

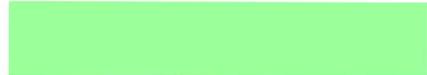


U.S. Citizenship
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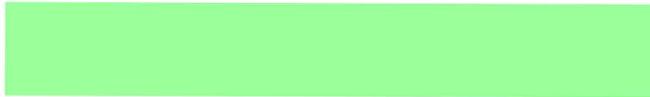
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DATE: **APR 09 2014** Office: TEXAS SERVICE CENTER

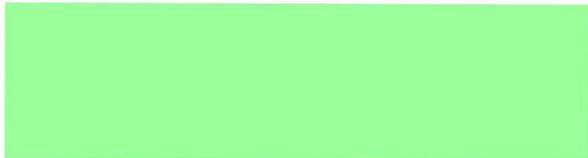


IN RE: Petitioner:
Beneficiary:



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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, 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 petitioner is a Florida limited liability company engaged in the development of three franchise frozen yogurt stores. It seeks to employ the beneficiary as its Chief Executive Officer.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity; (2) that the beneficiary was employed abroad in a primarily managerial or executive capacity; and (3) that it has a qualifying relationship with the beneficiary's foreign employer, the petitioner's claimed affiliate.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the evidence of record is sufficient to establish that the beneficiary will be employed in a managerial or executive capacity.

I. The Law

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 the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and 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 that 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. See 8 C.F.R. § 204.5(j)(5).

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), 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.

II. Managerial or Executive Capacity (United States)

The first issue to be addressed is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity.

A. Facts

The petitioner seeks to employ the beneficiary as its chief executive officer. At the time of filing on May 15, 2012, the petitioner indicated that it had established three subsidiaries in 2010, each of which is or will be operating a retail frozen yogurt store. The petitioner stated that the first store was opened May 2011, the second in March 2012, and the third store was under construction at the time of filing and expected to open in July 2012. The petitioner stated that the companies, collectively, employ 17 workers, with an anticipated staff of 28-30 upon the opening of the third store.

The petitioner stated that the beneficiary will perform only executive duties and described these duties as follows:

- Implement the company's objectives and goals – 20%
- Direct the creation of internal procedures – 20%
- Select qualified managerial [*sic*], who will continue to coordinate the operation of the corporation – 10%
- Implement the goals of marketing and sales activities – 15%
- Direct the budget and expenses and controls – 15%
- Personnel evaluation and hiring and firing – 5%
- Review of financial statement and analysis of the company – 5%
- Direct the logistics and legal matters – 5%
- Approve project feasibility - 5%

The petitioner submitted an organizational chart which depicts the beneficiary as CEO, supervising one manager, [REDACTED] and the three subsidiaries referenced above. The petitioner indicated that both of its current stores employ one manager, one assistant manager, one shift lead and five "workers" The chart depicts a vacant assistant manager position that will report to Mr. [REDACTED] and an estimated staff of 8 employees for the store that was to be opened in July 2012.

The petitioner provided a chart with information regarding the duties, salary, and educational credentials/requirements for each position on the organizational chart. Here, the petitioner provided a different breakdown of the beneficiary's duties:

- a. Coordinate the preparation of the company's budget – 15%
- b. Plan and direct tax policies – 10%
- c. Plan and direct the company's policies, including hiring and firing managers – 10%
- d. Coordinate the U.S. company's departments concerned with pricing, marketing and logistics – 15%
- e. Select and interact with outside auditors, consultant and other advisors – 10%

- f. Plan and direct areas that support the company structure, such as administration, accounting, tax, legal, insurance and asset protection – 20%
- g. Analyze possibilities of expansion and additional investments in the US – 10%
- h. Review [r]eports to be submitted to the [a]ffiliate in Brazil – 10%

The petitioner stated that the manager is a full-time employee who is responsible for administration and employees, finance, recommending hiring and firing, daily meetings with the president, and presenting the president with options for contracts and investments. The petitioner also provided the names and duties of all 15 store employees and indicated that they all work full-time. The petitioner indicated that the store manager position for its Coconut Grove, Florida store was vacant.

The petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, for 2011. The petitioner reported four employees in the first two quarters, two employees in the third quarter, and one employee in the fourth quarter. The petitioner also provided Forms 941 for its subsidiary, Business X 1, LLC, which operates a Miami store. The subsidiary reported 15 employees in the third quarter of 2011 and six employees in the fourth quarter of 2011. The petitioner did not submit Forms 941 for the second claimed operational subsidiary, nor did it provide any evidence of wages paid to employees in 2012.

The director issued a request for evidence (RFE) in which he instructed the petitioner to submit a more detailed description of the beneficiary's duties to include his specific tasks and the amount of time he allocates to specific tasks. The director also requested a more detailed organizational chart and copies of IRS Form W-2s. The director asked the petitioner to explain the apparent discrepancy between the number of employees indicated on the Form I-140 and the number of employees reflected in the company's IRS Forms 941. Finally, the director requested that the petitioner submit its IRS Forms 941 for 2012.

In response, the petitioner re-submitted one of the previous position descriptions for the beneficiary, which is listed as duties "a." through "h." above. The petitioner added that the beneficiary's activities have included hiring a new marketing manager, hiring a different CPA, holding meetings with managers to reach goals, and hiring general contractors to rebuild the retail stores.

The petitioner also provided a new employee list with names, duties, salaries/wages, and educational requirements. The petitioner indicated that it had hired a marketing manager and an executive/assistant subsequent to the filing of the petition. The petitioner indicated that its Miami location had seven full-time employees as of October 2012, and its Coconut Grove location had 10 full-time employees. The petitioner indicated that the manager position for this store remained vacant. The petitioner indicated that its third store, originally scheduled to open in July 2012, was still under construction. Finally, the petitioner submitted copies of IRS Forms 941 for 2012. The petitioner reported two employees in the second quarter, while the two operating subsidiaries reported 12 and 13 employees, respectively.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. In denying the petition, the director acknowledged the petitioner's claim that the beneficiary would be employed in an executive capacity, but observed that the submitted duty description failed to provide any insight into the nature of his actual duties. Finally, the director found insufficient evidence to establish that the petitioner's staffing levels are sufficient to

allow the beneficiary to perform in a primarily managerial or executive capacity. The director noted that the petitioner had only one employee at the time of filing, while the subsidiaries operating the company's stores employ only part-time employees.

On appeal, the petitioner asserts that it submitted exhaustive evidence to establish that the beneficiary functions as a "top level executive." The petitioner indicates that the beneficiary supervises two professionals - the manager and marketing manager. In addition, the petitioner submits copies of its 2012 IRS Forms W-2, Wage and Tax Statement, which were previously unavailable, in support of the appeal.

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages a business or a component of a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The beneficiary's job descriptions submitted in the initial petition and in response to the RFE are insufficient to establish that the beneficiary will be primarily performing managerial duties. Duties such as "implement the company's objectives and goals," "direct the creation of internal procedures," "coordinate the preparation of the company's budget," "plan and direct tax policies," and "plan and direct the company's policies" do not illustrate what the beneficiary would actually be doing on a day-to-day basis as the CEO of frozen yogurt franchise business. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner submitted, without explanation, two different breakdowns of the beneficiary's responsibilities and indicated that each vague duty description accounted for 100% of the beneficiary's time. The petitioner provided no explanation for this inconsistency. 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).

Finally, the director specifically advised the petitioner that its initial descriptions of the beneficiary's duties were insufficient and requested a definitive description that was to include specific, delineated tasks. The petitioner chose to re-submit one of the two position descriptions provided at the time of filing, with minimal additional explanation or clarification regarding what the beneficiary actually does on a day-to-day basis. 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). Overall, the petitioner's descriptions of the beneficiary's duties are insufficient to establish that he will be employed in a qualifying managerial or executive capacity.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

While the petitioner indicates that the beneficiary will be employed in an executive capacity, it also emphasizes that the beneficiary will manage professional personnel. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The record reflects that the petitioner directly employed one additional employee, a manager, at the time the petition was filed. The petitioner has provided evidence that this employee has a bachelor's degree in accounting. In evaluating whether the beneficiary manages professional employees, we evaluate whether the subordinate position requires 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 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'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The petitioner indicated that the manager is responsible for administration, finance, recommending hiring and firing decisions, and meeting with the company president. The petitioner has not submitted sufficient information to establish that this position is one which requires a bachelor's degree. Nor

has the petitioner established that the manager is employed in a supervisory or managerial capacity at the time of filing. The manager had no subordinates within the petitioning company and was not depicted as supervising the subsidiaries' store employees. While the record reflects that the petitioner later hired a marketing manager and an assistant, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The record reflects that one of the petitioner's stores likely employed a store manager at the time of filing, and therefore, the beneficiary may have supervised one subordinate supervisor. However, upon review of the totality of the record in its entirety, the petitioner has not established that the beneficiary is primarily engaged in the supervision of a subordinate staff comprised of managers, supervisor or professionals, as required for the beneficiary to qualify as a personnel manager.

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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial 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.*

Here, the petitioner describes the beneficiary's duties in broad terms that borrow from the statutory definition of executive capacity, and indicates that he is employed in the senior position in its organizational hierarchy. However, as observed by the director, the petitioner has not established that the beneficiary is primarily focused on the broad goals and policies of the organization, or that he is sufficiently relieved from involvement in the day-to-day operations of the company.

An analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. At the time of filing, the petitioner claimed that both of its operating stores were staffed by eight full-time employees. However, the petitioner also indicates that one of its stores has a vacant manager position, and the record reflects that neither store was paying wages consistent with the stated staffing levels. For example, in the quarter in which the petition was filed, the petitioner's subsidiary operating in [REDACTED] Florida paid a total of \$14,676.15 in salaries and wages. Based on the petitioner's claimed staffing structure, the quarterly wages for each store should amount to \$36,620.¹ The amount actually paid would be sufficient to pay one part-time and three full-time workers at an hourly wage of \$8.00. Even taking into account significant turnover among hourly staff in the retail industry, the record does not establish that the petitioner was close to its stated staffing levels at the time

¹ The petitioner indicates that the manager earns a salary of \$30,000 and the seven hourly employees receive a wage of \$8.00 and work 40 hours weekly. A full-time worker with a wage of \$8.00 would earn \$4,160 per quarter.

of filing. More importantly, the petitioner did not explain how it operates one of its stores without a manager, nor did it explain who performs the manager's duties. At most, this store appears to have sufficient staff to maintain one to two employees on site during its operating hours. The petitioner has not established that the store supports a manager, an assistant manager, a shift lead and five hourly employees as claimed. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. It is appropriate for USCIS 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the petitioner's assertions are true. *See Systronics*, 153 F. Supp. 2d at 15.

The record establishes that the petitioner had only two employees at the time of filing and the record does not support the petitioner's claims regarding the staffing levels of its two subsidiary yogurt franchises. The beneficiary's and his subordinate's duties are poorly defined, and the record shows that one of the petitioner's retail businesses is operating without a store manager. The record does not establish that the beneficiary's one subordinate employee sufficiently relieves him from administrative duties associated with the franchised businesses, or that the subsidiary employees relieve him from performing duties associated with the oversight of the stores, including first-line supervision of non-professional personnel and other functions attributed to the vacant store manager position. Regardless of the beneficiary's position title and claimed level of authority, the record does not support a conclusion that the petitioner has a reasonable need for the beneficiary to perform primarily managerial or executive duties at its current stage of development.

Based on the foregoing discussion, the petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity and the appeal will be dismissed.

III. Managerial or Executive Capacity (Foreign)

The next issue to be addressed is whether the petitioner established that the beneficiary was employed in a managerial or executive capacity abroad.

In denying the petition, the director observed that the petitioner submitted a vague position description for the beneficiary's position with the foreign entity, and that the description included non-qualifying duties. On appeal, the petitioner emphasizes that the beneficiary occupied the senior position in the foreign entity, supervised four department managers and their subordinate supervisors and employees, and performed primarily managerial or executive duties.

Upon review of the evidence submitted, including supplemental information provided on appeal, the petitioner has established that the beneficiary was employed in a qualifying managerial position. The evidence establishes that the beneficiary managed the entire organization, supervised a subordinate staff of managerial or supervisory personnel, had authority to hire and fire staff, and exercised discretion over the day-to-day operations of the organization through his subordinates. The petitioner has provided specific examples of the beneficiary's decision-making authority and managerial duties sufficient to meet its burden of proof. Finally, the petitioner has submitted evidence that the foreign entity's staff was sufficient to relieve the beneficiary from any significant involvement in the day-to-day operation of the company. Accordingly, the director's finding with respect to this issue will be withdrawn.

IV. Qualifying Relationship

The third and final issue addressed by the director is whether the petitioner established 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"). An affiliate is defined, in pertinent part, as (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. 8 C.F.R. § 214.2(l)(1)(ii)(L).

The petitioner has consistently stated that it has an affiliate relationship with the beneficiary's foreign employer. The petitioner submitted evidence to establish that the foreign entity is owned by [REDACTED]

[REDACTED] The petitioning company is owned by three members as follows:
[REDACTED]

The director did not dispute these ownership percentages, but found that "there is no affiliate relationship as the stockholders of the foreign entity are not exactly the same as the stockholders of the U.S. entity."

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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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.

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'r 1982). If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners.

Here, both companies are majority owned by the same individual, [REDACTED] and therefore, the petitioner and foreign entity have a qualifying affiliate relationship. Accordingly, the director's adverse finding with respect to this issue will be withdrawn.

V. Conclusion

The petition will be denied and the appeal will be dismissed based on the petitioner's failure to establish that the beneficiary will be employed in a qualifying managerial or executive capacity. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.