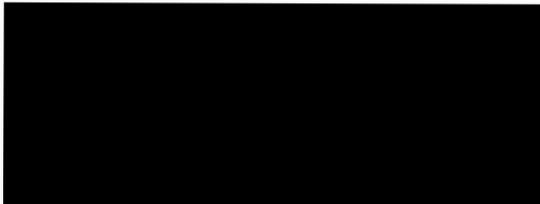


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File: EAC 05 215 52544 Office: VERMONT SERVICE CENTER Date:

DEC 22 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 in the position of researcher 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 Virginia corporation, states that it is engaged in research and development. The petitioner claims to be an affiliate of [REDACTED] located in Korea. The petitioner seeks to employ the beneficiary for a period of one year to open a new office in the United States.

The director denied the petition, concluding that the petitioner did not establish the following three requirements: (1) that the beneficiary has been employed in a managerial or executive capacity by the foreign entity; (2) that the petitioner failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position; and, (3) that a qualifying relationship exists between the foreign company and the United States entity.

On appeal, counsel for the petitioner asserts that the foreign company and the United States company are affiliates since the same three individuals have “an almost equal share of ownership of the [U.S. company] who also have equal interest in [the foreign company].” Counsel for the petitioner further states that the beneficiary served as a chief executive with the foreign company and “chief executives do indeed provide leadership, having a support staff, and having a role in establishing the company’s goals in collaboration with other executives.” Finally, counsel for the petitioner asserts that the beneficiary will hold a managerial position since he will supervise other employees and will manage an essential function of the U.S. organization. Counsel for the petitioner submits a brief and documentation in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been employed in a primarily managerial or executive capacity by the foreign entity.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The instant petition was filed on July 29, 2005. In support of the petition, the petitioner submitted a "Certificate of Employment" dated May 30, 2005, from the foreign company stating that the beneficiary commenced his employment with the foreign company on March 2, 2004 and is presently employed. In addition, the certificate stated that the beneficiary is employed in the position of chief executive officer in the technology research and development department. On Form I-129, the petitioner indicated that the beneficiary has been responsible for the following duties: "Develop semiconductor; PR Stripper; Thinner, Rework Solution as a director of technology."

In addition, the petitioner submitted the beneficiary's resume. On the resume, the beneficiary stated that he held the position of Director of Technology, Research and Development. The beneficiary described on his resume his duties for the foreign entity to include the following:

- Developing semiconductor & LCD materials: PR-Stripper, Thinner, Rework solution.

- Developing bump materials: Negative & Positive Bump PR, Negative & Positive Bump PR-Stripper, Positive bump developer, Electro plating solution.
- Consulting Electro-chemical division of Korea POLYOL Co.: Customer Audit, Quality system, Process control, Facility Design, Semiconductor Process, etc.
- Developing monitoring system: PR, Metallic contaminants.
- Developing new CMP parts.

On August 8, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit additional evidence in support of its petition. Specifically, the director requested: 1) a description of the typical managerial responsibilities that are performed by the beneficiary abroad; 2) documentary evidence of the managerial decisions made by the beneficiary on behalf of the foreign organization; 3) a list of the foreign employees that are supervised by the beneficiary, including their positions, a description of their job duties, educational level and experience requirements for the position; and, 4) an organizational chart for the overseas office, including the beneficiary's current position.

In a response to the director's request, dated August 30, 2005, the petitioner submitted a tax clearance certificate for the beneficiary; a certificate of income for the beneficiary indicating that he was employed by the foreign company in 2004; a letter from the president of the foreign company; and a letter from the senior manager of [REDACTED], the beneficiary's employer from December 1995 until February 2004. The petitioner did not submit any of the documentation requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner submitted a letter from the president of the foreign company dated August 15, 2005, that stated the following:

[The beneficiary] has provided leadership in several projects including; the development of semiconductor and LCD materials, developing bump material and CMP parts, consultation with the Electro-chemical division of Korea POLYOL Co.

The director denied the petition on September 8, 2005 on the ground that the petitioner did not establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign company. The director referenced the foreign entity's statement that the beneficiary had provided leadership in several projects, but found insufficient evidence that he actually supervised others in producing the company's products. The director determined that the petitioner had failed to establish that the beneficiary supervised managerial, professional or supervisory employees, or that he managed a function of the foreign entity.

The petitioner filed the instant appeal on September 22, 2005 and submitted the supporting brief on October 17, 2005. On appeal, counsel for the petitioner asserts that the beneficiary held the position of chief executive officer for the foreign company and thus was a top executive. Counsel then cites the U.S. Department of Labor's *Occupational Outlook Handbook* for top executives and states that "chief executives do indeed provide leadership, having a support staff, and having a role in establishing the

company's goals in collaboration with other executives." Counsel for the petitioner further states that the petitioner submitted a business profile of the foreign company with the original petition that addresses the business structure of the foreign company.

Counsel's assertions are not persuasive. Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. 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)(iii).

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary "has provided leadership in several projects including; the development of semiconductor and LCD materials, developing bump material and CMP parts, consultation with the Electro-chemical division of Korea POLYOL Co." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the operational and personnel functions that the beneficiary will supervise. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary is responsible for "developing semiconductor & LCD materials: PR-Stripper, Thinner, Rework solution," "developing bump materials: Negative & Positive Bump PR, Negative & Positive Bump PR-Stripper, Positive bump developer, Electro plating solution," "developing monitoring system: PR, Metallic contaminants," and "developing new CMP parts." It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I & N Dec. 593, 604 (Comm. 1988).

As noted above, in the request for evidence the director requested that the petitioner submit a definitive statement describing the foreign employment of the beneficiary. The petitioner failed to submit this document in its response. This evidence is critical as it would have established if the beneficiary held a position of managerial or executive capacity by the foreign company. 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). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the petitioner did not submit a detailed job description of the duties performed by the beneficiary at the foreign company and thus AAO cannot determine if the beneficiary was employed by the foreign entity in a managerial or executive capacity. 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)).

On appeal, counsel for the petitioner asserts that the petitioner submitted a business profile of the foreign company which included an organizational chart. Upon review of the organizational chart, the top two positions are illegible and do not appear to identify the employees by name. It appears that the foreign company is divided into two departments: the research and development group and consulting group. The chart does not indicate job titles and does not specifically indicate the beneficiary's position with the foreign company. Although the petitioner claims that the beneficiary supervised managers or supervisors, the petitioner did not submit any documentation as to what positions the beneficiary supervised and whether these employees are actually hired by the company. Although the petitioner submitted an organizational chart, the petitioner did not identify these employees by name and job titles. 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 addition, in the "Certificate of Employment" the foreign company indicated that the beneficiary was the chief executive officer in the technology research and development department. However, on the beneficiary's resume and in the letter submitted by the president of the foreign company in response to the director's request for evidence, the beneficiary's position is stated as director of technology research and development. 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). Furthermore, in reviewing the brief job description of the beneficiary, it does not appear that the scope of his duties expand to that of a chief executive officer of a company. 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)).

Furthermore, in reviewing the "Certificate of Employment" submitted by the foreign company, the AAO questions the authenticity of this document. It appears that the date of appointment and the date in which the certificate was issued were placed on the form with transparent tape. It is possible that the tape with the dates was placed on the form after signature. In addition, the certificate was created by the beneficiary himself. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based upon the petitioner's failure to submit the requested comprehensive job description, and the lack of evidence of the foreign company's staffing levels, it cannot be concluded that the beneficiary has been employed by the foreign entity in a managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has demonstrated that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In addition, if a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business "for the previous year" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

The petitioner indicated on Form I-129 that the beneficiary will be employed in the position of researcher and his proposed duties will be "research, marketing, development of semiconductors."

On August 8, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit additional evidence in support of its petition. Specifically, the director requested: 1) a complete position description for all of the proposed employees in the United States, including the beneficiary's position; 2) evidence demonstrating that the beneficiary, within one year, will be relieved from performing the non-managerial, day-to-day operations involved in producing a product of providing a service; and 3) an organizational chart for the proposed office in the United States.

In response, the petitioner submitted a letter dated August 16, 2005 from the chief executive officer of the United States company. The petitioner indicated that the beneficiary's proposed duties in the U.S. entity would be the following:

[The beneficiary] currently serves at [sic] the Director of Technology R & D at [the foreign company]. We wish for [the beneficiary] to serve in a similar capacity with regard to a joint venture between [the foreign company] and [the U.S. company]. [The beneficiary's] specific duties will include:

- Overseeing the Research Department
- Research and development of semiconductor materials
- Research and development of electronic materials
- Consultation with prospective investors.

This is a managerial position requiring that [the beneficiary] oversee the department, supervising three (prospective) employees participating in the creation of the semiconductors.

The director denied the petition on September 8, 2005 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary would be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it appeared that the beneficiary "would be involved in the daily duties of research and development" and it is not evident that he will hold a position of managerial or executive capacity.

On appeal, counsel for the petitioner cites from the *Occupational Outlook Handbook* for the position of "Engineering and Natural Science Managers" and states "simply because [the beneficiary] is participating in the research does not preclude him from being in a managerial and executive position." In addition, counsel states that the beneficiary will be supervising employees and will manage an essential function of the organization since he will manage the essential research department. Counsel states, "overseeing the Research Department is indeed overseeing 'a major component of the organization!'"

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial, administrative, or operational duties. An employee who "primarily" performs the tasks necessary to produce a product or provide a service is not considered to be "primarily" employed in a

managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I & N Dec. at 604.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary will be responsible for "overseeing the research department." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the research department and the subordinates in the department that the beneficiary will supervise. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary will be responsible for the "research and development of semiconductor materials," the "research and development of electronic materials," and "consultation with prospective investors." It appears that the beneficiary will be developing and marketing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. at 604.

As noted above, in the request for evidence, the director requested that the petitioner submit a complete description of the duties the beneficiary will perform and a job description for all the proposed position in the United States company, and an organizational chart of the U.S. entity. The petitioner failed to submit this documentation in its response. This evidence is critical as it would have established if the beneficiary will hold a position of managerial or executive capacity by the United States company. 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). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the petitioner did not submit a detailed job description of the duties to be performed by the beneficiary at the U.S. company and thus AAO cannot determine if the beneficiary will be employed in a managerial or executive capacity. 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. at 165.

In addition, although the petitioner claims that the U.S. entity will hire three employees, the petitioner did not submit the job titles or job descriptions for the prospective employees, or a timeline for hiring the additional personnel. 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. at 165.

Based on the vague job description submitted with the petition, and considering the petitioner's failure to document the employment of employees the beneficiary will supervise, the director reasonably concluded that the petitioner has failed to demonstrate that the beneficiary would be primarily performing managerial or executive duties in his proposed position.

On appeal, counsel for the petitioner asserts that the beneficiary will manage an essential function of the U.S. organization. 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the beneficiary's job description is too vague to establish that he would perform primarily managerial or executive duties, and appears to include non-qualifying duties associated with the petitioner's day-to-day functions. The petitioner has not provided evidence that it will employ any other employees, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations. Based on the foregoing discussion, the petitioner has not established the beneficiary will be employed in the U.S. in a managerial or executive capacity.

Furthermore, as contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory

requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner submitted a two-page "investment brief" for [REDACTED] of Korea, but no business plan for the new U.S. company. Without a business plan, it is impossible to conclude that the U.S. company will support a managerial or executive position within one year. Again, 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. at 165.

Upon review, the petitioner has not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position. For this additional reason, the appeal will be dismissed.

The third issue in this proceeding is whether a qualifying relationship exists between the foreign company and the United States entity. 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 is 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 regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

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

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (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.

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

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.

The petitioner claims to be an affiliate of the beneficiary's foreign employer, In support of this claim, the petitioner submitted: (1) a Certificate of Registration Corporation for a company named [REDACTED] located in Korea; (2) a Certificate of Registration Corporation for [REDACTED] the beneficiary's claimed foreign employer; (3) the petitioner's certificate of incorporation dated January 26, 2005, indicating that the company is authorized to issue 1,000 common shares; (4) articles of amendment changing the name of the petitioning corporation in March 29, 2005; and, (5) a joint venture agreement between [REDACTED] of Korea and [REDACTED], dated June 8, 2005. None of the submitted documents identified the ownership and control of the beneficiary's foreign employer or the petitioning U.S. company.

On August 8, 2005, the director requested that the petitioner submit additional evidence to establish a qualifying relationship between the foreign organization and the United States company. Specifically, the director requested: 1) evidence of ownership of the stocks for the United States company; 2) a copy of the stock ledger for the United States entity, which shows all of the stock transactions since its incorporation; 3) copies of all stock certificates issued for the U.S. company; 4) documentary evidence establishing all stocks/shares ownership and control of the foreign entity, including the number of shares of stock issued by the foreign entity and the individuals to whom they have been issued; and 5) copies of all stock certificates issued for the foreign company.

In response, the petitioner re-submitted the Articles of Incorporation for the United States company indicating that the U.S. entity had 1,000 shares of common stock. In addition, the petitioner re-submitted the certificate of Registration Corporation for [REDACTED] of Korea" indicating that the total number of outstanding shares of the foreign company is 6,300,000, however, the document does not name the owners of the shares of the foreign company. The petitioner failed to submit the requested stock certificates and stock ledger for the U.S. entity, nor did it submit any documentation to establish the ownership and control of [REDACTED]

The director denied the petition on September 8, 2005 on the ground that the petitioner submitted insufficient evidence to establish an existing qualifying relationship between the foreign company and the

United States company. The director noted that the petitioner did not submit the evidence requested by the director and thus the director was unable to determine the ownership or control of either the foreign company or the United States company.

On appeal, counsel for the petitioner asserts that the foreign company and the United States company are affiliates since “three individuals have an almost equal share of the ownership of the company who also have equal interest in [the foreign company].” On appeal, the petitioner submits stock certificates number one through three for the U.S. company, a copy of the transfer ledger for the U.S. company and a copy of the minutes of the organization meeting for the U.S. company. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the petitioner indicated that the United States company is an affiliate of Polaris-Five Korea, however, the petitioner submitted documentation related to [REDACTED], a different company located in Korea, rather than [REDACTED]. 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.

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 the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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, CIS is unable to determine the elements of ownership and control.

On appeal, the petitioner acknowledges the specific deficiency noted by the director, yet still fails to provide evidence that the foreign entity and the United States company are owned by the same group of individuals. The petitioner has failed to submit any documentation to establish the owners of the foreign company. 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. at 165. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Finally, counsel asserts that the previously submitted "joint venture agreement establishes that [REDACTED] and [REDACTED] are contractually obligated to work together to develop, manufacture, and market semiconductor equipment." Counsel's assertion is not persuasive, as the petitioning company is not named as a party to the joint venture. The evidence of record does not demonstrate any common ownership and control between the Korean company known as WinPac, Inc. and the petitioner, which has the same name. The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.