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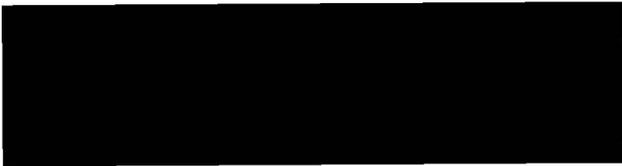
U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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File: WAC 08 010 50647 Office: CALIFORNIA SERVICE CENTER Date: **APR 30 2008**

IN RE: Petitioner:  
Beneficiary:



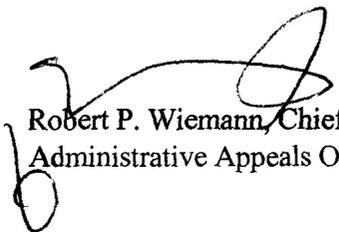
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Nevada corporation established in August 2007, is described as a candy manufacturer. It claims to be a joint venture company and a subsidiary of Inovell Confectionery located in Busan, Korea. The petitioner seeks to employ the beneficiary in the position of Chief of Candy Production in its new office in the United States for a period of one year.

The director denied the petition on three separate and alternative grounds, concluding that the petitioner did not establish: (1) that the U.S. company and the foreign entity have a qualifying relationship; (2) that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity; or (3) that the U.S. company would support the beneficiary in a primarily managerial or executive position within one year of approval of the petition.

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 denies that the U.S. company is a joint venture and emphasizes that the petitioner provided sufficient evidence to demonstrate a qualifying parent-subsidiary relationship between the foreign and United States companies. Counsel further asserts that the director did not give proper weight to the petitioner's descriptions of the beneficiary's duties with the foreign entity, and erroneously concluded that he was not employed in a managerial or executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

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

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

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

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

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 involves 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.

### **I. Qualifying Relationship**

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

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

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

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

The nonimmigrant petition was filed on October 11, 2007. On the L Classification Supplement to Form I-129, the petitioner indicated that the U.S. company is a "joint venture" and stated at: "The company is a co-owned subsidiary of Inovell Korea with Kimmie Candy Company of Reno, Nevada." In an attachment to the L Classification Supplement, the petitioner further explained the relationship between the two companies as follows:

Inovell (Korea) has been the production company for Kimmie Candy Company. The companies have created [the petitioning company] for the production of all candies in the United States. Inovell (Korea) has invested approximately \$100,000 in cash and equipment to the Kimmie Candy for the production of candy. As part of the production [sic] agreement, Kimmie [sic] will provide all facilities and marketing and [the petitioner] will manufacture all candy products to Kimmie's specifications.

At Part 4, Item 7 of the Form I-129, the petitioner indicated that a previous nonimmigrant petition had been filed on the beneficiary's behalf. The petitioner explained as follows:

Kimmie Candy Company as a joint venture company filed a petition for the beneficiary. The joint venture was not an acceptable business entity as there is no requirement for filing with a

federal, state or local governmental office. In order to remove the issue the parties have created a formal business entity to comply with CIS regulations.

In a letter dated August 25, 2007, the owner of the foreign entity indicated that the company had invested \$250,000 in the U.S. venture through "equipment, product transfer, and cash." He explained that "our company's invoices to Kimmie Candy Company shows sums in a higher amount, which is explained by the reduction of partial payment by Kimmie for certain unrelated product."

The petitioner submitted a copy of its Articles of Incorporation, showing that the company was incorporated on August 13, 2007, and authorized to issue 10,000,00 shares with a par value of \$.001. The minutes of annual meeting of shareholders for the U.S. company indicates that 3,750,000 shares were issued to Kimmie Candy Company and 3,750,000 shares were issued to Inovell Confectionery Inc. The petitioner submitted its stock certificates numbers one and two, which reflect equal ownership of the company by these two parties.

In a letter dated October 3, 2007, counsel for the petitioner described the petitioner as being "formed as the outgrowth of the previously manifested 'Joint Venture Agreement.'" Counsel stated that "the fully paid shares are representative of the inflow of both cash and equipment as established by the attached invoices and invoices which have been transferred to capital deposited."

As "verification of stock purchase," the petitioner submitted copies of approximately 34 commercial invoices, primarily for candy products, shipped from the Korean company to "Kimmie Candy LLC," and which identify the parties as "seller" and "buyer," respectively. The transaction amounts varied from approximately \$6,000 to approximately \$70,000.

In addition, the petitioner submitted a manufacturing agreement between Inovell Korea and Kimmie Candy, dated October 16, 2006, in which Inovell agreed to manufacture 1.5 to 2.5 million pounds of product, with production divided between the United States and Korea. According to the terms of the agreement, Kimmie Candy agreed to pay salaries and compensation for all Inovell employees based in Nevada, to include a production executive, a chief production engineer, and a chief candy specialist. Inovell is to provide all equipment and expertise to manufacture the products in the United States while Kimmie Candy would provide space in its warehouse for the manufacturing activities, and be responsible for selling, marketing and distributing the product. Pursuant to the agreement, Kimmie Candy would also provide management and supervisory staff, materials, assembly line workers and accounting and marketing staff. The foreign entity would provide engineering resources, product designers, confection engineers, production engineers, production equipment, testing equipment, and management staff to oversee project management.

Finally, the petitioner submitted a joint venture agreement executed on October 2, 2006 by Inovell Korea and Kimmie Candy Company. The agreement does not mention the petitioner in the matter but instead indicates that "the JV is incorporated as Kimmie Candy Company." Therefore, the agreement does not pertain to the petitioner in this matter, Inovell Confectionary, Inc.

On October 17, 2007, the director issued a request for additional evidence. In part, the director requested that the petitioner submit 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. In addition, the director requested evidence to show that the foreign company and the U.S. company have paid for the U.S. entity. Specifically, the director instructed the petitioner as follows:

It must be shown that Inovell, Korea has transferred funds to have equal share in the joint venture with Kimmie Candy. The evidence should include copies of the original wire transfers from the parent company. It should also include copies of bank statements for Kimmie Candy showing withdrawal amounts and [the petitioning company's] bank account statements showing deposit amounts equal to the Kimmie debits on the same or nearly the same dates. Also, canceled checks, deposit receipts, etc. detailing monetary amounts for the stock purchase should be submitted. . . . The submitted invoices showing purchases from Inovell by Kimmie Candy in no way qualify as evidence of stock purchase because they are clearly purchase of product, are all dated up to a year prior to the incorporation of the joint venture, and do not show that any money has actually changed hands.

In a response dated October 30, 2007, counsel for the petitioner provided the following explanation:

As set forth in Item 10 of the manufacturing agreement attached to the original petition shares were authorized and distributed evenly between Kimmie Candy and Inovell Confectionery (Korea) based upon revenue splits against future sales revenues, as well as the contribution of capital equipment by Inovell Confectionery per Manufacturing Agreement.

The petitioner also submitted a copy of its stock transfer ledger which contained information consistent with the previously submitted stock certificates.

The director denied the petition on November 16, 2007, concluding that the petitioner had failed to establish that the U.S. entity has a qualifying relationship with the beneficiary's foreign employer. The director acknowledged the petitioner's claim that the U.S. company was established with an investment of approximately \$100,000 in cash and equipment by the Korean company, while the U.S. entity's contribution for its one-half share of the joint venture company is the provision of facilities and marketing. However, the director determined that the record does not contain any evidence to establish that the foreign entity has actually provided any cash or equipment. The director noted that while the petitioner submitted a copy of its stock ledger, it did not indicate any "corresponding dollar amounts or purchase terms" related to the issuance of shares," and emphasized that the petitioner "provided no clarification or documentation of the alleged capitalization of the U.S. Company."

The director further noted that while the petitioner referred to the submitted invoices as evidence of a transfer of assets, there was "no indication [that] anything other than cash, such as half-ownership in a joint venture, was expected for payment." The director also found that the name of the U.S. petitioner, "Inovell Confectionery, Inc." rather than the name of the foreign entity, "Inovell Confectionery Company," appeared on the petitioner's stock certificate #2, thus casting doubt on the new entity. The director concluded "it was

not shown the shares were purchase[d] for anything of value and because the stock certificates themselves do not show a 50-50 joint venture, affiliation was not established."

On appeal, counsel for the petitioner states that the director incorrectly stated that that the U.S. company is a joint venture. Counsel asserts that the original business conducted between the foreign entity and Kimmie Candy was "done as a joint venture first of all under a memorandum of understanding, then under a formal joint venture agreement." Counsel contends that the new corporation formed is a "mutually owned" corporation and a 50 percent owned subsidiary of the Korean company. Counsel asserts that the invoices submitted were only provided to show the ongoing relationship between the foreign entity and Kimmie Candy, not as evidence of a stock purchase. Counsel further explains as follows:

Inovell is responsible for all candy production, hiring and firing of all employees in the production department [and] meets the requirement of 50 percent ownership with complete control of the production of candy product. Kimmie Candy is responsible for the sales and marketing of all products. Kimmie Candy will continue to purchase the candy product, as it has in the past[,] marketing and selling the product.

\* \* \*

The petitioner is a separate entity. It is a separate business created from the outgrowth of a relationship first created by Kimmie purchasing candy from Inovell of Korea. The relationship grew to Kimmie requesting a more diverse product line. The relationship grew to a memorandum of understanding giving Kimmie the right of requesting the development of a specific product line. To finally, a joint venture agreement whereby Inovell would develop a United States facility for the production of product.

\* \* \*

The creation of [the petitioning company] for the production of candy product thereafter became the petitioner. The ownership as established by the stock certificates, invoices of equipment transferred from Korea to the United States, and cash retained from invoices of candy production purchased from Inovell Korea by Kimmie Candy.

The petitioner also submits a letter from [REDACTED] president of Kimmie Candy Company, who states: "[W]e entered into a Joint Venture Agreement with Inovell, which specified that Kimmie Candy would hire three executives from Inovell to come to the United States and oversee our domestic production facility." He states that Kimmie Candy would be able to immediately hire 20 local employees to work in its production facility once the Inovell executives arrive.

In support of the appeal, the petitioner submits copies of six commercial invoices for equipment transferred from the Korean company to the United States, with a total value of approximately \$112,000, dated between April 2007 and July 2007. It is noted that four of the six invoices are identical in terms of the equipment shipped and the total monetary amount of such equipment. Furthermore, all previously submitted commercial invoices in the record included the foreign entity's company logo, address, telephone and fax numbers, and

bear the company's stamp, while the new invoices do not. It is also noted that the invoices state that they are "For Account & Risk of" the U.S. petitioner; however, the U.S. company did not exist until August 2007.

Upon review, the petitioner has not established that it has a qualifying relationship with the foreign entity, either as a joint venture or as a subsidiary. Furthermore, it appears that the petitioner was formed for the purpose of executing the transfer of the beneficiary and two other employees from the foreign entity to the office of the foreign entity's primary customer, Kimmie Candy Company. The petitioner has not established that the newly-formed U.S. company would be a qualifying organization for the purposes of this visa classification.

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 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.

Notwithstanding counsel's statements on appeal, the petitioner has consistently claimed to be a joint venture company formed by Inovell Confectionery of Korea and Kimmie Candy Company, a Nevada corporation. Citizenship and Immigration Services (CIS) accepts the interpretation that a 50-50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K). Neither the Act nor the regulations provides a definition of the term "joint venture." However, the AAO has applied a broad definition of joint venture in prior decisions. *Matter of Hughes* states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (quoting a definition from Endle J. Kolde, *International Business Enterprise* (Prentice Hall, 1973)). *Matter of Siemens Medical Systems, Inc.* states: "Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents." *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362, 364 (BIA 1986). In order to meet the definition of "qualifying organization," a joint venture must be formed as a corporation or other legal entity. 8 C.F.R. § 214.2(l)(1)(ii)(G). A business created by a contract as opposed to one created under corporation law is not be deemed a "legal entity" as used in section

101(a)(15)(L) of the Immigration and Nationality Act. *Matter of Hughes*, 18 I&N Dec. 289, 294 (Comm. 1982); *see also Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

Although the petitioner has submitted a manufacturing agreement and a joint venture agreement, neither of these pertains to the petitioning company, as both agreements were signed approximately 10 months before the U.S. company was incorporated. They were, nevertheless, submitted as evidence of the claimed joint venture relationship. The record does not contain a joint venture agreement between the foreign entity and Kimmie Candy clearly setting forth the purpose and terms of the venture, the terms of stock issuance, the amount and type of consideration to be paid by each party, or the responsibilities and management authority of each company under the terms of the agreement. 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)). The evidence of record does not establish that the two companies have a bona fide joint venture relationship.

Furthermore, the record remains devoid of evidence that the foreign entity made an investment in the U.S. company in exchange for its purchase of 50 percent of its stock. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The director properly concluded that the invoices submitted in support of the initial petition and referenced in response to the director's request for evidence appear to show normal sales transactions between the foreign entity and its customer, Kimmie Candy. These documents are insufficient to demonstrate that any consideration was provided by the foreign entity in exchange for its 50 percent share in the newly formed U.S. company. Counsel now claims that the foreign company invested equipment in valued in excess of \$100,000 as consideration, and provides new commercial invoices ostensibly documenting these transactions. Furthermore, the petitioner has made inconsistent claims regarding the amount of capital invested by the foreign entity into the U.S. company, ranging from \$100,000 to \$250,000. Finally, regardless of the amount of equipment the petitioner claims to have provided to the U.S. company in exchange for its ownership interest, invoices alone are insufficient to establish that such equipment was provided at no cost in exchange for ownership interest in a company. The petitioner has not submitted sufficient evidence to establish that it is a subsidiary of the foreign entity.

Finally, in order to qualify for this visa classification, the petitioner must establish that it will be doing business in the United States. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states: “*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.”

Here, the record shows that the petitioner's customer, Kimmie Candy wishes to commence candy manufacturing operations in its existing facility and requires the services of its foreign supplier's personnel to oversee the setup of the manufacturing operations, and to assist with the hiring and training of U.S. personnel who will be employees of Kimmie Candy. While a new legal entity has been formed in the United States to serve as the L-1 petitioner in this case, the evidence in the record suggests that the beneficiary would in fact be working at the facility of Kimmie Candy, would receive his salary and benefits from Kimmie Candy, and would be supervising employees of Kimmie Candy. Rather than submitting a business plan for the new U.S. company, the petitioner has submitted a business plan for Kimmie Candy Company. Contrary to the requirements stated in the regulations, the U.S. company has not provided its hiring plans, financial goals, proposed organizational structure, business license, or any other evidence that it would be doing business according to the regulatory definition. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

On appeal, the president of Kimmie Candy confirms that the U.S. company was created with the intention that "it would allow the three executives from Inovell Confectionery in Korea to come to our Reno, Nevada facility." Overall, the evidence in the record strongly suggests that the petitioner is a shell company formed to facilitate the beneficiary's employment in the United States as a nonimmigrant transferee. It cannot be determined that the U.S. company will be doing business in the United States, or that it will operate separately from Kimmie Candy. For this reason, the petitioner has not established that it is a qualifying organization. Accordingly the appeal will be dismissed.

## **II. Primarily Managerial Or Executive Capacity with Foreign Entity**

The second issue in the present matter is whether the petitioner established that the beneficiary has been employed by the foreign 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.

The petitioner indicated on Form I-129 that the foreign entity has eight employees and that the beneficiary serves as the chief of the foreign entity's production department. The petitioner stated that the beneficiary "manages the production department under supervision of Chief Executive," "supervises candy production department and maintenance department," and "oversees the Chief Candy Specialist."

The petitioner provided an employment verification letter from the foreign entity which indicated that the beneficiary was hired in 2004 and serves as manager of the manufacturing department. The foreign entity also provided a letter dated August 25, 2007, in which the beneficiary is described as "Chief of Candy Production." The foreign entity stated that the beneficiary supervises a candy specialist, maintenance and purchasing departments, is responsible for raw product purchases, and supervises quality and price issues for the department.

Finally, the petitioner submitted a copy of the beneficiary's resume. The beneficiary indicated that he is a "manufacture department engineer" responsible for the following duties:

- Manage electrical candy manufacture system in Inovell Confectionery
- Maintenance check for sugar coating machine
- Computer program in sugar coating manufacture line
- Control sugar syrup in various weathers
- Developed the automated minute spray system
- Participate in minute sugar coating manufacturing process
- Participate in Development of electrical automated manufacture system
- Participate in Sugar manufacture system

The petitioner also provided an organizational chart for the foreign entity which depicts a president, an on-site manager/production executive, a chief production engineer, a chief candy specialist, three candy production positions, a vice president of sales, three project managers in the sales department, a marketing department or employee, a warehouse manager, assembly and shipping staff. Notably, there was no maintenance or

purchasing department depicted, although the foreign entity stated that the beneficiary manages these departments. Only the president and on-site manager/production executive were identified by name on the chart. As noted above, the petitioner stated on Form I-129 that the foreign entity has eight employees.

In the request for evidence issued on October 17, 2007, the director requested additional evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Specifically, the director instructed the petitioner to submit: (1) the total number of employees at the foreign location where the beneficiary is employed; (2) a more detailed organizational chart that includes the names and job titles of all employees; (3) brief descriptions of job duties, educational level and salaries for all employees supervised by the beneficiary; and (4) a more detailed description of the beneficiary's duties, including the percentage of time the beneficiary allocates to each of the listed duties.

In a response dated October 30, 2007, counsel for the petitioner indicated that the foreign entity employs a total of twelve employees. The petitioner stated that the beneficiary, as Chief of Candy Production, performs the following duties:

He is responsible for the supervision of the Candy Specialist(s), maintenance department and quality control. His duties include Supervise as [sic] the Candy Specialists as well as the entire production facility. Additionally, he is in charge of organization and planning. He oversees the purchase of new capital equipment for the manufacturing line. He further supervises the purchasing director on all raw material purchases as well as vendor and supplier management. Production line planning also falls under his supervision as he creates production plans and schedules that coincide with customer order structure and delivery schedules.

The petitioner re-submitted the organizational chart that was submitted with the initial petition. As noted above, this chart only identified two employees by name and job title, and does not include a maintenance department or purchasing director. The beneficiary's name does not appear on the chart.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The director noted that the beneficiary's job description was insufficient to establish that he was more than a first-line supervisor of non-professional personnel. The director further noted that the petitioner had failed to provide the requested detailed organizational chart for the foreign entity, and that the only chart provided did not even identify the beneficiary by name, or include his job title.

On appeal, counsel for the petitioner asserts that the director had no basis for determining that the beneficiary would not be employed in a managerial capacity. Counsel asserts that the beneficiary manages several departments of the company, has a university degree in business administration, and manages a candy specialist, a maintenance manager, and quality control departments. Counsel contends that the director exhibited a "callus [sic] disregard of the information provided by the company, saying basically the company is lying, about their employees is the only apparent reasoning" for the director's finding. Finally, counsel suggests that the director placed undue emphasis on the size of the foreign entity in determining that the beneficiary was not employed in a managerial capacity.

In support of the appeal, the petitioner submits a letter dated December 6, 2007 from the foreign entity's president, who describes the beneficiary as an executive who underwent an 18-month executive training program. He indicates that the beneficiary is employed as the foreign entity's "Chief Candy Specialist" and manages three division managers who are responsible for chocolate coating and candy coating, and who in turn manage production line workers. He further states that the beneficiary's direct supervisor, Jin Seop Sim, is the foreign entity's Chief Production Engineer, and that he is responsible for overseeing raw material inventory levels, quality control issues, and overseeing the facility's production schedule, all of which are duties that were formerly attributed to the beneficiary. It is further noted that, in previous correspondence, the petitioner indicated the Mr. Sim is a candy specialist and that he worked under the beneficiary's supervision.

Upon review, counsel's argument is not persuasive. The petitioner has failed to establish 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(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.*

Preliminarily, the AAO notes that the petitioner failed to provide a consistent job title for the beneficiary's current position with the foreign entity, and also failed to provide consistent information regarding the placement of his position in the foreign entity's organizational hierarchy. The petitioner initially stated that the beneficiary is the "Chief of Candy Production," reporting directly to the foreign entity's chief executive, with responsibility for managing the "candy production department," "maintenance department," and the "Chief Candy Specialist." At the same time, the petitioner submitted an organizational chart which did not include the position of "Chief of Candy Production" or the beneficiary's name. The only position shown to report to the chief executive of the foreign entity was an on-site manager/production executive, a position that is clearly held by another individual.

At the same time, the petitioner submitted a resume for the beneficiary in which he identified his job title as "manufacture department engineer." The duties he listed were all technical in nature and related to automated manufacturing processes. The beneficiary's responsibility for participating in the development of sugar manufacturing processes, developing automated spray systems, controlling sugar syrup in various weather conditions, and performing machine maintenance checks have not been shown to be managerial or executive in nature. Notably, the beneficiary did not mention any responsibility for supervising other employees or departments of the foreign entity in his resume. 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).

Given the inconsistent information provided with the initial petition, the director reasonably requested a detailed description of the beneficiary's position and an explanation as to how his time is allocated among his various duties. The information submitted by the petitioner in response to the director's request did little to

clarify the beneficiary's actual job duties or the inconsistencies in the record. The petitioner indicated that the beneficiary supervises "the entire production facility," the maintenance department, and a purchasing director. Again, the petitioner's organizational chart includes neither a purchasing employee nor a maintenance department. The petitioner failed to provide a detailed list of the beneficiary's duties, and neglected to respond to the director's request for information regarding how the beneficiary's time is allocated among his various duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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).

Finally, on appeal, the petitioner indicates for the first time that the beneficiary has been employed by the foreign entity in the position of "Chief Candy Specialist," which, based on the position description provided, is in fact a lower-level position than that of his previously claimed position of Chief of Candy Production. Many of his claimed managerial responsibilities have now been attributed to another employee, the very same employee he was previously claimed to have supervised. The petitioner has provided no explanation for the beneficiary's change in job title and job duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Given the petitioner's failure to clearly and consistently identify the beneficiary's position within the foreign entity and the duties associated with that position, it cannot be determined that he was employed in a primarily managerial or executive capacity. Furthermore, in addition to failing to provide a sufficient job description to establish the beneficiary's employment in a managerial or executive capacity, the petitioner has failed to submit requested evidence regarding the foreign entity's staffing levels and organizational hierarchy. The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy.

At the time of filing, the petitioner stated on Form I-129 that the foreign entity has eight employees. At the same time, the petitioner submitted a general organizational chart for the foreign entity which appeared to indicate a minimum of 15 positions. In response to the director's request for additional evidence regarding the number of employees and their names, job titles and job duties, the petitioner stated that the foreign entity employs 12 employees, but chose to re-submit the same organizational chart depicting 15 or more positions, and which identified only two employees by name. On appeal, the petitioner submits a more detailed organizational chart depicting at least 18 employees, and indicates that the beneficiary supervises six of them.

However, the petitioner has still not clarified its initial statement that the foreign entity has only eight employees.

Again, 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 petitioner has not provided any documentary evidence, such as payroll records for the foreign entity, which would clarify how many employees the company actually employs. Furthermore, the latest organizational chart shows that of the foreign entity's 18 or more employees, only three are directly involved in manufacturing candy. Additionally, the AAO notes that the three employees have three tiers of supervision, a staffing arrangement that does not appear to be credible.

For these reasons, counsel's claim on appeal that the director placed undue emphasis on the size of the foreign entity or the number of employees the beneficiary supervises is without merit. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the employer in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* As discussed, the record is fraught with discrepancies regarding the beneficiary's job title, job duties, placement in the organizational hierarchy, the size of the foreign entity, and the number of employees supervised by the beneficiary.

Overall, the petitioner's claims fail on an evidentiary basis. There is insufficient evidence in the record regarding the beneficiary's actual duties while employed by the foreign entity. Further, the lack of consistent, credible evidence pertaining to the organizational structure of the foreign entity and the beneficiary's place within the hierarchy prohibits a finding that the beneficiary primarily supervised subordinate professional, supervisory or managerial staff, and also precludes the AAO from determining that he functioned at a senior level with respect to the foreign entity's manufacturing or production function. Based on the contradictory and inconsistent evidence submitted, the AAO is unable to determine what position the beneficiary holds within the foreign entity, what duties he performs, what percentage of those duties are managerial or executive in nature, how many employees the foreign entity has, or which employees the beneficiary supervises, if any. According, it cannot be concluded that he has been employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

### **III. Managerial Or Executive Position in United States**

The third and final ground for denial was the director's finding that the petitioner failed to establish that the new U.S. company would support a managerial or executive position within one year of approval of the petition. The AAO observes that counsel for the petitioner has not addressed this issue on appeal and has not submitted evidence to overcome the director's determination. Upon review, the AAO concurs with the director's determination and will dismiss the appeal for this additional reason.

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.

Here, the petitioner was specifically requested to submit a business plan for the U.S. company including specific details regarding the business to be conducted, and one, three and five-year projections for business expenses, sales, gross income and profits and losses. In response to the director's request, counsel for the petitioner simply stated that "no business plan was required due to the past performance of the companies in the manufacturing of candy." 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 record does contain a detailed business plan for Kimmie Candy Company, but this cannot be accepted in lieu of a business plan for the petitioning U.S. entity. The record also contains no concrete hiring or staffing plan for the U.S. company, no documentary proof of the amount of the investment in the U.S. company, and no detailed description of the beneficiary's proposed job duties in the United States.

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 petitioner's failure to submit evidence required by 8 C.F.R. § 214.2(l)(3)(v)(C), the petitioner has not established that the U.S. company would support a primarily managerial or executive position within one year. For this additional reason, the appeal will be dismissed.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The petition will be denied and the appeal dismissed 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.