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File: EAC 07 174 52339 Office: VERMONT SERVICE CENTER Date: **AUG 01 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)

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa 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 is a corporation organized under the laws of the State of West Virginia and allegedly operates a restaurant.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the beneficiary was employed abroad in a primarily managerial or executive capacity.

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 to the petitioner asserts that the director erred and that the beneficiary has been, and will be, primarily performing qualifying duties.

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 first issue in the present matter is whether the beneficiary will 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.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform 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 petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed as either a manager *or* an executive and will consider both classifications.

The petitioner describes the beneficiary's proposed duties in operating the petitioner's restaurant in a letter

dated May 22, 2007 as follows:

- Act as a liaison between [REDACTED] the vice-president of our firm, and the accounting department and sales department;
- Help deal with the increasing financial situation, including the oversight of various efficiency initiatives and streamlining techniques;
- Develop long-range goals of the company, giving insight into how to increase market share and gain an upper-hand on regional competitors;
- Head up a major project that will allow for the accommodation of the increased sales and expansion, which means the hiring of new employees, the increase of marketing strategies, and the decrease in wasted time & effort, which in the earlier days of the business, was acceptable. However, such waste is to be avoided. Considering [the beneficiary's] success in streamlining of [the foreign employer] over the years, his work here will be invaluable;
- Be responsible for corporate planning, general administration, especially with the sales and purchasing departments (as that is where the bulk of his experience lies);
- Review with the President and employees company's achievements, and discuss the required changes in goals or objectives of the company.

The petitioner also submitted corporate documents related to the beneficiary's purported acquisition of a controlling interest in the petitioner. The document titled "Agreement of Understanding Between Shareholders of [the petitioner]" indicates in paragraph 3 that [REDACTED] will serve as "president" of the petitioner and that she will "oversee and manage all day[-]to[-]day operations." The beneficiary shall serve as secretary/treasurer.

Finally, the petitioner submitted an organizational chart for the United States operation. The chart shows the beneficiary at the top of the organization directly supervising a vice president, [REDACTED] who, in turn, is portrayed as supervising a "manager/chef," who, in turn, is portrayed as supervising restaurant staff. However, the petitioner did not specifically describe the duties of the beneficiary's claimed subordinates.

On July 20, 2007, the director requested additional evidence. The director requested, *inter alia*, a description of the titles and job duties of the beneficiary's proposed subordinate employees and a more detailed description of the beneficiary's proposed duties.

In response, counsel submitted a letter dated August 30, 2007 in which he further describes the proposed organizational structure and staffing of the petitioner's restaurant as follows:

[The beneficiary] will be at the top, President. [REDACTED] will be the other director of the business as Vice-President. Then, Harbhajan [REDACTED] will be the main supervisor on the floor of the restaurant, who will supervise 3 other waiters and another cook.

In this structure, [the beneficiary] will be taking care of all executive decision making, now that he holds 51% ownership of the business. In addition, he will issue all company policies, whether dress-code related or financially-related, for example. He will also instruct

Harbhajan Singh Teja on the type of service to be provided, and on the hiring and/or firing of employees based on their overall performance.

* * *

[Gurbax] Kaur will run a lot of the accounting and financial aspects of the business. She will also be involved in much of the marketing and advertising for the restaurant. Finally, Ms. Kaur will play a major part of the future investing the company does. She is actively negotiating and researching possible investment opportunities on a daily basis. Mr. Harbhajan Singh Teja is in charge of two things: running the restaurant on a day-to-day business [sic], and making sure supplies are refilled. This involves making sure employees report to work, and taking inventory on food ingredients, supplies, etc., and placing orders on a periodic basis with the approval of [the beneficiary].

On December 11, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties will primarily be those of a manager or executive.

Upon review, counsel's assertions are not persuasive.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will develop "long-range goals," give insight into how to "increase market share," lead a project to increase sales and to expand the business, and be responsible for corporate planning and general administration. However, the petitioner does not specifically define any of these goals or plans and fails to explain what, exactly, the beneficiary will do to increase market share and sales, expand the business, or administer the single-location restaurant business. The petitioner also failed to provide a more detailed description of the beneficiary's proposed duties even though this evidence was specifically requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, given the vague job description and the nature of the petitioner's business, it appears more likely than not that the beneficiary will primarily perform non-qualifying administrative or operational tasks in his administration of the restaurant and will not primarily perform qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the organizational chart, the beneficiary will directly supervise a vice president who, in turn, will supervise a manager/chef who, in turn, will supervise the restaurant staff. However, none of these employees is credibly described as having supervisory or managerial responsibilities over other employees. First, the petitioner failed to specifically describe the duties of the subordinate "supervisors" even though this evidence was specifically requested by the director. Once again, 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). Second, the vague descriptions provided by counsel describe the claimed subordinate "supervisors" as primarily performing accounting and financial tasks, ordering supplies, taking inventory, cooking food, and generally performing the tasks necessary to the operation of a single-location, seven-employee restaurant. None of the subordinate "supervisors" is described as possessing a significant degree of control or authority over the employment of subordinates. Overall, the record is not persuasive in establishing that the petitioner has an organizational complexity requiring the employment of an employee who primarily performs "managerial" duties through the supervision of a subordinate tier of managers or supervisors. Accordingly, it appears that the beneficiary will more likely than not primarily perform non-qualifying administrative, operational, or first-line supervisory tasks in his operation of the restaurant along side his subordinate staff. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006).

In view of the above, it appears that the beneficiary will be primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner failed to establish the skills and education required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

¹In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. 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. 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 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-day 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is too vague such that the AAO cannot deduce with any certainty what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears instead that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

²While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will likely be a first-line supervisor of non-professional employees and/or will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, it is appropriate for CIS to consider the size of the petitioning company 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.*

In this matter, the petition contains serious inconsistencies regarding the beneficiary's purported role in the management of the business. As noted above, the record contains corporate documents related to the beneficiary's purported acquisition of a controlling interest in the petitioner. The document titled "Agreement of Understanding Between Shareholders of [the petitioner]" indicates in paragraph 3 that [REDACTED], the person who allegedly sold the beneficiary his controlling interest in the petition, will serve as "president" of the petitioner and that she will "oversee and manage all day to day operations." The beneficiary shall serve as secretary/treasurer. However, the petitioner asserts elsewhere that the beneficiary will serve as "president" and will supervise [REDACTED]. The petitioner offers no explanation for this fundamental inconsistency which undermines the credibility of the petition. 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.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

The second issue in the present matter is whether the petitioner has established that the beneficiary was employed abroad in a primarily managerial or executive capacity.

The petitioner described the beneficiary's duties abroad in allegedly operating a poultry farm in a letter dated May 22, 2007 as follows:

- He is responsible for overseeing the product mixing operations, which is an intermediate procedure between the purchase of the raw ingredients and the sale of the final product. In a farm, such a procedure is what separates good quality from poor quality. The business needs to make sure that the animals are provided for property [sic] in order to assure the quality of the product;

- He supervises the acquisition of raw ingredients from vendors, helping to choose which products to buy, negotiating the quality, quantity, and price of these items to ensure that no item is ever out of stock;
- He prepares quality reports & pamphlets and represented our firm within various trade associations and around the community;
- He is in charge of overseeing financial matters, making sure that the numbers match, and guarding against theft, fraudulent activities, and inefficiency;
- He is in charge of hiring and firing personnel within the delivery and production departments;
- He provides a supervisory presence to greet customers and respond to any complaints they may have with the quality of the goods, or with the service the customers receive from staff;
- Maintains contact with leading vendors to ensure smooth operation of not only the business, but the timely delivery of supplies for production;
- Studies the local market and provides input to the executives as to how to better serve the public and gain market share.

The petitioner also submitted an organizational chart for the foreign operation. The chart shows the beneficiary at the top of the organization supervising a "manager" who, in turn, is shown supervising a "hatchery operator," who, in turn, is shown supervising six workers.

On July 20, 2007, the director requested additional evidence. The director requested, *inter alia*, a description of the titles and job duties of the beneficiary's subordinate employees and a more detailed description of the beneficiary's managerial responsibilities abroad.

In response, counsel submitted a letter dated August 30, 2007 in which counsel further describes the beneficiary's duties abroad as follows:

In addition to making all executive decisions regarding the direction of the business, and taking responsibility for all obligations incurred by the business, [the beneficiary] has also acted as manager of the business by supervising two intermediate-level workers [who] in turn supervised six lower level workers, five laborers and a delivery driver.

* * *

The two intermediate supervisors are as follows: [REDACTED] is a Manager (and he will be the one to take over day-to-day operation of the farm if [the beneficiary's] L-1 petition is approved). [REDACTED] the Hatchery Operator, who takes care of the physical well-being of the actual facilities that house and nurture the chickens and other animals/inventory.

On December 11, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was primarily employed abroad in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties were primarily those of a manager or executive.

Upon review, counsel's assertions are not persuasive.

Once again, 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). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary acted in a "managerial" or "executive" capacity. In support of the petition, the petitioner submitted a vague and non-specific job description which fails to describe the beneficiary as "primarily" performing qualifying duties. For example, the petitioner states that the beneficiary oversaw "the product mixing operations," supervised "the acquisition of raw ingredients from vendors," prepared "quality reports [and] pamphlets," represented the employer "within various trade associations and around the community," greeted customers, responded to complaints, maintained contacts with vendors, and studied the local market. However, these duties are either those of a first-line supervisor engaged in administering a small farming operation or are non-qualifying administrative or operational tasks necessary to the provision of a service or the production of a product. As the petitioner failed to establish how much time the beneficiary devoted to performing these non-qualifying tasks, it cannot be concluded that he "primarily" performed qualifying duties abroad. Once again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As asserted in the organizational chart, the beneficiary directly supervised a manager who, in turn, supervised a hatchery operator who, in turn, supervised farm laborers. However, none of these employees is credibly described as having supervisory or managerial responsibilities over other employees. The petitioner failed to specifically describe the duties of these subordinates even though this evidence was specifically requested by the director. Once again, 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). Regardless, the record is not persuasive in establishing that the foreign employer had an organizational complexity which required the employment of an employee who primarily performed "managerial" duties through the supervision of a subordinate tier of managers or supervisors. Therefore, it appears that the beneficiary was primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. Once again, a managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees were professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The job description fails to describe the beneficiary as primarily performing executive duties. As explained above, it appears instead that the beneficiary was primarily employed as a first-line supervisor and performed the tasks

necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has failed to establish that the beneficiary primarily performed managerial or executive duties abroad, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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" and "is or will be doing business." "Affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(1).

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 Intn'l.*, 19 I&N Dec. 593; *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 Intn'l.*, 19 I&N Dec. at 595.

In this matter, the petitioner claims that the beneficiary owns 100% of the foreign employer and 51% of the petitioner's stock, thus establishing, if true, that the two entities are "affiliates." In support of this claim, the petitioner submits, *inter alia*, a "Sale and Purchase of Stock Agreement," a "Bill of Sale for Stock," a "Promissory Note," and a copy of the petitioner's 2006 Form 1120S, U.S. Income Tax Return for an S Corporation. The sales agreement, bill of sale, and note collectively indicate that [REDACTED] sold 510 of her 1000 shares of stock in the petitioner to the beneficiary in exchange for a promissory note in which the beneficiary promises to pay Kaur \$76,500 in two installments. If the beneficiary fails to pay the full amount within one year, i.e., before April 27, 2008, ownership of the stock shall revert automatically to [REDACTED]. The instant petition was filed on June 4, 2007. The documents also indicate that the two stockholders may not transfer any shares without the permission of the other and that [REDACTED] shall remain the president of the petitioner and will "oversee and manage all day[-]to[-]day operations." Finally, the petitioner's 2006 Form 1120S indicates in Schedule K that the 100% owner of the petitioner is Harbhajan Singh Teja.

Upon review, the petitioner has not established that it and the foreign employer are "affiliates." First, it does not appear as if [REDACTED] owned any shares of stock in the petitioner when she purportedly "sold" 510 shares to the beneficiary on April 28, 2007. Instead, it appears as if the petitioner was 100% owned by [REDACTED] Teja as this is what was reported to the Internal Revenue Service on the Form 1120S. Accordingly, the alleged

