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**U.S. Department of Homeland Security**
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

[redacted]

B4

DATE: OCT 14 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on three separate adverse findings regarding the petitioner's eligibility. First, the director found that the petitioner failed to submit credible evidence establishing that it has a qualifying relationship with the beneficiary's foreign employer. Second, the director determined that the petitioner failed to provide sufficient evidence showing that the foreign entity continues to do business. Third, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Additionally, the director issued a finding of willful misrepresentation based on perceived inconsistencies in the record. First, the director found the petitioner's claim, which indicates that the beneficiary continued to serve as the foreign entity's vice president from 1998 through 2005, to be misleading based on the beneficiary's continued and uninterrupted stay in the United States since his last entry on April 4, 2002. Second, the director observed that two of the submitted documents, i.e., the documents entitled "Release Agreement" and "Lease Deed," were also misleading in that both contained the beneficiary's signature while simultaneously indicating that the respective transactions took place in India despite the fact that the beneficiary was already residing in the United States at the time of these transactions and thus could not have been party to any transactions that took place in India.

On appeal, counsel disputes all three findings of ineligibility as well as the director's finding of willful misrepresentation. The petitioner provides additional documentation in an attempt to overcome the director's adverse decision.

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

I. Willful Misrepresentation

As a preliminary matter, the AAO will address whether the evidence submitted with respect to the claimed ownership of the beneficiary's foreign employer rises to the level of a misrepresentation. A misrepresentation is an assertion or manifestation that is not in accord with the true facts.[1] A misrepresentation of material fact may lead to serious consequences, including but not limited to the denial of the visa petition, a finding of fact that may render an individual alien inadmissible to the United States, and criminal prosecution.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

In the present matter, the director issued a decision on February 19, 2009 in which he concluded that certain documents that the petitioner submitted in its response to the notice of intent to deny (NOID) constituted willful misrepresentation. Specifically, the director pointed to anomalies that he discovered upon reviewing the documents entitled "Release Agreement" and "Lease Deed," dated April 2, 2005 and April 11, 2005, respectively. The director observed that both documents indicate that they were witnessed and executed in

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[1] The terms "fraud" and "misrepresentation" are not interchangeable. Unlike a finding of fraud, a finding of material misrepresentation does not require an intent to deceive or that the officer believes and acts upon the false representation. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975). A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

India at a time when the beneficiary was already residing in the United States. As such, the director determined that the beneficiary could not have signed either document in India in the presence of a witness and that the petitioner's submission of documents that suggest this factual impossibility rise to the level of willful misrepresentation.

On appeal, counsel explains that the documents in question were submitted for the purpose of correcting an error that was made in the petitioner's original support statement, where the petitioner indicated that the beneficiary relinquished his ownership of his foreign employer. Counsel claims that this claim was incorrect and directs the AAO's attention to the document entitled "Release Agreement" in an effort to establish that in fact it was not the beneficiary who relinquished his claim in the partnership where he was previously employed, but rather that it was his partner who relinquished his share of the partnership by transferring his ownership share to the beneficiary. Counsel maintains the claim that the petitioner is a wholly owned subsidiary of the beneficiary's foreign employer and further contends that in a parent-subsidiary relationship the issue of the parent employer's ownership and the validity of the documents pertaining to the parent's ownership are immaterial to issues concerning the petitioner's eligibility.

After reviewing the facts in the present matter, the AAO finds that the finding of willful misrepresentation was not warranted in the present matter. Although the director provided an accurate analysis of the "Release Agreement" and the "Lease Deed" and properly questioned the validity of these documents based on his analysis, the anomalies discussed in the director's decision are not material to issues concerning the petitioner's eligibility. As such, the AAO hereby withdraws the director's finding of willful misrepresentation.

Notwithstanding the above, the AAO points out that the petitioner has failed to resolve the various anomalies that led the director, and now the AAO, to question the credibility of the petitioner's claims and the supporting documents that have been submitted to corroborate such claims. Namely, the AAO joins the director in questioning the reliability of the "Release Agreement" and the "Lease Deed." As properly pointed out in the director's February 19, 2009 decision, the documents indicate that they were executed in India on April 2 and April 5, 2005, respectively, and both contain the beneficiary's signature as well as the signatures of two witnesses, indicating that the execution was witnessed by two individuals neither of whom was a named party to either transaction. In light of the fact that the beneficiary was residing in the United States on each of the execution dates, it would have been factually impossible for the beneficiary to be present in India and for his signature to have been witnessed by third party individuals in India. Although counsel claimed in his March 20, 2009 statement that the foreign documents were sent to the beneficiary by facsimile, thus indicating that the documents could have been executed on the dates indicated, neither document contains a date and time of the claimed facsimile to corroborate counsel's claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, each document contains the signature of two witnesses, thus indicating that someone other than the beneficiary himself was present to actually see him sign the documents. Regardless of whether the documents were sent to the beneficiary by facsimile or by mail, the beneficiary would had to have signed the documents in the United States and thus could not have been witnessed by the two individuals whose signatures are affixed to the documents. While the witness signatures may not be essential for either document to be deemed valid, the fact that the beneficiary's signature appears alongside the signatures of two witnesses clearly leads anyone who reviews these documents to draw the obvious conclusion, i.e., that the

beneficiary signed the documents in the presence of two witnesses. 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). Furthermore, the petitioner's failure to resolve inconsistencies on record casts doubt on the petitioner's credibility and may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

In the present matter, the petitioner was unable to resolve the anomalies discussed above. As such, the AAO reserves the right to further scrutinize and question the validity of any document the petitioner has submitted in support of its claims, particularly handwritten documents whose information may not be verified by an independent source. Counsel challenges the director's questions regarding the petitioner's credibility, asserting that U.S. Citizenship and Immigration Services (USCIS) must evaluate the petitioner's claim based on the preponderance of the evidence standard of proof. In applying the preponderance of the evidence standard, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Accordingly, when evidence that is submitted in support of the petition is deemed to be lacking in credibility, it is reasonable for USCIS to go scrutinize and possibly reevaluate the reliability of evidence that initially may have been deemed to be credible. *See Matter of Ho*, 19 I&N Dec. at 591. In applying the preponderance of the evidence standard, the AAO would be remiss to find that the petitioner's claim is "probably true" or "more likely than not" if any of the petitioner's supporting documents have been deemed unreliable. The preponderance of the evidence standard hinges on the petitioner's submission of relevant, probative, and *credible* evidence. When the credibility of certain evidence is questioned, the AAO cannot conclude that the preponderance of the evidence standard has been met.

While the director's finding of willful misrepresentation has been withdrawn, the AAO cannot dismiss the questions that have arisen regarding the petitioner's credibility. As such, the AAO will take into account the above findings when conducting an analysis of the petitioner's eligibility.

II. Eligibility

The first eligibility issue to be addressed in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it has a qualifying relationship with 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. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

*Affiliate* means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) 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;

* * *

*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United 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.

The director's adverse finding stems, in part, from an inconsistency in the record concerning the claimed ownership of the foreign entity. As previously noted, while the petitioner's initial support letter indicated that the beneficiary sold his ownership interest in the foreign employer to his business partner, the petitioner subsequently altered the original claim, asserting that it was made in error and that in fact it was the beneficiary's partner who relinquished his 50% ownership in the foreign entity leaving the beneficiary as the foreign entity's sole owner.

The director also noted an inconsistency concerning the petitioner's own ownership. Specifically, the director issued a notice of intent to deny (NOID) dated October 8, 2008 in which he discussed Schedule E of the petitioner's 2005 and 2006 tax returns where the beneficiary was identified as owner of 100% of the petitioner's common stock. The director pointed out that the information put forth in the tax returns is in direct conflict with the petitioner's own claim in which the petitioner asserts that it is a wholly owned subsidiary of the foreign entity. Although the petitioner responded to the NOID by providing amended tax returns to reflect its original claim of being foreign-owned, the director found this evidence, which was created in response to an adverse finding, to be insufficient to resolve the inconsistency.

On appeal, counsel criticizes the director's focus on the foreign entity's ownership, asserting that when a U.S. petitioner claims to be a wholly owned subsidiary of a foreign entity, the foreign entity's ownership is not germane to a determination of whether or not a qualifying relationship exists. Counsel's argument, however, rests on the understanding that the ownership claim regarding the alleged parent entity is not in question. In light of the inconsistencies that the director pointed out in the NOID and in the subsequent denial, the AAO supports the director's rejection of the petitioner's amended tax returns as a valid means of resolving a previously created inconsistency. Once an inconsistency has been observed, it is the petitioner's burden to resolve the inconsistency by providing competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Amended tax returns that were created by the petitioner or the petitioner's representative after the discrepancy was pointed out by the director cannot be deemed as competent objective evidence.

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 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 must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, 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.,* 19 I&N Dec. 362. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The information provided in the tax returns that the petitioner originally submitted indicate that the beneficiary, rather than the beneficiary's foreign employer, owns the petitioning entity. These documents do not support the petitioner's claim of being a wholly owned subsidiary of the beneficiary's foreign employer. 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)). If the beneficiary is claimed to be the owner of both the petitioning entity and the foreign employer, the definition of affiliate would apply and the petitioner would have to provide competent objective evidence to establish that the beneficiary is the owner of both employers as indicated by the tax returns and foreign documents. *See Matter of Ho*, 19 I&N Dec. at 591-92.

In light of the doubts created by inconsistent supporting evidence, the AAO cannot concur with counsel's assertion that the foreign entity's ownership is irrelevant in the present matter. It therefore follows that the AAO also cannot conclude that the petitioner has provided sufficient evidence to establish the existence of the claimed parent-subsidiary relationship between the foreign and U.S. employers.

Additionally, the AAO finds that even if the petitioner's ownership were not disputed, as a matter of law, the beneficiary is ineligible for the classification sought based on the claim that the foreign parent entity, which the petitioner claims as its owner, is a sole proprietorship. It is fundamental to this immigrant classification that the petitioner establish that the beneficiary was employed abroad "by a firm or corporation or other legal entity or an affiliate or subsidiary thereof." Section 203(b)(1)(C) of the Act. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation or other legal entity, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984).

The petitioner claims that the foreign entity is a sole proprietorship which is owned by the beneficiary. Based on this very claim, and in light of the definition of a sole proprietorship, the foreign business cannot be deemed a firm or corporation or other legal entity where a legal entity is an entity other than a natural person. *Black's Law Dictionary* 620 (6th Ed. 1991). As in the present matter, if the foreign business is actually operating as a sole proprietorship, there is no foreign entity according to the legal definition and thus no qualifying relationship can exist.

In summary, the record shows numerous obstacles and inconsistencies that prevent the AAO from concluding that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer. Not only are there unresolved questions concerning the U.S. petitioner's ownership, but there are also considerable deficiencies concerning the foreign entity's ownership. Thus, even if the director did not issue a finding of willful misrepresentation and if the foreign documents that attest to the foreign entity's ownership were found to be valid, the effect of the document entitled "Release Agreement," in which [redacted] purportedly relinquished his ownership of the foreign entity in favor of the beneficiary, would be to preclude the existence of a qualifying relationship, which cannot exist when either the U.S. or the foreign employer is a sole proprietorship. On the basis of the considerable deficiencies that are evident in the instant record of proceeding, the AAO cannot conclude that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer and the petition cannot be approved.

The next eligibility issue to be addressed in this proceeding is whether the beneficiary's foreign employer continues to do business, which is defined as the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2).

On October 2, 2008, the director issued a NOID instructing the petitioner to provide additional documentation to establish that the foreign employer continues to do business. The director expressly stated that the handwritten invoices and statements of income that were submitted were not sufficient to establish that the beneficiary's foreign employer continues to do business.

In response, the petitioner provided bank statements, payroll records for 2006-2008, photographs, and tax returns for 2006 and 2007.

The director nevertheless denied the petition in a decision dated February 18, 2009 finding that the submitted documents show a limited number of banking transactions during a four-year period, The director further noted that the handwritten payroll records and lack of utility bills contributed to the adverse findings.

The AAO agrees with counsel's argument that none of the above findings, either separately or together, should generally serve as a basis for determining whether a business operation is conducting business on a regular, systematic, and continuous basis. Therefore, while the AAO acknowledges the petitioner's submission of additional tax returns that contain foreign government stamps to show that they were filed, such documents are not sufficient to establish that the foreign employer has continued to do business on a regular, systematic, and continuous basis. The petitioner has maintained the claim that the foreign business operates as a wholesaler of textile products. As such, the AAO would expect to see invoices and shipping documents showing that the foreign business has continued to purchase inventory from vendors and sell that inventory to its wholesale clients. Bank documents, tax returns, and utility bills are not sufficient to establish that the foreign operation has continued to engage in the purchase and sales transactions that are necessary to generate income. Furthermore,

the AAO finds that the director was justified in expressing skepticism when reviewing the handwritten documents offered by the petitioner. Again, while handwritten documents may otherwise be sufficient in meeting the preponderance of the evidence standard, the submission of documents that have been rightfully deemed as unreliable or invalid may render the handwritten documents insufficient to meet the burden of proof. *See Matter of Ho*, 19 I&N Dec. at 591. In the present matter, the petitioner has failed to submit sufficient objective evidence to establish that the beneficiary's foreign employer has and continues to do business abroad.

In order to establish eligibility for the immigration benefit sought, the petitioner must provide evidence that it is a multinational entity, i.e., an entity that conducts business in two or more countries, one of which is the United States. 8 C.F.R. § 204.5(j)(2). As the record lacks sufficient documentation to establish that the petitioner is doing business abroad through an affiliate or subsidiary, the AAO cannot conclude that the petitioner meets the definition of multinational. Therefore, on the basis of this conclusion, the petition cannot be approved.

The remaining issue to be addressed in this proceeding is whether the beneficiary was employed abroad in a qualifying managerial or executive capacity.

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

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated March 10, 2003, which the petitioner submitted in support of the Form I-140, [redacted] the then-president of the beneficiary's foreign employer, provided the following list of the beneficiary's job responsibilities during his employment abroad in the position of vice-president:

- Overall management and directing of business [and] overseeing the growth and development of business in concert with the president of the company,
- Ensuring quality of the product and service to customers,
- Assuring cost effective purchasing and production planning,
- Implementing least-cost inventory management and distribution,
- Financial management to ensure profit maximization,
- Setting up sales targets and growth objectives, with long-term strategic planning for the business[.]

In the subsequently issued NOID, the director instructed the petitioner to provide a definitive statement listing the beneficiary's job duties, the percentage of time spent performing each duty, the beneficiary's position within the foreign employer's organizational hierarchy, and the number of subordinates supervised as well as their job descriptions and the qualifications required for the respective positions.

In response, counsel provided a statement dated October 30, 2008 in which he stated that the beneficiary performed executive and managerial job duties during his employment abroad. Counsel stated that the petitioner reviewed sales reports and financial statements, explored growth markets and investment opportunities, and had authority over the company's goals and policies. Counsel claimed that the beneficiary assumed the position as the company's president after he acquired full ownership of the business.

Additionally, the petitioner provided a statement dated October 21, 2008 from [redacted], the foreign employer's current manager, who listed the following nine elements to describe the beneficiary's employment abroad in the position of vice president:

1. As Vice President, work with and support the president in the management and growth of the business.

2. Review company performance based on quarterly and annual sales reports and establish annual sales target in conjunction with the president.

3. Review quarterly and annual financial reports and accounts statements and establish budgets and financial plan with the president in order to achieve profit maximization.

4. Explore growth markets for company's product line in various geographic markets.

5. Explore other investment opportunities in India and elsewhere, including i[n] the U.S.

6. Monitor competitive and economic environment surrounding company's business.

7. Conduct annual employee performance appraisals and establish individual employee goals and targets.

8. Ensure financial discipline and internal financial control.

9. Review and establish various policies and procedures for the company such as cost effective purchase procedures, efficient inventory management systems, quality assurance procedures, customers service procedures and monitoring systems.

[redacted] further stated that in April 2005 the beneficiary acquired full ownership of the foreign business and continued to carry out additional duties in his new position as president, including providing overall direction and executive leadership and overseeing growth of the foreign business. [redacted] indicated that the beneficiary continues to oversee the foreign business's senior management staff to ensure that they achieve goals and targets and comply with applicable regulations.

In the director's February 19, 2009 decision, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying capacity. The director also commented on the claim that the beneficiary continued to carry out his newly acquired role as president of the foreign employer despite the fact that he has resided in the United States, without interruption, since prior to the date he acquired ownership and control of the foreign business.

In examining the executive or managerial capacity of the beneficiary, the AAO will first review the beneficiary's job description as one key element. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In an effort to elicit the information that would enable the director to assess the beneficiary's employment capacity, the director's NOID expressly instructed the petitioner to list the specific job duties the beneficiary performed during his employment abroad and to assign a percentage of time to each of the listed tasks. Although the petitioner's response included a supplemental description of the beneficiary's foreign employment, the information was inadequate to convey a meaningful depiction of the beneficiary's actual daily job duties in his position as vice president. The petitioner provided no clarifying definition of what tasks were performed in managing business growth, exploring growth markets and investment opportunities, ensuring financial discipline, and reviewing and establishing policies and procedures. Without an express definition of the specific tasks the beneficiary performed and the amount of time he allocated to each task, the AAO is unable to affirmatively conclude that the beneficiary's employment abroad was comprised of primarily managerial or executive job duties. On the basis of this additional finding, the instant petition cannot be approved.

Furthermore, while not discussed in the director's decision, the AAO finds that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity in his proposed position with the U.S. entity.

The petitioner is expressly required by regulation to clearly describe the job duties the beneficiary would be expected to perform in his proposed employment with the U.S. entity. 8 C.F.R. § 204.5(j)(5). Although counsel's brief includes a supplemental description of the beneficiary's proposed position, the information does not specify the beneficiary's actual daily job duties. For instance, there is no indication as to the specific tasks involved in monitoring financial management, overseeing the vice president and manager, or exploring business opportunities. 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. Furthermore, the AAO notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Based on the additional ground of ineligibility discussed above, this petition cannot be approved.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The petitioner has not sustained that burden.

**ORDER**: The appeal is dismissed.