the remaining 5,956,290 shares, or 24.02% of the total shares issued.

In a letter dated April 26, 2005, the petitioner stated that both [REDACTED] and [REDACTED] Ltd. are publicly traded companies and emphasized that [REDACTED] Ltd. is by far the largest shareholder of both companies and in fact controls both companies. The petitioner further stated: "As both [the petitioner's] present employer, [REDACTED] and [the petitioner] are effectively owned and controlled by the same corporate parent, [REDACTED] of Korea, they qualify as affiliates for the purposes of the "L" visa regulations."

The petitioner submitted an annual report for the [REDACTED], which identifies [REDACTED] Ltd. as an affiliate company and group member. The petitioner noted in its April 26, 2005 that its parent company is the largest manufacturer of instant noodles in the world and operates five food-manufacturing plants in Korea. The petitioner further indicated that [REDACTED] operates five factories in Korea that are engaged in manufacturing packaging for Nong Shim products.

On May 11, 2005, the director issued a notice of intent to deny the petition, advising the petitioner that the evidence submitted was insufficient to establish the claimed affiliate relationship between the petitioner and the beneficiary's foreign employer. Specifically, citing the regulatory definitions related to qualifying organizations at 8 C.F.R. § 214.2(l)(1)(ii), *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982), and *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (Comm. 1986), the director stated:

The U.S. entity. . . is 100% owned by [REDACTED] of Korea ("NS-K"), "NS-K", in turn, is 30.82% owned by [REDACTED] of Korea.

[REDACTED] Company of Korea also owns 40.32% of the foreign entity, which also is the beneficiary's current employer, Youlchon Chemical Company.

Being a major stockholder of both the U.S. company and the foreign entity, [REDACTED] of Korea holds less than 51% of both companies and thus does not have a controlling factor of either company. No voting proxies or other agreements have been included in the record showing that any degree of control of both entities has been formally relinquished by other shareholders in favor [of] [REDACTED] of Korea. The evidence fails to show that [REDACTED] of Korea has effective de jure or de facto of both organizations.

In a response to the director's notice of intent to deny the petition, dated May 25, 2005, counsel for the petitioner emphasized that the statutory definition of subsidiary at 8 C.F.R. § 214.2(l)(ii)(K) includes a legal entity of which a parent company owns, directly or indirectly, less than half of the entity, but in fact controls the entity. Counsel further asserted:

Therefore, the express language of the applicable regulations allows for two legal entities to qualify as affiliates within the meaning of the regulations if their common parent company owns less than 50 percent of each entity, so long as the parent has control over both entities. Such is the case here, as the common parent, [REDACTED] company of Korea, controls both entities, [the] petitioner. . . and [the beneficiary's] current employer Youlchon, despite having less than an 50 percent ownership percentage in each entity.

Contrary to the language of the NOID. . . , there is no legal requirement that the parent company manifest its ownership of the affiliated subsidiary companies in one of two exclusive ways, as the Service Center dictates: (1) through the parent company's ownership of a greater than 50 percent of the subsidiary's voting shares; or (2) through the parent company's ownership of less than a majority of the subsidiary's voting shares, but possession of proxy votes in sufficient quality to bring the parent company's *de facto* voting interest in the subsidiary over the 50 percent threshold. In creating this overly restrictive standard, the Service Center apparently has applied an incomplete interpretation of the principal authority on the subject, *Matter of Hughes*, 18 I&N Dec. 362 (Comm'r 1982).

* * *

Matter of Hughes, supra, says also that an "ownership and control" relationship is established, in some corporate structures, with "a relatively small concentration of ownership, perhaps 10%, in conjunction with dispersal of other stock among many minority investors" . . . *Matter of Hughes* suggests that the Service Center may look beyond mere ownership possession at other factors which would indicate ownership and control.

In support of these assertions, the petitioner re-submitted the shareholder lists for [REDACTED] and [REDACTED]. Counsel noted the dispersal of the majority of the stock among hundreds, or in the case of [REDACTED] thousands of shareholders, and emphasized that "[REDACTED] has effective ownership and control by virtue of the less than fifty percent ownership percentage, but dispersal of stock among numerous minority investors."

Counsel further asserted that six of members of [REDACTED]'s eight-member board of directors "were appointed by and represent the interests of [REDACTED]" and two directors are actually members of both company's boards of directors. Similarly, counsel stated that two of [REDACTED] three directors were appointed by and represent the interests of [REDACTED]. Counsel stated that the membership of the Board of Directors of both companies demonstrates the control of the claimed parent company. Finally, counsel noted that "federal law has applied a common sense approach to ownership and control issues in other contexts, finding that neither a majority ownership of shares, nor an aggregated so-called 'majority', created

by adding a minority ownership of shares plus proxy votes, is required." Counsel cited to the [REDACTED] Company Act, 12 U.S.C. § 1841(a)(2), noting the application of "a more realistic and flexible standard." Counsel also cited to the Securities Act of 1933, as amended, noting that the regulation at 17 C.F.R. §230.405 does not include a percentage of ownership in its definition of "control" of a company. Counsel requested that the director "apply the proper standard of determination" and take into account that each affiliate is a publicly traded company with several thousand shareholders, each with share ownership exceeding 30 percent by a common holding company, and each with a majority membership of its board of director representing the interests of the holding company.

In support of its rebuttal to the director's notice of intent to deny, the petitioner provided letters from corporate officers confirming the membership of the boards of directors of [REDACTED] and [REDACTED], and the appointment of directors to each board by [REDACTED]

The director denied the petition on June 8, 2005, concluding that the petitioner had not established that the U.S. company and the beneficiary's foreign employer have a qualifying relationship. Specifically, the director stated:

Being a major stockholder of both the U.S. company and the foreign entity, [REDACTED] of Korea holds less than 51% of both companies and thus does not have a controlling factor of either company. No voting proxies or other agreements have been included in the record showing that any degree of control of both entities has been formally relinquished by other shareholders in favor of [REDACTED] of Korea. The evidence fails to show that [REDACTED] of Korea has effective de jure or de facto control of both organizations.

The director acknowledged counsel's assertion that the claimed parent company is the largest shareholder of both companies and that the majority of the stock in each company is dispersed among many mostly individual investors. The director observed:

The investors are independent individuals, and they are not bound together as a single unit by an agreement to vote in concert. In the absence of voting agreements establishing control of both companies by a single individual shareholder or a combination of shareholders, the petitioner has not demonstrated that an affiliate or subsidiary relationship exists between the U.S. and foreign entities.

On appeal, counsel for the petitioner asserts that the director misapplied the governing regulations for intracompany transferees in finding that the petitioner and the beneficiary's foreign employer are not affiliates. Counsel again asserts that the director applied an overly restrictive standard in requiring evidence of proxy votes so as to give [REDACTED] a 51% voting interest in the foreign and U.S. entities. Counsel contends that the director interpreted *Matter of Hughes* too narrowly and did not apply the decision in its entirety, noting that "minority stock ownership with control of proxy votes which amount to a majority of voting power" is not the exclusive means by which to establish control of a company in a case in which a company has no majority owner.

Counsel requests that the AAO look beyond mere ownership possession and consider other factors, which show that [REDACTED] appointed the majority of directors on both the U.S. and foreign entity's boards of directors. Counsel further asserts:¹

[T]he [REDACTED] is in the business of creating plastics and packing for the Non Shim group's food products. The owners and executives of [REDACTED] control [REDACTED] [the petitioner] and [REDACTED] exists only to service the food product manufacturing efforts of the [REDACTED] group. It is not a loose "business association between companies" as the Notice of Denial asserts. In reviewing this decision, the totality of the circumstances should be reviewed, circumstances such as the structural and functional connection between the entities in question.

Upon review, counsel's assertions are persuasive. The petitioner has submitted sufficient evidence to establish that both the U.S. entity and the beneficiary's current foreign employer are subsidiaries of [REDACTED] in that [REDACTED] holds less than a majority interest in both companies, but, as the largest shareholder among several thousand small shareholders, in fact controls both companies. See 8 C.F.R. § 214.2(l)(1)(ii)(K) (defining "subsidiary," in part, as "a firm, corporation or other legal entity of which a parent owns, directly or indirectly, less than half of the entity, but in fact controls the entity.") Accordingly, the petitioner and the beneficiary's foreign employer, as subsidiaries ultimately owned and controlled by the same parent company, are affiliates as defined at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1).

The AAO concurs with counsel's assertion that the director applied an overly restrictive interpretation of how a petitioner may establish control through minority ownership. Although *Matter of Hughes* preceded the regulatory definitions of "subsidiary" and "affiliate," the decision remains a useful precedent and is instructive in interpreting the definitions that were eventually incorporated into the regulations in 1987. *Matter of Hughes* explored in some detail the meaning of subsidiary and affiliate in various contexts, as follows:

In order to be deemed affiliates, companies should be bound to one another by substantial, but not necessarily majority, ownership of shares. The affiliation may be indirect as in the

¹ Counsel subsequently supplemented the appeal on May 3, 2006, citing a recent USCIS adopted decision, *Matter of Chawathe*, A74 254 994 (AAO, January 11, 2006) as instructive in determining corporate control of publicly traded corporations. Counsel requests that the AAO adopt "an analogous, flexible" approach to determining corporate control in the instant matter. The cited matter involved an application to preserve residence for naturalization purposes in which the AAO considered the issue of whether a publicly traded corporation may be considered an "American firm or corporation," pursuant to section 316(b) of the Immigration and Nationality Act, 8 U.S.C. § 1427(b), when its stock ownership is widely dispersed and there is no readily available means to determine the nationality of its owners. As specifically stated in the AAO's decision, *Matter of Chawathe* applies only to the preservation of residence for purposes of naturalization. The analysis of a publicly traded corporation's nationality and the term "American firm or corporation" does not apply to the determination of corporate ownership and control in the context of a nonimmigrant intracompany transferee petition under section 101(a)(15)(L) of the Act.

case of two subordinate organizations related to each other by reason of a parent corporation owning a significant portion of the subordinates' stocks. It may also be applied directly to the relationship between two legal entities one of which owns a significant percentage (but not necessarily a majority) of the stock of the other. More importantly, affiliation requires that the financial link between two entities involve control by one over the management of another. In the case of entities related to each other as siblings, the parent entity must have both control and a financial interest in the subordinate companies. Control may be de jure by reason of ownership of 51% of outstanding stocks of the other entity or it may be de facto by reason of control of voting shares through partial ownership and by possession of proxy votes. In some corporate structures, a relatively small concentration of ownership, perhaps 10%, in conjunction with dispersal of other stock among many minority investors may convey the right to appoint the board of directors. In examining control, the Service may take into consideration one company's ownership of patents, processes, copyrights, or other elements which are used by a related company. Because a structural or economic link is viewed as a characteristic of affiliation by authorities, the foregoing elements of control unaccompanied by significant ownership would not alone be considered as establishing affiliation.

From the foregoing discussion, the terms "affiliate" or "affiliation" may be broadly used to describe business entities which have relationships with one another based upon ownership and control. Ownership need not be majority if control exists. The term "subsidiary" is a more specific form of affiliation in which the company so described is subordinate to the control of another. A company which exercises control of another through ownership is usually referred to as a "parent company." The term "affiliate," is also sometimes more specifically used to describe the relationship between two companies which have no direct linkage but are directed, controlled, and at least partially owned by the same parent corporation.

18 I&N Dec. at 292-3.

Thus, while the director properly recognized that majority control by a shareholder that owns less than 51 percent of an entity may be demonstrated through the submission of proxy votes giving that shareholder a majority voting interest in a subsidiary company, counsel correctly asserts that proxy votes are not an exclusive means by which to establish control over an entity of which the claimed parent owns less than a 51 percent interest.

Matter of Hughes differentiates between situations in which proxy votes may reasonably be utilized in order to establish control, and situations involving large corporations with widely dispersed ownership structures. The latter situation, as discussed in *Matter of Hughes*, clearly allows for and may require the consideration of other types of evidence to establish the requisite control. The petitioner and the foreign entity in this matter have a common, single large shareholder, which enjoys a "concentration of ownership" in each company more significant than the 10 percent contemplated by the Commissioner in *Matter of Hughes*. This large concentration of ownership among the extremely diverse holdings of minor shareholders has in fact conveyed the right of the single large shareholder, Nong Shim Holdings Co. Ltd., to appoint the majority of the

members of each company's boards of directors, thus vesting [REDACTED] with effective control of both subsidiary companies.

Further, a review of the totality record, including the Nong Shim Group's annual report, supports a conclusion that the petitioner, the beneficiary's foreign employer, and [REDACTED] are bound together functionally and structurally, as well as through significant common ownership interests, in a single corporate group with common management and control. The petitioner has submitted sufficient evidence to establish a qualifying affiliate relationship between the U.S. entity and the beneficiary's foreign employer, consistent with the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L). Accordingly, the director's decision dated June 8, 2005, will be withdrawn.

Although the director's decision will be withdrawn, the AAO finds that the record as presently constituted does not contain sufficient evidence to establish: (1) that the petitioner is doing business in the United States, as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H); or (2) that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. Accordingly, the petition will be remanded to the director for further action and entry of a new decision, consistent with the discussion below.

In order for the petitioner to be considered a "qualifying organization" as required by 8 C.F.R. § 214.2(l)(3)(i), the petitioner must establish that it "is or will be doing business . . . as an employer in the United States." 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(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.

As noted above, the nonimmigrant petition was filed on May 3, 2005. The petitioner indicated on Form I-129 that the company was established in 2003 and projected annual gross income of \$17,000,000. The petitioner did not indicate that the beneficiary would be coming to the United States to open or be employed in a new office.

In support of the petition, the petitioner submitted its 2003 IRS Form 1120, U.S. Corporation Income Tax Return, which indicated that the company earned "interest income" only in 2003. The petitioner also submitted audited financial statements for the U.S. company, which was described by its independent auditors as "a development stage enterprise," for the years ended December 31, 2003 and December 31, 2004. The statements and accompanying notes confirm that, as of December 31, 2004, the company had not commenced its intended manufacturing and distribution operations in the United States, and had not yet earned any income from the sales of goods or services. The notes to the financial statements indicated "since inception, the Company has devoted substantially all of its efforts towards acquiring property and construction of a new manufacturing facility which is to be completed during 2005."

Thus, while the record includes evidence of a large investment in the U.S. company by its foreign parent and substantial preparations undertaken in anticipation of commencing operations in the United States, it is not possible to conclude based on the current record that the company was engaged in the provision of goods and/or services as of the date this petition was filed. Accordingly, the director is instructed to request documentary evidence as he deems appropriate to establish that the petitioner was in fact doing business in a

regular, systematic, and continuous manner as of May 2005. 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).

Another issue not addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity. The petitioner seeks to employ the beneficiary as its chairman and has submitted a job description that indicates his proposed executive level authority over the company's managerial and executive employees, policies, objectives, departments and functions.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While the position description submitted includes duties which could be considered executive in nature, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. The petitioner has not submitted sufficient evidence to establish the size and organizational structure of the U.S. entity and therefore it cannot be concluded that the company has a reasonable need for the beneficiary's services in a primarily executive capacity.

The nonimmigrant petition was filed on May 3, 2005. The petitioner indicated on Form I-129 that it had 170 employees as of the date of filing. However, in support of the petition, the petitioner submitted its payroll records for the pay period ended on March 20, 2005, which reflected a total of only 22 employees. 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). As noted above, the record does not contain evidence that the petitioner had actually commenced manufacturing operations as of May 2005, which raises questions as to whether the stated figure of 170 employees represented the company's projected hiring, as opposed to the petitioner's actual staffing levels as of the date of filing. The petitioner did not submit an organizational chart in support of the petition, and thus it is unclear what "executives and managers" and "department heads" the beneficiary will direct in his position as chairman. 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)).

In order to address these deficiencies, the petition will be remanded to the director who shall, at a minimum, request that the petitioner submit payroll records and state quarterly wage reports reflecting the petitioner's staffing levels as of May 2005, a detailed organizational chart depicting the company's structure as of the date of filing which clearly identifies all of the beneficiary's direct and indirect subordinates by name and position title, and any other evidence the director finds necessary in order to establish that the beneficiary will be employed by the petitioning company in a qualifying managerial or executive capacity.

Although the petitioner has overcome the director's sole ground for denial of the petition, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements of the requested classification. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated June 8, 2005 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.