U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D7

FILE: SRC 04 244 51859 Office: TEXAS SERVICE CENTER Date: SEP 26 2006

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner, a Florida corporation, claims to be a subsidiary of Ametiszt Tropi, Ltd. located in Hungary. The petitioner states that the United States entity is engaged in the business of investments and construction. Accordingly, the United States entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for three years. 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 L-1A status in order to continue to fill the position of chief executive officer.

The director denied the petition on January 12, 2005, due to the petitioner's failure to respond to a request for evidence issued on October 8, 2004. The petition was considered abandoned and was denied pursuant to the regulation at 8 C.F.R. § 103.2(b)(13). The director subsequently granted the petitioner's motion to re-open and afforded the petitioner another opportunity to respond to the request for evidence, which was not previously physically received by the petitioner.

The director denied the petition on June 1, 2005 concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The director also determined that the record contained insufficient evidence to establish that the new office is viable and can remunerate the beneficiary after the initial one-year period granted to open a new office.

The petitioner subsequently filed an appeal on June 27, 2005. On the Form I-1290B Notice of Appeal, the petitioner asserts: "The beneficiary is fulfilling an executive position. Please find the supporting evidence. The U.S. company generated enough revenue to remunerate the position of the beneficiary." The petitioner indicated that it did not intend to submit a separate brief or evidence in support of the appeal. Accordingly, the record will be considered complete.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition. The petitioner's general objections to the denial of the petition, without specifically identifying any errors on the part of the director or providing new evidence to support that the beneficiary will be employed in a

managerial or executive capacity, are simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner. 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)).

The petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not satisfied any of the enumerated evidentiary requirements. The petitioner has not submitted evidence that the United States and foreign entities are still qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H). The petitioner has not submitted a detailed statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition so that the AAO can determine whether the beneficiary is employed in a primarily managerial or executive capacity. The petitioner has not submitted a statement describing the staffing of the new operation. Finally, the petitioner has not submitted sufficient evidence of the financial status of the United States operation. For all of these reasons, the petition may not be approved and the appeal will be dismissed

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner stated on the Form I-129 that the beneficiary's duties include "CEO duties and responsibilities including major decision-making, leading the management, hiring, firing and instructing managers, employees and contractors." The petitioner did not, however, define the beneficiary's goals and policies, or clarify the role of the subordinates that the beneficiary will supervise. 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).

The director specifically requested additional evidence to establish that the beneficiary is acting primarily in an executive position. In response, the petitioner stated that the beneficiary "is acting solely in an Executive position, supervising, evaluating, directing and overseeing the Operations Manager's tasks." This vague statement does not assist in clarifying the beneficiary's actual duties in the United States. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. This vague statement does not assist in clarifying the beneficiary's actual duties in the United States. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner emphasized that the beneficiary "was physically present in the United States only about 10% of the year 2004 to execute his Executive Tasks." However, the petitioner must still provide detailed descriptions of the beneficiary's duties, evidence that the beneficiary performs primarily managerial or

executive duties, and evidence that the U.S. company has sufficient lower-level staff to perform the routine, non-qualifying tasks associated with operating the business. Furthermore, the petitioner indicated on Form I-129 that the beneficiary would be employed on a full-time basis by the U.S. company under the extended petition, therefore the petitioner's argument that the beneficiary spent little time in the United States in 2004 is not persuasive.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on the totality of the record whether the description of the beneficiary's duties represents a credible account of the beneficiary's role within the organizational hierarchy. As noted by the director, the record does not demonstrate that the petitioner has any subordinate professional employees to perform the routine non-executive and non-managerial functions of the business.

The evidence of record establishes that the U.S. company employed the beneficiary as chief executive officer and one operations manager as of the date the petitioner was filed. However, the petitioner has not explained how the services of the operations manager obviate the need for the beneficiary to primarily conduct the petitioner's business. 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)). Although the record shows that another employee was hired in January 2005, 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. 248 (Reg. Comm. 1978).

In addition, the petitioner did not submit a quarterly tax return for the third quarter of 2004, the quarter in which the petition was filed. Thus, the petitioner did not submit documentation evidencing the employees of the U.S. company at the time of filing. The petitioner submitted a W-2 form for 2004 issued to the individual who is in the position of operations manager for the amount of $6000.00. In addition, the company's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004 indicates a total amount of salaries and wages paid as $6000.00. It is implausible that the amount paid in wages is a salary for a full-time operations manager. In addition, the petitioner did not submit any documentation evidencing that the beneficiary has been employed by the petitioner for the year prior to filing the instant petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

A critical analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary supervises subordinate employees who would relieve him from performing non-qualifying duties. Rather, it appears from the record that the only individual performing any marketing and sales functions, finance operations and business development activities is the beneficiary himself. As the petitioner can only establish that the company employed an operations manager, it is reasonable to assume, and has not been proven otherwise, that the beneficiary would be performing all other sales and marketing functions and financial development, and all of the various operational tasks inherent in operating a business on a daily basis, such as purchasing products, maintaining inventory, negotiating contracts, researching the investment market, paying bills, and handling routine customer transactions.

Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role.

The record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has not demonstrated that the U.S. company has hired additional employees who would relieve the beneficiary from performing primarily non-qualifying duties associated with operating a salon and retail business. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted evidence of two real estate transactions involving the petitioner in April 2004 and July 2004. The petitioner did not submit any invoices, receipts, or contracts suggesting that it has been providing a service or selling its goods on a regular basis. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business during the year prior to September 16, 2004, the date the instant petition was filed. For this additional reason the petition may not be approved.

In addition, beyond the decision of the director, the petitioner failed to provide sufficient evidence to establish that a qualifying relationship exists between the foreign company and the petitioner. 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 is the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). In the instant petition, the petitioner claims that the U.S. entity is 100% owned and controlled by the foreign parent company.

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, the stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must 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.

The petitioner did not submit any off the above-mentioned documents and thus it is impossible for the AAO to determine if the two companies have the required qualifying relationship. 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., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. 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)).

The director specifically requested that the petitioner submit copies of the articles of incorporation, and documentation that clearly denoted ownership and the percent owned by each entity, including copies of stock certificates, stock ledgers or company registration that clearly establishes ownership. In its response, the petitioner failed to submit any of the requested documentation. 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).

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petitioner 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. Inasmuch as counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the petitioner has not sustained that burden. Therefore, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed.