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FILE: WAC 04 253 50789 Office: CALIFORNIA SERVICE CENTER Date: **JUL 07 2006**

IN RE: Petitioner:
Beneficiary:



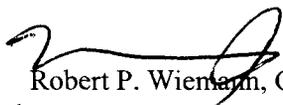
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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. Wieman, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager 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 Wyoming limited liability company registered to do business in California. The petitioner claims to be engaged in the purchase and wholesale of computers and computer parts. The beneficiary was initially granted a one-year period in L-1A status in order to open a new office in the United States. The petitioner's subsequent petition to extend the beneficiary's status was denied on August 25, 2004 (WAC 04 111 50607). The petitioner now seeks to extend the beneficiary's L-1A status for a three-year period.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary would be employed in a primarily managerial or executive capacity; or (2) that the U.S. and foreign entities have a qualifying relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the beneficiary does not need to supervise professional employees in order to qualify as a manager or executive. Counsel claims that the U.S. entity is a wholly owned subsidiary of the foreign entity and attempts to clarify discrepancies noted by the director, specifically stating that the ownership interests reflected in the tax returns are "an internal accounting" issue that does not affect the "ownership status" of the U.S. company. Counsel submits a brief 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity.

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee

is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

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

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

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

The nonimmigrant petition was filed on September 16, 2004. The petitioner attached a job description for the beneficiary's position as general manager, and indicated that he currently manages four full-time employees and is in the processing of hiring a warehouse employee. The petitioner stated the beneficiary would perform the following responsibilities for the U.S. company:

I. BOARD OF DIRECTORS

1. Advises and assists the Board of Directors in consideration and determination of whatever objectives, policies and other basic controls are required . . .
2. Interprets and administers policies established by the board; issues stand practice instructions to members and department heads and other personnel. . .
3. Keeps the Board regularly informed of the progress and results of cooperative operations for conformity with established objectives, programs and budgets. . . .

II. FINANCE

1. Defines, recommends and controls operating and financial objectives; develops, in conjunction with department managers, short- and long-term plans and programs with supporting budget requests and financial estimates for each department and the cooperative as a whole, submits proposals to the B.O.D. for approval. Directs operations to achieve budget goals. . .

2. Maintains all necessary financial records as required by law, and presents quarterly reports to the Board.
3. Ensures that all funds, physical assets, and other property of the company are appropriately safeguarded and administered. Maintains physical plant.

III. OPERATIONS

1. Maintains a continuing study of economic, industry and technological development and trends and provides the board with whatever forecasts and plans are necessary to assure that all phases of operations are adequately equipped to meet customer/clients needs. . . .
2. Ensures that the organization structures at all levels of the company are the most efficient for the operations which company is engaged; plans for changes in the organization structure. . . and secures approval of the Board when major realignments are needed.
3. Maintains appropriate contacts and develops necessary relations with government departments, industry organizations and other organizations Makes efficient use of these and all other available resources.

IV. PERSONNEL

1. Generally responsible for the selection, employment, promotion, discipline and termination of employees. Develops pay and benefits packages. Directs and generally supervises all company employees in their performance of assigned duties and in the manner in which they pursue their objectives and programs, renders advice, assistance, and guidance to other employees.

V. MEMBERSHIP AND COMMUNITY

1. Keeps the members adequately informed of the affairs of the company; encourages their participation, sees that sound relationships are maintained between staff and customers . . .
2. Organizes and maintains company related educational and outreach programs.
3. Maintains a positive Company profile and awareness in the community.

The petitioner also provided the following description of the beneficiary's daily duties:

The beneficiary['s] duties involve him in the day to day business of the company, and on a daily basis, he communicates with the employees and discusses all daily transactions. It is the sole responsibility of the beneficiary to approve all credit sales, all new customer sales, approve and authorize all purchasing transactions, especially when an overseas or new vendor is involved. The beneficiary['s] daily duties are as follow[s]:

- 1 Hour spent daily in meeting with sales people.
- 1 Hours spent daily in visiting or calling large corporate and resellers accounts
- 2 hours spent daily in calling or visiting newly establish [sic] accounts, and follow up with them current or prospective transactions made by the sales people. During this kind

of visit the beneficiary is usually accompanied by the sales manager or the sales executive handling those specific account sales.

- 1 Hour daily spent reviewing sales reports, credit and collection reports.
- 1 Hours daily spent calling overseas vendors and trying to work out on deals that can benefit the company. This 1 hour also involved a communication with the company[s] other branches in overseas and might also involve discussing business decisions with the partners or giving instructions to sales or purchase managers in overseas branches.

The petitioner attached an organizational chart showing the beneficiary over two sales executives, a sales manager and a web design/sales executive employee. The petitioner indicated that the sales executives are responsible for inside and outside sales, making phone calls and personal visits to new companies, promoting the petitioner's services and products, following up with established customers and updating them on new arrivals, and following up on their technical support requests. The petitioner stated that the web designer/sales executive performs the same responsibilities and also designs, develops and implements web sites, online applications and performs graphic design work. The petitioner noted that all three of these employees report to the sales manager, who is responsible for managing the sales department, supervising and training the sales executives, signing and authorizing their sales orders and submitting all required inventory requests to the "purchase manager." The petitioner stated that all three sales executives are employed at a base salary of \$1,300, with a 10 to 25% commission on sales of services, while its sales manager receives a 30% commission on sales turnover but no base salary. The petitioner noted that the sales manager "represents Tradecom, Inc. in a joint venture with [the petitioner]."

In an undated letter submitted in support of the petition, the petitioner explained that all three of its sales executives, two of whom were previously independent contractors, are payroll employees as of August 2004, while its sales manager continues to work on a part-time commission basis. The petitioner attached California Form DE-34, Report of New Employees; IRS Forms W-4, Employee's Withholding Allowance Certificate; and Forms I-9, Employment Eligibility Verification, to confirm the employment of two of the sales executives. The record also contains the petitioner's Form DE-6, Quarterly Wage and Withholding Report for the first quarter of 2004, confirming the employment of the beneficiary and one sales executive. Finally, the petitioner's submission included a copy of the petition and supporting documents submitted with its previous I-129 petition requesting an extension of the beneficiary's L-1A status, which was denied by the director on August 25, 2004.

The director issued a request for additional evidence on September 28, 2004, in part requesting evidence that the beneficiary 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 within the organization.

In a response dated October 18, 2004, the petitioner re-submitted the job description that was provided with the initial petition filing.

The director denied the petition on November 2, 2004, concluding that the petitioner had not established that that the beneficiary would be employed in a managerial or executive capacity. The director observed that the beneficiary would supervise four non-professional employees and the preponderance of his duties would be

directly providing the services of the business. The director noted that the petitioner had failed to establish that the beneficiary would manage an essential function of the business, or that he would manage a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner concedes that the beneficiary's subordinates are not professionals, but emphasizes that the nature of the business does not require the services of professional workers to perform sales duties. Counsel contends that the lack of professional subordinates "shouldn't affect in any way the classification of the capacity in which the beneficiary is employed with the U.S. entity. [The beneficiary] is the founder of the company in the US and in 2 overseas countries. Over the years . . . [the beneficiary] remained the main and sometime sole decision maker for these companies." Counsel asserts that even companies with no professional employees require managers.

Counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in the United States 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(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 in either an executive or a managerial capacity. *Id.* The petitioner does not clarify whether 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

Although the petitioner provided a lengthy description of the beneficiary's duties, the description is over-broad and fails to identify the specific managerial or executive tasks the beneficiary will perform on a day-to-day basis. For example, the petitioner stated that the beneficiary will assist the board of directors in determining policies and objectives, interpret and administer policies, define and control operating and financial objectives, ensure that sound relationships are maintained between staff and customers, organize company related educational outreach programs and be responsible for the financial well being of the company. While these broad responsibilities suggest that the beneficiary will exercise a certain level of authority over the operations of the company, the petitioner must establish that the beneficiary's actual duties are primarily managerial or executive in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. The actual duties themselves 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).

Furthermore, some of the broad duties described suggest that the beneficiary is in fact responsible for performing day-to-day administrative and operational functions of the petitioner's business. The petitioner states that the beneficiary is responsible for managing the company's finances "in conjunction with department managers," but the petitioner is not organized into departments, does not employ any lower-level managers, and does not indicate that any of its employees perform duties related to the company's financial

function. If the beneficiary is solely responsible for the company's finances, it is reasonable to assume that he is responsible for routine tasks such as maintaining financial records, bookkeeping, paying bills, banking, etc. Similarly, the petitioner claims that the beneficiary maintains "a continuing study of economic, industry, and technological development and trends," a responsibility which suggests that the beneficiary performs market research tasks. Again, the petitioner does not claim to employ any lower-level staff that would relieve the beneficiary from performing these tasks. The AAO cannot conclude that these finance-related and market research duties would be incidental to the beneficiary's daily duties.

Finally, the petitioner's description of the beneficiary's "typical day" confirms that the beneficiary is primarily engaged in non-qualifying first-line supervisory, sales, purchasing, financial and marketing tasks that prohibit him from allocating the preponderance of his time to qualifying duties. For example, the beneficiary is responsible for approving all credit sales, new customer sales and purchases, spends half of his day visiting or calling existing or prospective customers and vendors, and spends the remainder of his time meeting with his sales staff and reviewing sales and credit reports. The petitioner has also failed to identify any employees who would perform routine administrative and clerical tasks in the petitioner's office. While the beneficiary is evidently relieved from performing some of the petitioner's sales work, he is also directly participating in sales duties, and performing nearly all of the tasks necessary for the petitioner to provide a service or product. These duties, which based on the petitioner's representations comprise more than 50 percent of his time, cannot be considered managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "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 Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

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 show 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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. While the beneficiary in this matter evidently exercises discretion over the petitioner's business, the evidence shows that he is primarily engaged in operational tasks and the supervision of lower-level employees, rather than performing managerial or executive duties.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner has conceded that the beneficiary's subordinates are not employed in professional positions. While one of the employees has been identified as a "sales manager," the petitioner has placed this employee on the same level as its sales executives on its organizational chart. Furthermore, the petitioner has provided no evidence of payments to this employee, who is claimed to work on a part-time commission basis. The petitioner has not established any of its employees would supervise subordinate staff members or manage a clearly defined department or

function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Despite the petitioner's inability to show that the beneficiary supervises professional employees, the petitioner can still establish the beneficiary's eligibility by providing evidence that the beneficiary is a function manager. 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 provide a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 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)). As discussed above, the petitioner has not established that the beneficiary performs primarily managerial duties, has therefore not established that he is a function manager.

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.* The petitioner has not established that the U.S. company has expanded to the point where establishing goals and policies and directing subordinate managers are the beneficiary's primary duties.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from

primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel emphasizes on appeal that the petitioner operates a small business that has no reasonable need for professional personnel. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. In the present matter, the petitioner has not established the basic eligibility requirement in this matter, that the beneficiary is primarily performing managerial or executive duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a managerial or executive position under the extended petition. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the U.S. company and the foreign entity have a qualifying relationship as required by 8 C.F.R. §214.2(l)(3)(i).

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.

* * *

(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
- (3) 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 petitioner stated on Form I-129 that the U.S. company is a wholly owned subsidiary of the foreign entity, Advance Computer Technology (Middle East). The petitioner's supporting evidence included: (1) its membership certificate number 001 issuing 250 membership units to [REDACTED] on May 17, 2001, with a copy of the back of the certificate assigning the 250 units to the foreign entity on February 1, 2003; (2) member certificate number 02 issuing 250 membership units to [REDACTED] on May 17, 2001, with a copy of the back of the certificate, assigning the 250 units to the foreign entity on February 1, 2003; (3) membership certificate number 003 issuing 500 membership units to the foreign entity on February 1, 2003; (4) the U.S. company's December 7, 1996 operating agreement, identifying the original members of the company as the beneficiary and [REDACTED]; (5) a May 17, 2001 resolution of the members of the U.S. company whereby [REDACTED] transferred her full 50% interest (250 units) in the company to [REDACTED]; (6) a February 1, 2003 resolution of the members of the petitioner whereby the beneficiary and [REDACTED] each transferred their 50% interests (250 membership units each) to the foreign entity; and (7) the memorandum of association for the foreign limited liability company, dated September 5, 2001, indicating ownership as follows: [REDACTED] (51%), the beneficiary (24%) and [REDACTED] (25%).

On September 28, 2004, the director requested additional evidence to establish that the U.S. company and foreign entity have a qualifying relationship, including: the petitioner's articles of incorporation; copies of all of the stock certificates issued to date; copies of the U.S. company's stock ledger showing all stock certificates issued to the present date including total shares of stock sold, names of shareholders and purchase price; and evidence to show that the foreign parent company has paid for its interest in the U.S. entity, including copies of original wire transfers from the parent company, canceled checks, and deposit receipts.

In a response received on October 19, 2004, the petitioner stated that the foreign company "has always been the only funding source for the U.S. company even prior to the transfer of membership made by the partners transferring their membership from their personal name to the foreign company name." The petitioner

attached copies of six wire transfer receipts confirming the transfer of funds from the foreign entity to the petitioner's bank account between July 2002 and April 2003, as well as evidence of funds received from [REDACTED] in April 2003, and funds received from the beneficiary in May and June 2003. The petitioner re-submitted its certificate of incorporation, member resolutions, membership certificates, and operating agreement.

The petitioner's response to the director's request for evidence also included its 2003 IRS Form 1065, U.S. Return of Partnership Income, and Schedules K-1, Partner's Share of Income, Credits, Deductions, etc. The petitioner's Schedules K-1 indicate that the company is owned by the beneficiary and Jean Tom Nasrallah as of December 31, 2003, with each member sharing 50 percent in ownership of capital and profit and loss sharing.

The director denied the petition on November 2, 2004, concluding that the petitioner had not established that the U.S. and foreign entities have a qualifying relationship. The director observed that the petitioner's membership certificates and Schedule K-1 of the company's Form 1065 were inconsistent with the petitioner's claim that it is a wholly owned subsidiary of the foreign entity. The director also considered whether the submitted evidence established an affiliate relationship and noted that while significant commonality of ownership may exist between the two companies, there was no evidence of common control sufficient to establish that the companies are affiliates as defined at 8 C.F.R. § 214.2(l)(1)(ii)(L).

On appeal, the petitioner asserts that the U.S. entity is a wholly owned subsidiary of the foreign entity and explains as follows:

The BCIS in their denial letter stated that the fact of having the US entity filling [sic] its Federal Tax with the IRS as a partnership is proof that the US entity is not owned by the foreign entity.

In this matter we would like to state the following facts:

When our company approached our accountant to prepare the tax we were clearly informed that being an LLC in the US and also in overseas the tax we eventually be passed to the partner and we been informed also that an LLC can be elect to be taxed as corporation or as a partnership and we elected to be taxed as partnership because its more easier [sic] for our own personal tax records.

Having the LLC Tax returns filed under the partners names doesn't not [sic] change the fact that the US LLC is wholly owned by the foreign entity which is in fact a Limited Liability Company owned by the same partners that the US LLC Tax returns were filed in their names.

In this regard we consider the tax returns an internal accounting issue that shouldn't in any way affect the ownership status of the US entity.

Upon review, the petitioner's assertions and the submitted documentation do not establish that the petitioner has a qualifying relationship with the foreign entity. 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, or in this case, membership certificates, alone are not sufficient evidence to determine whether a stockholder or member 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, or equivalent documents, must also be examined to determine the total number of shares or membership units issued, the exact number issued to each shareholder or member, and the subsequent percentage ownership and its effect on control of the company. Additionally, a petitioning company must disclose all agreements relating to 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.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

In this case, the petitioner has provided incomplete and inconsistent evidence regarding its actual ownership and control that prohibits a finding that the U.S. entity is a wholly-owned subsidiary of the foreign entity. While the petitioner's membership certificates show that the beneficiary and [REDACTED] transferred their membership interest in the petitioning organization to the foreign entity on February 1, 2003, the petitioner has not adequately explained why these two individuals are reported as the only members of the U.S. company on the petitioner's 2003 Form 1065, U.S. Return of Partnership Income. The petitioner's claim that the completion of the Form 1065 in this manner was merely an "internal accounting issue" is not supported by evidence, or even a coherent argument as to why the foreign entity was not listed as a member on Schedule K-1. 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)). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner's unsupported assertion that its accountant had some tax-related reason for not acknowledging the foreign entity's ownership of the U.S. company on Form 1065 or Schedule K-1 is not independent and objective evidence.

Further, the record shows that the beneficiary and another individual, [REDACTED] were the members of the U.S. company from November 25, 1996 until May 15, 2001. It is unclear why the petitioner did not provide a copy of the membership certificate that was initially issued to [REDACTED] or why the submitted membership certificate bearing the beneficiary's name was not issued until 2001. These omissions

raise questions regarding the validity of the submitted membership certificates. 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).

The petitioner also failed to provide sufficient evidence that the foreign entity paid for its claimed ownership interest in the petitioning company. Although the petitioner provided evidence of wire transfers to the U.S. entity's bank account, originating from the foreign entity, there is no evidence to establish that these monies were specifically transferred to pay for the foreign entity's ownership interest, nor any evidence identifying the amount of money the foreign entity agreed to pay in exchange for its 500 membership units. Given the petitioner's representations that the U.S. entity purchases goods to export to the foreign entity for re-sale, these funds could have been transferred to the U.S. company in the normal course of doing business. Again, the petitioner's Schedule K-1 shows that the capital of the company was contributed by two individuals, not by the foreign entity.

The petitioner in this matter has not submitted consistent or credible evidence of its ownership and control and therefore has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the record reflects that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the validity of the beneficiary's previous L-1A petition expired on March 25, 2004. However, the instant petition for an extension of the beneficiary's L-1A status was filed on September 16, 2004, almost six months following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), 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. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

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.

ORDER: The appeal is dismissed.