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U.S. Department of Homeland Security
20 Mass. Ave., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 008 50763 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify its chief executive officer as a nonimmigrant intracompany transferee pursuant to § 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 Florida that intends to operate as a cosmetics importer. The petitioner claims that it is an affiliate of the beneficiary's foreign employer, located in India. The petitioner seeks to employ the beneficiary for two years.

The director determined that the petitioner had not provided sufficient evidence that the beneficiary's duties in the foreign company are primarily that of an executive or manager. Additionally, the director determined that the petitioner had not established that the petitioning company and the foreign company are qualifying organizations.

On appeal, counsel restates the same assertions made in the initial petition and states that the beneficiary has been employed in an executive capacity. On appeal, counsel states that the petitioner and foreign company were affiliates at the time of incorporation and at the time of filing the instant petition.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

As the petitioner had been doing business for less than one year at the time of filing, the petitioner is considered a "new office." *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). The regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

> (A) Sufficient physical premises to house the new office have been secured;
>
> (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

((1)) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

((2)) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

((3)) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioner has established that the beneficiary's prior year of employment abroad was in a position that was primarily managerial or executive.

In its initial petition, the petitioner stated that the beneficiary's most recent position with the foreign company was the general manager position. In that position, the beneficiary had "full responsibility including foreign relationships, assigning executive positions, coordinating and establishing business relationships with affiliates outside of India and organizing and structuring local divisions and teams." The petitioner stated that the beneficiary also coordinated third party vendors and exercised day-today discretionary authority over the work of the internal and international department. Also, the petitioner stated that the beneficiary coordinated outside contractors.

The director requested a statement describing the staffing of the foreign company which should include the following information:

> Clearly indicate the number of employees, the position and job duties of each employee, the education level of each employee, and specific date each employee began employment with the company. Submit a work schedule for all employees. Also submit evidence of any contract employees. If you have contract employees, submit a statement describing how often the foreign business uses their services.

In response, the petitioner stated:

> The foreign company is staffed by five full time employees. Additionally, the foreign company contracts for independent services on an as need [sic] basis. The following attached documents represent the staffing of the foreign company and their respective incomes. Please note, that these individuals as shown on the payroll sheet put in at least 40 hours per week. Additional staffers not listed in the attachment are support staff to the management staff at [foreign company].

The petitioner submitted monthly salary sheets for the foreign company which indicated the name of the employee, the title of each employee (some of these titles were abbreviated), and their salaries. The AAO notes that the employees' names vary from month to month.

The director denied the petition noting that the petitioner did not submit a list of the employees' job duties or their education levels. Also, the petitioner did not submit evidence of contract employees. The director stated that without the requested evidence, the petitioner has not proven that the beneficiary works as a manager or executive for the foreign company.

On appeal, counsel for the petitioner submits a letter from the petitioner which restated the beneficiary's duties for the foreign company. Counsel states "[p]ayroll ledger statements also testify to the position and salary of the [b]eneficiary with the Indian [c]ompany." Counsel restates the beneficiary's position description that was provided in the initial petition. Counsel refers to the copies of the payroll ledger listing position titles from the foreign company that were previously submitted and states, "the description of the positions was believed to be self-explanatory." However, on appeal counsel further describes each positions duties and responsibilities as well as the education level of each employee. Counsel further explains that independent contractors are engaged as unskilled workers and work in the warehouse five to seven days a month. Counsel also states that the foreign company engages outside legal and accounting services. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

Counsel's arguments are not persuasive. In order to qualify for an intracompany transferee visa the petitioner must establish that the beneficiary has been employed in a primarily managerial or executive capacity by the foreign company. The petitioner did not submit all requested evidence and submits the evidence on appeal. 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). The petitioner did not submit evidence that outside contractors are used or describe the duties and education level of the employees.

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

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 vague descriptions provide insufficient detail to allow CIS to determine many of the beneficiary's daily or weekly

responsibilities. The petitioner states the beneficiary sets policy for its operations as well as plans and directs daily operations. The petitioner has not identified the goals or policies set by the beneficiary. 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). Counsel adds that the beneficiary "[h]ave [sic] wide latitude with little if any ownership oversight." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner provided insufficient evidence to determine whether the petitioner has established that the beneficiary has been employed primarily in a managerial or executive capacity. Though requested by the director, the petitioner did not provide a statement of the job duties of each employee of the foreign company. Therefore the petitioner did not provide sufficient evidence for CIS to determine that the beneficiary has been employed in a managerial or executive capacity. Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity. Consequently, the appeal will be dismissed.

The second issue in this proceeding is whether a qualifying relationship exists between the petitioning company and the foreign company.

CIS regulations at 8 C.F.R. § 214.2(l)(ii)(G) define the term "qualifying organization" as follows:

> *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.

8 C.F.R. § 214.2(l)(ii)(I) states:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. § 214.2(l)(ii)(J) states:

Branch means an operating division or office of the same organization housed in a different location.

8 C.F.R. § 214.2(l)(ii)(K) states:

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.

8 C.F.R. §214.2(l)(ii)(L) states, in pertinent part:

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.

The petitioner claims to be the affiliate of Hemkunt Agencies of India. In support of this claim, the petitioner submitted the articles of incorporation for the petitioner and an electronic filing cover sheet for the beneficiary with the Secretary of State in Florida. Additionally, the petitioner submitted a signed statement listing the shareholders and their ownership interests in the U.S. company, which consisted of:

32% interest
32% interest
18% interest
18% interest

The petitioner submitted a certificate of business registration for the foreign company. Additionally, the petitioner submitted a signed letter from the foreign company listing the shareholders and the percentage of their ownership interests in the foreign company. The list of five shareholders were as follows:

32% interest
32% interest
15% interest
6 % interest
15% interest

On November 21, 2002, the director requested additional documentation to establish that the foreign and United States entities are qualifying organizations. The director stated that based on the statements provided, the same individual does not own the two companies and the two companies are not owned by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity.

In response to the request for additional documentation, counsel asserted that the U.S. company is affiliated with the foreign company. Counsel stated "please be advised that the foreign corporation information reviewed is accurate only insofar as showing who the original incorporators and founders of the company in India are . . . please see attached, which is reflective of the share interest of the [foreign company]." Counsel summarized his assertions by stating that the "attachment sufficiently meets the definition of affiliate, since both the foreign and the domestic corporation are owned and operated by the same group of individuals, or controlled by the same parties or interests."

The director denied the petition noting that the attachment referred to by counsel was not submitted with the response. Therefore, the director found that the petitioner had not met the requirements according to 8 C.F.R. § 214.2(l)(3). The petitioner had not established that the U.S. company and the foreign company are qualifying organizations.

On appeal, counsel states "the two companies elected to structure an affiliation between their two respective enterprises." Counsel states [redacted] as three shareholders collectively have majority interest in both the foreign company as well as in the U.S. based company, thereby giving this group of persons control of both corporations, at the time of incorporation."

Counsel explains further that there has been a "realignment of equity ownership interest . . . ." Counsel states that the new ownership interest in each company is:

Shareholders	Foreign	U.S.
[redacted]	28%	28%
	16%	16%
	25%	29%
	22%	18%
	09%	
		09%

Counsel concludes by stating "it is clearly realized that all equity participants of the two corporations hold similar equity interest in both corporations."

Counsel's arguments are not persuasive. 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 immigrant visa classification. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988)(in immigrant visa proceedings). In 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*, *supra* at 595.

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) specifically allows the director to request such other evidence as the director may deem necessary. While the petitioner has submitted the Articles of Incorporation for the U.S company, a certificate of business registration for the foreign company, and unsworn statements describing ownership interest, the petitioner has not submitted sufficient evidence to establish that the foreign company owns and controls the U.S. company or that they share common ownership so that they may qualify as affiliates. 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).

Counsel claims that at the time of filing the petition, three of the four shareholders of the U.S. company collectively held 82% interest of the U.S company and the same three shareholders collectively held 53% of the foreign company. Counsel therefore asserts that these three shareholders have a majority ownership in both companies. In order to establish that the U.S. company is an affiliate with the foreign company according to CIS regulations, the petitioner must provide more evidence of common ownership than "statements" that the two companies have three shareholders in common. Asserting that three of the four shareholders of the U.S. company are also three of the five shareholders of the foreign company does not demonstrate ownership and control. No evidence was submitted that proves that any of these three individual shareholders have the ability to combine their shares and act as one shareholder in order to create a majority in either the foreign or U.S. company. Additionally, the remaining two shareholders in the foreign company are different from the remaining single shareholder in the U.S. company. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this case the U.S. entity is owned by three individuals and one company, and the foreign entity is owned by four individuals and one company. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

On appeal, counsel states that the ownership interest in each company has changed. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The record clearly indicates that the petitioning enterprise does not maintain a qualifying "affiliate" relationship with the overseas company. The evidence indicates that the foreign company is owned by four individuals. The U.S. company is owned by five individuals. Accordingly, the two entities are not "owned and controlled by the *same group* of individuals, each individual owning controlling approximately the same share or proportion of each entity...." 8 C.F.R. § 214.2 (l) (1) (ii) (L) (*2*) (emphasis added). In addition, there is no single individual or parent entity with ownership and control of both companies that would qualify the two as affiliates. 8 C.F.R. § 214.2 (l) (1) (ii) (L) (*1*). Although counsel claims that the U.S. company and the foreign company are majority

owned by the same group of three shareholders counsel has provided no evidence, such as a proxy statement, which would establish that this "group" owns and controls both companies. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

As general evidence of a petitioner's claimed qualifying relationship, the petitioner's submitted signed statements alone are not sufficient evidence to determine whether a shareholder maintains ownership and control of a corporate entity. A petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

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 statements of the petitioner. 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. However, the petitioner has provided no such documentation. 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).For this reason, the petition may not be approved.

There is no direct evidence in the record to support the petitioner's claim that the U.S. company and the foreign company are affiliates. Consequently, it must be concluded that the petitioner has failed to demonstrate a qualifying relationship with a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G).

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.