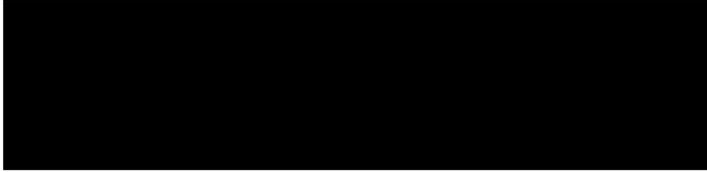




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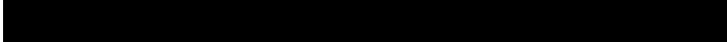
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File: WAC 05 082 51718 Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2007**

IN RE: Petitioner: 
Beneficiary: 

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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, 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 dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that claims to be engaged in the sale and distribution of educational videos and literature. The petitioner also claims that it is the affiliate of Roman Instructional Media Resources, Inc., located in Quezon City, the Philippines. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner has failed to establish that (1) the beneficiary would be employed in the United States in a primarily managerial or executive capacity, or (2) a qualifying relationship exists between the U.S. and foreign entities.

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, even though the petition is for an extension of L-1A status, the beneficiary's eligibility should be considered based on the standards for a "new office" petition since the company had been in operation for only five months when the petition for extension was filed. Counsel also asserts that the beneficiary performs in an executive capacity because she directs the management of the entire organization. With respect to the qualifying relationship between the U.S. and foreign entities, counsel claims that the two entities have common ownership in that they are owned and controlled by the same group of stockholders each of whom owns approximately the same share or proportion of each company. In support of these assertions, the petitioner submits additional evidence.

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 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 the present matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as

promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

In an undated letter accompanying the Form I-129, Petition for a Nonimmigrant Worker, counsel for the petitioner stated the following regarding the beneficiary's job duties in the U.S. entity:

Promptly upon her assuming the duties of CEO, [the beneficiary] organized the office, hired employees, established a marketing network, established company policies, set up business objectives and goals, established credit and finance facility for the company, drew up the company budget, obtained and negotiated contracts. In the 4 months of operations of the company it has been able to generate approximately \$56,000 in sales. [The beneficiary's] continued employment with the U.S. company is critical to the success of the projects and contracts that it has committed to. [The beneficiary] has actually worked in the company for less than 4 months and her services are needed to complete the company's start up operations and bring the company to full operations within one year.

On February 28, 2005, the director issued a request for further evidence (RFE). Specifically, the director requested an organizational chart of the U.S. entity, which should (1) include the names of all executives, managers, supervisors, and the number of employees within each department or subdivision; (2) identify the beneficiary's position and list all employees under the beneficiary's supervision by name and job title, and (3) include a brief description of job duties, educational level and annual salaries/wages for all employees under the beneficiary's supervision. The director also requested Federal Forms 941 and California Quarterly Wages Reports (Forms DE-6) for all employees for the preceding four quarters as well as copies of the U.S. company's payroll summary, Forms W-2, and Forms 1099 evidencing wages paid to employees. In connection with the beneficiary's managerial or executive capacity, the director requested (1) a list of the

specific goals and policies that the beneficiary has established and specific discretionary decisions that the beneficiary has exercised over the previous six months; (2) evidence that the beneficiary receives only general supervision from the higher level executives, the board of directors, or stockholders of the company, and (3) a specific day-to-day description of the duties the beneficiary has performed over the previous six months.

In a letter dated May 26, 2005 responding to the RFE, counsel for the petitioner stated:

The position of President/Gen. Manager is occupied by [the beneficiary] as intra-company transferee from the Philippines. The position of Executive Assistant to the Gen. Manager is occupied by [redacted] a U.S. citizen. The company, having operated less than a year, the organization is not completely staffed at this time [sic]. The functions of the different departments are ad hoc positions filled by consultants and other officers of the company. For example, the Finance/Accounting is handled for now by the company's tax consultant and Accountant, [redacted]. The position of Sales and Marketing is handled for now by [the beneficiary] as well with [sic] account executive functions handled by [redacted] [and [redacted] who are officers of the corporation but not officially employed on a payroll for the company [sic]. They are merely assisting [the beneficiary] set up the company until full staffing is ready. The organization of the U.S. business is parallel to the organization of the Philippine parent company. Thus, the Department for International Relations with distributors and suppliers are still performed by the Philippine office temporarily until the U.S. office is completely organized.

In the same letter, counsel stated the following in regards to the beneficiary's executive capacity:

For the last six months, [the b]eneficiary has been acting as Chief Executive Officer of the company. She is organizing the corporation, renewed the office lease, installed computer and other necessary business equipments, set up a marketing network for the company. In the first four months of operations, [the b]eneficiary has generated \$52,000 sales for the company and renewed and negotiated other contracts for the Philippine office. At this time all decision making, business planning, financial decisions and administrative decisions are exercised by [the b]eneficiary alone. The company is still at a start up stage and is not completely staffed. Other officers of the company contribute their efforts by providing leads and contacts for marketing. They also assist in the physical set up of the office.

The petitioner also stated that the beneficiary was negotiating various real estate loans and leases for the company. The petitioner submitted an organizational chart for the U.S. entity that lists only the positions within the company without naming any individuals occupying those positions. The petitioner also submitted federal and state quarterly wage reports for the quarters ending September 30, 2004, December 31, 2004 and March 31, 2005, and its payroll summary from September 1, 2004 through May 15, 2005, which show that the beneficiary was the only employee of the company, until she was joined in January 2005 by the executive assistant.

On August 5, 2005, the director denied the petition. The director determined that given that there appears to be only one other employee on the payroll, the record does not establish that the U.S. entity has the

organizational complexity to support an executive or managerial position. The director found the evidence has not established that the beneficiary supervises a subordinate staff of professional, managerial or supervisory personnel who will relieve her from performing non-qualifying duties, and as such, the beneficiary's activities will not be primarily managerial or executive.

On appeal, counsel for the petitioner asserts that, even though the petition is for an extension of L-1A status, the beneficiary's eligibility should be considered based on the standards for a "new office" petition since the company had been in operation for only five months when the petition for extension was filed. Counsel also asserts that the beneficiary performs in an executive capacity because she directs the management of the entire organization. Counsel also indicates that the beneficiary is in the process of setting up a new restaurant business for the company which is to start operation in October 2005; counsel submits on appeal various documents in connection with this new business.

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary would be employed in the United States 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 petitioner must specifically state whether the beneficiary will be primarily employed in a managerial or executive capacity.

Overall, the description of the beneficiary's duties that the petitioner has provided is vague and nonspecific and fails to demonstrate what the beneficiary will do on a day-to-day basis. In the letter accompanying the initial petition, the beneficiary's responsibilities were described as "organized the office, hired employees, established a marketing network, established company policies, set up business objectives and goals, established credit and finance facility for the company, drew up the company budget, obtained and negotiated contracts." As previously noted, the director then requested more specific details regarding the beneficiary's role in the U.S. entity, including a specific day-to-day description of the duties the beneficiary has performed over the previous six months. However, instead of providing specific details and a day-to-day description of the beneficiary's duties over the previous six months as requested, counsel for the petitioner merely stated that the beneficiary "organiz[ed] the corporation, renewed the office lease, installed computer and other necessary business equipments, set up a marketing network for the company." Similarly, there was no evidence to substantiate counsel's statement that "at this time, all decision making, business planning, financial decisions and administrative decisions are exercised by [the b]eneficiary alone." 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). Moreover, 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 answer a critical question in this case: What will the beneficiary primarily do on a daily basis? 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). Further, 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 addition, the AAO notes that the beneficiary's job description include tasks such as "install[ing] computer and other necessary business equipments," "obtain[ing] and negotiate[ing] contracts," and "set[ting] up a marketing network for the company." These are tasks that are necessary to provide the company's service or product and, as such, will not be considered managerial or executive in nature. The petitioner gave no indication as to what percentage of the beneficiary's time is spent engaging in these non-qualifying tasks. 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).

Moreover, as the director observed, the evidence fails to demonstrate that the beneficiary has a subordinate staff of professional, managerial or supervisory personnel who would relieve her from performing non-qualifying duties. The evidence submitted indicates that the company has on staff only one other employee with the title of executive assistant. The petitioner did not provide a job description for this employee, and it is unclear based on the record what this employee actually does within the company. Additionally, in her letter responding to the RFE, counsel for the petitioner claimed that "the functions of the different departments are ad hoc positions filled by consultants and other officers of the company." However, counsel claimed that these officers are not officially on the company's payroll. There is no evidence submitted to substantiate counsel's claim regarding the role of "consultants and other officers" within the company, or to demonstrate the extent to which these individuals, or the executive assistant, would relieve the beneficiary from primarily performing non-qualifying duties. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The AAO notes that the petitioner indicated more than once in the record that "the company is still at a start up stage and is not completely staffed." However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Along the same lines, the AAO does not find persuasive counsel's assertion on appeal that "the beneficiary's eligibility should be considered based on the standards for a 'new office' petition since the company had been in operation for only five months when the petition for extension was filed." The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in the regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible for an extension under the regulations. In the instant matter, it appears the U.S. company simply has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In light of the foregoing, the AAO concludes that the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

The second issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the foreign entity and the U.S. entity.

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; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

(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.

On the L Supplement to Form I-129, the petitioner stated that "the U.S. entity is a subsidiary of the Philippine corporation and the majority of the U.S. shares are owned by the Philippine corporation." In the letter accompanying the petition, counsel for the petitioner stated that the shares of the company are owned by the foreign parent company and its controlling shareholders. The petitioner submitted certifications by the corporate secretary of each company that set forth the stock ownership of each company as follows:

The foreign entity:

Shareholder	No. of shares	%
[REDACTED]	8,000	30%
[REDACTED]	8,000	30%
[REDACTED]	8,000	30%
[REDACTED]	500	5%
[REDACTED]	500	5%

The U.S. entity:

Shareholder	No. of shares	%
[REDACTED]	14,000	35%
[REDACTED]	8,000	20%
[REDACTED]	8,000	20%
[REDACTED]	6,000	15%
[REDACTED]	4,000	10%

The petitioner submitted the foreign entity's articles of incorporation, dated April 19, 1999, showing that the company's stock has been subscribed to and paid for by the shareholders and in the numbers listed above. With respect to the U.S. entity, the petitioner submitted copies of the company's share certificates numbers 1 through 5, dated May 22, 2003, setting forth the ownership of shares by the shareholders and in the amounts set forth above. The petitioner also submitted a copy of the U.S. entity's board resolutions dated May 22, 2003, confirming the proposed issuance of shares to the shareholders set forth above.

In the RFE, the director stated, "[s]ince the foreign company owns less than 50% of the petitioner, explain how the petitioner and the foreign company have a qualifying relationship as defined in 8 CFR 214.2(l)(ii)(G)."

In response, counsel for the petitioner offered the following explanation:

As previously documented and stated in the original filing, the U.S. company is owned by the Philippine company and by the shareholders of the Philippine company. Exhibit E shows the U.S. company owned by [REDACTED] Philippines by 20%. The other shareholders, [REDACTED] and [REDACTED] altogether owning another 45%.

The U.S. company is therefore majority owned by 65% of the foreign company and its

shareholders. These same shareholders of the U.S. company own and control 60% of the Roman Resources, Philippines.

The "Exhibit E" to which counsel referred consists of the certifications of ownership of the companies that were previously submitted and described above. The petitioner submitted no other evidence in support of its claims regarding the qualifying relationship between the two companies.

In denying the petition, the director observed that although the ownership of the U.S. entity by the foreign entity and the foreign entity's controlling shareholders do amount to 65%, the foreign company owns only 20% and there is no evidence that it controls the U.S. entity. In addition, the director found that while there is commonality of ownership between the two companies, the record does not show that the two companies are owned and controlled by the same parent or individual, or by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity.

On appeal, counsel claims that the two entities have common ownership in that they are owned and controlled by the same group of stockholders each of whom owns approximately the same share or proportion of each company. Counsel further claims that the U.S. company was in fact established by the foreign company and intended to be its subsidiary in the United States. Counsel also claims that the foreign entity has assigned its president as its representative for voting its shares in the U.S. company, and that the shareholders of the U.S. entity who are not present in the United States have assigned their shares/votes to the foreign entity. Counsel submits copies of two sets of resolutions of the board of the foreign entity, one showing that the foreign entity assigned the beneficiary to go to the United States to set up the U.S. company, and the other setting forth the described designation of representative and assignments of shares.¹ Counsel asserts that the AAO has recognized an affiliate relationship where persons own different amounts of shares but vote in block by agreement. Finally, counsel asserts that other factors exist to show a qualifying relationship between the two entities, including the same corporate name and the sharing of technical, financial and personnel resources.

In reviewing the record, while the director's analysis is not entirely correct, the AAO agrees with the director's conclusion that the evidence is insufficient to demonstrate that a qualifying relationship exists between the U.S. and foreign entities as required under 8 C.F.R. § 214.2(1)(3)(i).² The regulations and case law confirm

¹ It is noted that although counsel claims that these board resolutions were previously introduced into the record, a review of the record shows that they were in fact submitted for the first time on appeal.

² The director indicates in the denial that the "identical group of individuals" must each own and control approximately the same share or proportion of each entity. On appeal, counsel takes issue with this language and cites *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990). To the extent that the director may not have considered indirect ownership, his use of the word "identical" is hereby withdrawn. The L-1 definition of affiliate at the time of the *Sun Moon Star Advanced Power, Inc.* decision read, "Affiliate means . . . 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." 8 C.F.R. § 214.2(1)(1)(ii)(L) (1990). The court in *Sun Moon Star Advanced Power, Inc.*, however, did not directly address this regulation in its decision. See *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. at 1373. Instead, it only discussed an apparent mistake in the August 20, 1987 memorandum's interpretation of

that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 593 (Comm. 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). 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.

Counsel appears to claim on appeal that the two entities should be considered affiliates in that they are owned and controlled by the same group of stockholders, each of whom owns approximately the same share or proportion of each company. Counsel's claim is without merit as it is not supported by the record. The record indicates that the beneficiary owns directly and indirectly 36% of the U.S. entity but only 5% of the foreign entity, and [REDACTED] and [REDACTED] each own directly and indirectly 30% of the foreign entity but only 26%, 21% and 16%, respectively, of the U.S. entity. Thus, while the evidence submitted indicates that the same group of individuals directly and indirectly own shares in both companies, the evidence does not show that each individual owns "approximately the same share or proportion of each company." C.F.R. § 214.2(l)(1)(ii)(L)(2) (emphasis added). As such, the record does not show that the two entities have a qualifying relationship as "affiliates" under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

Finally, counsel on appeal submits a copy of the foreign entity's June 2, 2003 Board Resolution as evidence of the actual control of the petitioner. However, absent actual proxy voting agreements, this board resolution alone is insufficient evidence of the control of the petitioner's issued shares. Even if the board resolution was sufficient evidence of proxy votes, the petitioner has still failed to demonstrate that it has a qualifying relationship with the foreign entity. Specifically, the evidence indicates that the foreign entity directly owns 8,000, or 20%, of the shares of the U.S. entity. The foreign entity's June 2, 2003 board resolution alleges that (1) [REDACTED] and [REDACTED] assign and designate their shares in the U.S. entity (8,000, 6,000, and 4,000 shares, respectively) to the foreign entity "for all intents and purposes, including receiving dividends, representation at stockholder meetings and exercising voting rights and any and all stockholder benefits, privileges and responsibilities;" and (2) that [REDACTED] is "designated, appointed and authorized to represent [the foreign entity]'s 8,000 shares of [the U.S. entity] at its board

the regulation, in which the then Immigration and Naturalization Service (INS) added the word "exact" to describe the ownership required. *Id.* at 1376. When the word "exact" is added, it implies that the ownership must be "absolutely identical" and that indirect ownership will not be permitted or even considered. See *id.* at 1376, 1380. Specifically, the court in *Sun Moon Star Advanced Power, Inc.* stated that, based on the memorandum's interpretation of the regulation, "a determination of whether companies are affiliates depends upon finding that the companies are owned by the exact same individuals and excludes the possibility of indirect ownership of the affiliates by these individuals through a third company." *Id.* at 1376 (emphasis in original). Thus, as the word "exact" does not appear in the regulations, the court concluded that indirect ownership should also be considered when determining whether the same individuals own both entities. At the same time, by not directly addressing the regulation, the court implied that it did not have an issue with the plain meaning of "affiliate" in 8 C.F.R. § 214.2(l)(1)(ii)(L) and its requirement that the "same group of individuals" own and control, whether directly or indirectly, the same approximate share or proportion of each entity.

meetings, including the power to vote its shares and represent [the foreign entity] in any and all its capacity." Whether intentionally or inadvertently, this board resolution shows that while the foreign entity has been assigned control of 45% of the U.S. entity through the collective shares of the three individual shareholders, it in turn has designated the power to vote its original 20% holding to one of the individual shareholders. Thus, assuming the continuing validity of the assignments outlined in these resolutions, the foreign entity effectively controls only 45% of the U.S. entity, and the U.S. entity cannot be considered a subsidiary of the foreign entity as defined under 8 C.F.R. § 214.2(l)(1)(ii)(K).

In light of the foregoing, the AAO finds that the evidence is insufficient to establish that a qualifying relationship exists between the U.S. and foreign companies.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition, which, in this case is January 2004. The petitioner submitted a number of invoices to show that it has been sourcing for materials, making purchases and transacting business. However, these invoices only date back as far as September 2004. There is no other evidence to show that the petitioner was doing business from January through September 2004. Moreover, according to the letter from counsel accompanying the petition for extension, the U.S. entity did not start up its operations until the beneficiary arrived in the United States in August 2004. Thus, the record does not show that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. For this additional reason, the petition may not be approved.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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

ORDER: The appeal is dismissed.