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FEB 15 2005



File: SRC-02-275-50535 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its President as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability company organized in the State of Texas that operates a discount store. The petitioner claims that it is the affiliate of Step-In Restaurant, located in India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; (2) the petitioner has a qualifying relationship with the beneficiary's foreign employer; (3) the foreign entity is doing business; (4) the petitioner is doing business; and (5) the beneficiary will depart the United States upon completing his stay in L-1A status.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that: (1) the beneficiary will be employed in a primarily managerial or executive capacity; (2) the petitioner is an affiliate of the beneficiary's foreign employer due to common ownership; (3) the petitioner has been doing business since December 2001; and (4) it is unclear why CIS seeks the beneficiary's return to India, as "Dual Intent" is permitted. In support of these assertions, counsel submits a brief, additional evidence, and previously submitted documents.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petition filed on September 24, 2002, the petitioner described the beneficiary's job duties as follows:

The Beneficiary will continue to be employed as the President of the Petitioner, and will be responsible for performing the following duties; setting and establishing the company's goals and objectives; reviewing locations for the establishment of additional retail outlets; reviewing and analyzing market conditions; directing and managing the company; reviewing and approving budgets; reviewing and approving inventory orders prepared by subordinate staff; reviewing and approving marketing strategy; establishing sales and marketing goals and overseeing implementation of such goals; supervising and controlling work of subordinate managers and supervisors; hiring and firing managers and supervisors; and reviewing financial records prepared by professional staff. In performance of his duties, the Beneficiary will receive minimum supervision from the other members of the Board of Directors, and the Beneficiary will exercises [sic] wide discretion and latitude in the performance of his duties.

On November 9, 2002, the director requested additional evidence. Pertaining to the beneficiary's prospective employment, the director requested: (1) a description of the petitioner's staffing, including the beneficiary's job, in 2001 and 2002 including names, titles, duties, qualifications, hiring dates, salaries or hourly wages, hours worked per week, and dates of termination; (2) the petitioner's 2001 Form 940-EZ, Employer's Annual

Federal Unemployment (FUTA) Tax Return; (3) the petitioner's 2001 Forms W-3; and (4) the beneficiary's Forms W-2 and 1040 for 2000, 2001, and 2002.

In a response dated January 27, 2003, the petitioner submitted: (1) the petitioner's 2001 Form 940-EZ; (2) the petitioner's 2001 W-3; (3) a letter describing the beneficiary's prospective duties; (4) the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2001; (5) the petitioner's Texas State Quarterly returns containing the petitioner's payroll summary for the second and third quarters of 2002; and (6) a letter describing the beneficiary's duties and the petitioner's staffing. In the letter, the petitioner largely restated previously provided information in discussing the beneficiary's duties as follows:

The Beneficiary will continue to be employed as the President of the Petitioner, and will be responsible for performing the following duties for the Petitioner; such duties to include: twenty-five percent (25%) of his time setting and establishing the company's goals and objectives and reviewing locations for the establishment of additional retail outlets; twenty percent (20%) reviewing and analyzing market conditions, and directing and managing the company; twenty percent (20%) reviewing and approving budgets, and reviewing inventory orders prepared by subordinate staff; twenty percent (20%) reviewing and approving marketing strategy, establishing sales and marketing goals and overseeing implementation of such goals; and twenty percent (20%) supervising and controlling work of subordinate managers and supervisors, hiring and firing managers and supervisors, and reviewing financial records prepared by professional staff. In performance of his duties, the Beneficiary will receive minimum supervision from the Board of Directors, and the Beneficiary will exercise wide discretion and latitude in the performance of his duties. The Beneficiary will be in charge of supervising one (1) Manager. The Beneficiary's duties are solely supervisory, and he is not engaged in any day-to-day non-supervisory activities.

The petitioner's letter described the positions of the beneficiary's alleged subordinates as follows:

██████████ Manager

Employed since July 2002

Duties Include: supervising subordinate employees; training workers in performance of duties; assigning and coordinating work of subordinate employees; preparing marketing strategy; responsible for ordering; purchasing and maintaining inventory; prepare employee work schedule; and prepare sales, expense and inventory reports.

Cashier

Employed since January 2002

Duties include: assist customers; cleans work area, equipment and service area; maintains beverage machine; stocks inventory; operates cash register and credit card machine; and reconciles daily cash receipts.

On May 23, 2003, the director denied the petition. In part, the director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity. Counsel asserts that, "[a]s the President of the Petitioner, the Beneficiary is responsible for not only overseeing the management of the retail location, but also reviewing additional retail locations. The Beneficiary's position will be solely executive or managerial and does not include day-to-day work of the business." Counsel quotes the statutory and regulatory definitions for executive and managerial capacity, as well as the previously provided job description for the beneficiary. Counsel further discusses the beneficiary's duties as follows:

By reviewing and analyzing market conditions; reviewing and approving budgets and marketing strategy, and establishing sales and marketing, and overseeing implementation of such; the Beneficiary will primarily be responsible for managing the Marketing "department, function or component" of the Petitioner as he will devote more than Sixty Percent (60%) of time to these activities. Furthermore, by setting and establishing the company's goals and objectives and reviewing locations for the establishment of additional retail outlets and reviewing financial reports prepared by professional [sic], the Beneficiary will primarily supervise and control other supervisory, professional or managerial employees, including the Store Managers. The Beneficiary is responsible for seeking additional retail locations for the Petitioner, thus the Beneficiary directs the major component or function of the Petitioner's efforts to expand its retail operations.

The Beneficiary has and will have authority to recommend personnel actions, such as promotions, hiring, and firing of personnel supervised by him, and he has and will continue to have wide authority and discretion over the marketing department and major component and function of the Petitioner.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5<sup>th</sup> Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel references an unpublished AAO decision to support the assertion that "[a] person may be a manager or executive even [if] he is the sole employee of the company where he utilizes outside independent contractors or where the business is complex; he may be a function manager."

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(I)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In the instant case, the petitioner does not clearly state whether the beneficiary will perform managerial or executive tasks. Counsel discusses the beneficiary's managerial responsibility over two subordinates, yet counsel quotes the regulatory definition for executive capacity. Counsel further states that "[t]he Beneficiary's position will be solely executive or managerial," and indicates that the beneficiary can be considered a function manager. Thus, it appears that counsel intends to represent that the beneficiary will be primarily engaged in both managerial duties and executive duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive duties under section 101(a)(44)(B) of the Act, and the statutory definition for managerial duties under section 101(a)(44)(A) of the Act.

The job description submitted by the petitioner is vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statements that the beneficiary will be responsible for "setting and establishing the company's goals and objectives" and "directing and managing the company" provide no indication of the actual tasks the beneficiary will perform on a daily basis. The petitioner indicates that the beneficiary will be responsible for "reviewing and approving budgets." Yet, the petitioner has not indicated who prepares the budgets that the beneficiary will purportedly review and approve. Thus, regarding this task, it is unclear whether the beneficiary will prepare the budgets himself, or review the work of subordinate employees. Counsel repeatedly refers to the beneficiary's responsibility of reviewing locations for the establishment of additional retail outlets, yet this task has not been sufficiently described in order to determine whether it is a qualifying duty. The record does not indicate whether the beneficiary is merely checking real estate listings for available locations, or performing more sophisticated research and cost benefit analysis. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job description does not allow the AAO to sufficiently determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

The petitioner indicates that the beneficiary has been, and will continue to be, employed as its president. However, the evidence of record contains inconsistencies regarding who is acting as president. The beneficiary began work with the petitioner in L-1A status on September 25, 2001. Yet, the petitioner's 2001 Form W-3, Transmittal of Wage and Tax Statements, was signed by [REDACTED] on January 18, 2002, with an indication that he holds the title of President. Numerous other official documents bear Hasan Ali's signature, such as the petitioner's 2001 Form 940-EZ and IRS Forms 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2001 and third quarter of 2002. This evidence suggests that Hasan Ali is the true president. 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). The petitioner has failed to resolve these inconsistencies. Further, these inconsistencies call into question whether the job description provided for the beneficiary represents the beneficiary's true duties, or the duties of [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of

course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591 (BIA 1988).

Counsel states that "the Beneficiary will primarily supervise and control other supervisory, professional or managerial employees, including the Store Managers." Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Though requested by the director, the petitioner did not provide the qualifications of its manager or its cashier. Any 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). Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. As the cashier has no subordinates or managerial authority, it is clear that he is not a managerial or supervisory employee. The petitioner claims to employ a manager with supervisory responsibility over the cashier. Though this employee carries the title of manager, the petitioner has not clearly defined a department or function of the petitioner's operations that this individual manages, such that he could be classified as managerial employee. The fact that the manager has authority over the cashier qualifies him as a supervisory employee, such that the beneficiary has a subordinate that is supervisory. *See* section 101(a)(44)(A)(ii) of the Act. However, the fact that the beneficiary has a supervisory subordinate does not relieve the petitioner's burden to show that the beneficiary is primarily engaged in managerial or executive duties. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner indicates that the beneficiary only spends 20 percent of his time "supervising and controlling work of subordinate managers and supervisors, hiring and firing managers and supervisors." Thus, the fact that he has a supervisory subordinate does not establish that he is *primarily* engaged in managerial or executive duties.

Counsel asserts that the beneficiary can be considered a function manager. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, here the petitioner has failed to establish that the beneficiary is primarily engaged in managerial or executive duties. Thus, the petitioner has not shown that the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel references an unpublished AAO decision involving an employee of the Irish Dairy Board to support the assertion that "[a] person may be a manager or executive even [if] he is the sole employee of the company where he utilizes outside independent contractors or where the business is complex; he may be a function manager." Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5<sup>th</sup> Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(l)(14)(ii). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

Yet, counsel correctly observes that a company's size alone may not be the determining factor in denying a visa to an intracompany transferee. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

The petitioner has not articulated how the reasonable needs of the operation will be satisfied with the beneficiary acting in a primarily managerial or executive capacity. The petitioner operates a discount store. Thus, it is evident that the reasonable needs of the petitioner require its employees to perform numerous non-managerial and non-executive tasks such as answering questions for customers, operating a cash register, ordering and stocking merchandise, tracking inventory, receiving shipments and interacting with vendors, paying bills and managing a checkbook, reconciling daily cash receipts, and providing custodial services. The petitioner has not indicated the hours of operation for its discount store. However, for the sake of analysis, the AAO will assume the hours are 10:00AM to 9:00PM, Monday through Saturday, and 12:00PM through 6:00PM on Sunday. Thus, the petitioner's discount store is open for business 72 hours per week. The

most wages that the petitioner has paid in a given quarter occurred during the third quarter of 2002. The petitioner's payroll document for the third quarter of 2002 reflects that the beneficiary's subordinates were paid a total of \$3,400, for a combined average of \$261.54 per week (\$3,400 divided by 13 weeks equals \$261.54.) If these two employees were compensated at the federal minimum wage, \$5.15 per hour, their wages reflect that they worked a maximum combined total of 51 hours per week (\$261.54 divided by \$5.15 equals 51.) As the petitioner's discount store is assumed to be open 72 hours per week, the above calculation reveals that the beneficiary is the only employee working in the store for 21 hours per week. Thus, the beneficiary must commit a minimum of 21 hours per week to directly performing the non-managerial duties necessary to operate a discount store. Thus, the reasonable needs of the petitioner suggest that the beneficiary must spend a significant amount of time performing the tasks necessary to provide the petitioner's services. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. See 8 C.F.R. § 214.2(l)(3)(ii).

Based on the foregoing, the record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that it has a qualifying relationship with the beneficiary's foreign employer as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). Further, the director found that the petitioner failed to establish that it and the foreign entity had been doing business over the one-year period prior to filing. See 8 C.F.R. § 214.2(l)(14)(ii)(B). The regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) reflects that, in order for an entity to be considered a qualifying organization, the petitioner must show that it:

Is or will be doing business (engaging in international trade is not required) as an employer in the United States and 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 . . . .

The regulation at 8 C.F.R. § 214.2(l)(ii)(H) defines the term "doing business" as:

[T]he regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

Thus, the matters of whether the petitioner and foreign entity have been doing business over the last year are integral to whether the petitioner and foreign entity possess a qualifying relationship. Therefore, the AAO will address all three matters simultaneously.

In the initial petition, the petitioner asserted that the foreign entity is one hundred percent owned and controlled by the beneficiary, and the petitioner is majority owned and controlled by the beneficiary. Thus, the petitioner alleged that the two entities are affiliates. The petitioner described the foreign entity's business as a restaurant. The petitioner operates a discount store. To support these assertions, the petitioner submitted: (1) the foreign entity's Sales Tax Registration dated February 19, 1996; (2) a letter from an attorney for the foreign entity dated May 30, 2000, indicating that the beneficiary operates the foreign entity as a sole proprietorship; (3) an undated letter from the State Bank of India, indicating that the beneficiary was "maintaining a good balance with regular operations"; (4) a letter from the State Bank of India, dated March 1, 2000, indicating that the beneficiary was "maintaining a good balance with regular operations"; (5) a menu from the foreign entity's restaurant; (6) invoices reflecting that the foreign entity purchased signage, equipment, and soy bean oil in the year prior to filing the petition; (7) invoices for food items that fail to note the purchaser of the goods; (8) copies of the foreign entity's business license and permit, dated in 1989 and 1992; (9) an illegible document purportedly pertaining to the foreign entity's operation; (10) an untranslated financial statement for the foreign entity, dated August 31, 2001, that provides values in rupees; (11) a Certificate of Amendment for the petitioner, reflecting that it amended its charter on March 11, 2001 to show that two companies will serve as the "managers"; (12) two stock certificates for the petitioner, dated May 11, 2001; (13) a lease for the petitioner, signed by Hasan Ali; (14) the petitioner's 2001 IRS Form 1065, U.S. Return of Partnership Income; (15) a financial statement for the petitioner dated June 30, 2002; and (16) bank statements for the petitioner covering the period from November 30, 2001 to June 30, 2002.

In the director's request for evidence, in part she requested: (1) certificates of current status of the petitioner and foreign entity; (2) the SS-4 and EIN assignment notice for the petitioner; (3) the petitioner's IRS Form 1120 annual return for 2001; (4) Form 5472 Information Return Foreign Owned Corporation; (5) sales invoices, cash register tapes, and other evidence that the petitioner conducted business from September 2001 to September 2002; (6) the petitioner's state and federal quarterly returns for 2001 and 2002; (7) the petitioner's Form 940-EZ and W-3s for 2001; (8) documentation of the petitioner's rent payments from September 2001 to September 2002; (9) the petitioner's bank statements for 2001 and 2002; (10) a sales tax certificate, insurance policies, licenses and permits for all of the petitioner's business locations in 2001 and 2002; (11) the petitioner's utility bills for business locations in 2001 and 2002; (12) evidence of the foreign entity's business operations, including sales invoices, cash register tapes, and other evidence; (13) the foreign entity's telephone bills; (14) the foreign entity's current menu; (15) the foreign entity's monthly tax returns for 2002; and (16) documentation of the foreign entity's staffing in 2001 and 2002 including names, titles, duties, qualifications, dates of hire, compensation, hours worked, and date terminated for all employees.

In its response, the petitioner provided: (1) the petitioner's certificate of organization, dated May 2, 2001; (2) the petitioner's articles of organization; (3) the petitioner's Form SS-4; (4) a certificate of account status for the petitioner by the Texas Comptroller for the County of Travis, dated December 19, 2002; (5) invoices reflecting that the petitioner purchased goods, dated April 12, May 1, May 29, July 2, July 5, July 8, and July 18, 2002; (6) the petitioner's Texas State Quarterly filings for the fourth quarter of 2001, and the first, second, and third quarters of 2002; (7) the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2001; (8) the petitioner's 2001 IRS Form 940-EZ; (9) the petitioner's 2001 Form W-3; (10) bank statements for the petitioner covering the period from June 30, 2001 to September 30, 2002; (11) the petitioner's food dealer permit covering the period from October 17, 2002 to October 17, 2003; (12) the petitioner's alarm permit dated January 15, 2003; (13) the petitioner's Texas Sales and Use Tax Permit, dated June 1, 2001; (14) the petitioner's Texas Cigarette and/or Tobacco Products Permit, dated June 1, 2002; (15) a rent bill for the petitioner's leased space, dated February 1, 2002; (16) a sampling of the petitioner's 2002 utility bills; (17) numerous receipts for goods and food items purchased by the foreign entity in 2001 and 2002; (18) a sampling of the foreign entity's utility bills during 2001 and 2002; (19) a bank statement for the foreign entity dated December 6, 2002; (20) a financial statement for the foreign entity, covering the fiscal year ending March 31, 2002; (21) a statement from the foreign entity indicating that the beneficiary is the sole proprietor of the organization; (22) a list of the foreign entity's employees, including their titles and compensation; (23) the beneficiary's 2001 Form W-2; and (24) previously submitted evidence.

In the director's decision, she found that the petitioner failed to establish that: (1) it has a qualifying relationship with the beneficiary's foreign employer; (2) the foreign entity is doing business; and (3) the petitioner is doing business. Specifically, the director concluded that the evidence of record does not show that the beneficiary owns and controls the petitioner and the foreign entity. The director noted that the company names for the petitioner and foreign entity are presented with numerous variations in the documentation submitted. The director stated that the petitioner submitted no documentation to show that the beneficiary continues to own and control the foreign entity. The director noted that a portion of the petitioner's invoices list the contact person as "Faruq," yet the petitioner has not shown that it employs an individual by that name. The director pointed out that the petitioner's annual and quarterly returns all report a different address than the one provided in the petition, calling into question whether the petitioner operates at the Beechnut location as claimed. The director noted that the stock certificates issued by the petitioner state that it is a corporation, not a partnership. The director further indicated that the petitioner failed to provide partnership federal returns, individual returns for each partner, or the percent each partner owns. The director stated that the evidence strongly suggests that [REDACTED] controls the petitioner, as his signature appears on the petitioner's official documents and filings, and he serves as the guarantor of the petitioner's lease. The director stated that, while the provided evidence supports that [REDACTED] operates a dollar store that is doing business, evidence does not suggest that the petitioner has been doing business during the previous year as described. The director found that the petitioner has failed to show that the foreign entity continues to operate its restaurant, as the beneficiary has not returned to India since entering the United States on December 18, 1998.

On appeal, counsel asserts that the petitioner is an affiliate of the beneficiary's foreign employer due to common ownership, and the petitioner has been doing business since December 2001. Counsel reiterates that the petitioner is majority owned and controlled by the beneficiary, and the beneficiary is the sole proprietor of

the foreign entity, thus they are affiliates. Counsel lists various business activities of the petitioner that occurred in December 2001, and asserts that the petitioner has been doing business on a continuous basis since that time. Counsel notes that the petitioner's share certificates provide that it is a corporation due to a typographical error. In support of these assertions, counsel submits: (1) a letter from the States Bank of India noting that the beneficiary is the sole proprietor of the foreign entity, dated January 6, 2003; (2) receipts for the petitioner's payment of Texas Sales and Use taxes for January, February, March, April, and May 2003; (3) bank statements for the petitioner covering the period from September 30, 2002 to May 31, 2003; (4) the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2001 and the first quarter of 2003; (5) the petitioner's Texas State Quarterly filings for the fourth quarter of 2002 and the first quarter of 2003; (6) a sampling of the petitioner's 2003 utility bills; (7) an untranslated document purportedly pertaining to the foreign entity; and (8) previously provided evidence.

Upon review, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity.

As provided above, the regulation at 8 C.F.R. § 214.2(l)(ii)(G)(2) states that, in order for an entity to be considered a qualifying organization, the petitioner must show that it is doing business.

The director found that the petitioner failed to show that it has been doing business over the previous year. The director's decision turned on whether the petitioner conclusively established that it operated the discount store represented in the submitted documentation. The director found that a discount store did indeed operate at the petitioner's stated address, [REDACTED] Houston, Texas. However, due to discrepancies in the petitioner's name and address in the provided evidence, the director concluded that the petitioner was a separate organization from the store represented in the record. Thus, the director concluded that the submitted documentation of business activity did not apply to the petitioner, and therefore the petitioner failed to show that it has been doing business over the previous year. Upon reviewing the petitioner's documentation, the AAO notes that the petitioner's name is presented with several variations on purchase receipts. As these receipts are likely written by the petitioner's vendors, not the petitioner, the AAO finds these discrepancies insignificant. Further, the petitioner's name is written consistently on all official documents submitted, including numerous tax filings. Thus, the variations in the petitioner's name do not undermine that the evidence of record pertains to the petitioner's business activity. The director further noted that many of the petitioner's documents reflect a different address for the petitioner. The petitioner has indicated that the alternate address is the home address of the beneficiary. Given the small size of the petitioner's operation, the AAO finds it plausible that the petitioner would use one of the employee's home addresses for official correspondence. Thus, the AAO finds that the use of an alternate address does not undermine that the petitioner operates a discount store at [REDACTED] Houston, Texas. Accordingly, the AAO concludes that the petitioner is the same organization represented in the documentation of business activity. The director concluded that the evidence of record was sufficient to show that a discount store has operated at the petitioner's address for the previous year. The AAO agrees, and finds that the operated discount store is in fact the petitioner. Accordingly, the AAO finds that the petitioner has established that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The director's decision on this issue will be withdrawn.

The director found that the petitioner failed to establish that the foreign entity has been doing business over the previous year. The petitioner failed to address this finding on appeal. However, upon review the AAO finds that the petitioner submitted sufficient documentation to show that the foreign entity was doing business during the one-year period prior to filing the petition. The director's decision on this issue will be withdrawn.

Despite the fact that both the petitioner and foreign entity were doing business, the petitioner has not established that they have a qualifying relationship. 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 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 the director noted, the evidence of record suggests that Hasan Ali, not the beneficiary, controls the petitioner. [REDACTED] is the signor on the petitioner's official documents, including government tax filings and the petitioner's lease. [REDACTED] is listed as the guarantor of the petitioner's lease obligations. [REDACTED] is the signor and only partnership member listed on the petitioner's Form SS-4, Application for Employer Identification Number. Conversely, the only documents from the petitioner that are signed by the beneficiary are letters in connection with this immigration proceeding. Though the director explicitly noted these facts, on appeal counsel responds with a conclusory statement that both entities are owned and controlled by the beneficiary. 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). 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).

The petitioner provided two stock certificates that indicate that the petitioner is a corporation "authorized to issue 1,000 shares of Common Stock No Par Value." The director noted that these certificates are inconsistent with the petitioner's claim to be a partnership. 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). On appeal counsel responds by stating "please note that the word 'corporation' on the share certificates is only a typographical error." The petitioner neither provides new objective evidence nor references evidence in the record to clarify this inconsistency. Again, 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). Thus, the two stock certificates contradict the petitioner's claim to be a partnership owned and controlled by the beneficiary.

Further, despite the director's request, the petitioner failed to provide the beneficiary's IRS Forms 1040 for 2000, 2001, and 2002. These forms would have revealed whether the beneficiary received income from a partnership, thus helping to illuminate whether he has an ownership interest in the petitioner. 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 AAO notes that the petitioner submitted untranslated documents that may provide information regarding the ownership and control of the petitioner and foreign entity. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Based on the foregoing, the petitioner has not established that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). For this additional reason, the appeal will be dismissed.

The third issue in this proceeding is whether the petitioner has established that the beneficiary's employment in the United States is for a temporary period.

In the support letter submitted with the petition, the petitioner stated that "[w]e understand the temporary nature of this assignment as does the Beneficiary."

The director did not address this issue in her request for evidence. In the director's decision, she found that "the evidence of record suggests that the self-petitioner does not intend to return to an assignment abroad at the end of his stay."

On appeal, counsel states that, "[s]ince recognition of 'Dual Intent' by the Immigration and Naturalization Service, in accordance with changes made to the INA in the 1990's, it is unclear why the District Director is seeking the Beneficiary's return to India as a condition of approving the L-1."

Counsel's statement does not sufficiently address this issue. The petitioner indicates that the beneficiary is the sole owner of the foreign entity, and the majority owner of the petitioner. If this fact is established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. The sole evidence that the beneficiary is to be employed for a temporary period is the petitioner's ambiguous statement that "[it] understand[s] the temporary nature of this assignment as does the Beneficiary." Despite the director's decision on this issue, on appeal the petitioner failed to supplement the record or assert that the beneficiary intends to return abroad upon the completion of his stay in L-1A status. The concept of dual intent does not relieve the petitioner from the burden of showing that the beneficiary's stay in L-1A status is for a temporary period. Thus, the petitioner has not established that the

beneficiary's employment is for a temporary period as required by 8 C.F.R. § 214.2(l)(3)(vii). For this additional reason, the appeal will be dismissed.

In visa 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. Accordingly, the director's decision will be withdrawn in part and affirmed in part, and the petition will be denied.

**ORDER:** The appeal is dismissed.