U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

File: WAC 08 033 50823 Office: CALIFORNIA SERVICE CENTER Date: MAY 18 2009

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:

[redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and 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 employ the beneficiary 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, a California corporation, claims to be engaged in the import and distribution of Brazilian food. It states that it is an affiliate of Shopping das Noivas Ltda located in Brazil. The petitioner seeks to employ the beneficiary as its director of finance and administration for a period of three years.

The director denied the petition on three independent and alternative grounds. Specifically, the director determined that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; (2) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity; and (3) that the petitioner and the foreign entity have a qualifying relationship.

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 the director's decision was based on an erroneous conclusion of law and facts. Counsel submits a brief and additional evidence in support of the appeal.

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 first issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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.

The petitioner filed the nonimmigrant visa petition on November 8, 2007. The petitioner stated on Form I-129 that the U.S. company, which was established in 2004, is engaged in the import of Brazilian food and currently employs five workers. The petitioner stated that the beneficiary will serve in the position of director of finance and administration and provided an attachment describing the proposed duties. The petitioner indicated that the "primary function" of the position is to oversee the "entire functioning of the Finance and Administration Departments," under the supervision of the company's executive director. The petitioner described the specific responsibilities as follows:

1. Developing, reviewing and approving financial systems, procedures and control for the Company.
2. Preparing monthly financial statements and analytical reports for the Board of Directors, National Headquarters and Company staff.
3. Responsible for agency tax compliance and annual financial reporting.
4. Managing the annual year-end audit in conjunction with outside auditors.
5. Overseeing company space management, including planning, lease negotiations.
6. Administering the Company's insurance and benefits programs. Handling inquiries regarding unemployed coverage.
7. Coordinating and managing the activities related to account functions, personnel and office operations.
8. Identifying and insuring implementation of technological resources required to meet national standards.
9. Responsible for the accurate and timely payment of company's financial obligations and deposit and recording of cash receipts.
10. Reconciled bank statements in conjunction with monthly reports.

The petitioner also submitted a description for a "director of marketing" position, but there was no explanation provided for the submission of the second job description, or any indication that the beneficiary would hold more than one job title or role within the company.

The petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation, which indicates that the company achieved sales of $1,084,567 in 2006 and paid no salaries, wages, or compensation to officers.

The director issued a request for evidence (RFE) on November 21, 2007, in which he requested, *inter alia*, additional evidence to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director requested: (1) a copy of the petitioner's current organizational chart clearly identifying the beneficiary's proposed position and listing all employees by name and job title; (2) a brief description of job duties, educational level, annual salaries/wages, for all employees under the beneficiary's supervision; (3) copies of the petitioner's California Forms DE-6, Quarterly Wage Report, for the last four quarters; (4) copies of the U.S. company's payroll summary, Forms W-2 and Form W-3 for 2006; and (5) additional evidence to establish that the beneficiary will perform duties in compliance with the statutory definitions of managerial or executive capacity.

In response to the director's request, the petitioner submitted an organizational chart for the U.S. entity which depicts a total of five employees, including an administrative director, an administrative manager, a sales representative, a delivery person and an inventory control employee. The organizational chart does not identify the beneficiary's proposed position.

The petitioner submitted copies of 2007 Forms W-2 for the five employees identified on the organizational chart, who received salaries ranging from $3,000 to $6,000. Based on a review of the payroll documents submitted, it appears that all five employees were hired in October 2007 and that the petitioner had no employees prior to that date.

The petitioner indicated that the beneficiary will hold the position of "President and Director of Marketing and Finance," and submitted a position description that was nearly identical to that submitted at the time of filing and already quoted above. The first three duties on the list of ten duties were revised slightly as follows:

1. Developing, reviewing and approving financial systems, marketing procedures and control for the company.
2. Preparing marketing financial statements and analytical reports for the Board of Directors, and Company staff.
3. Responsible for agency tax compliance and annual financial reporting, and marketing. . . .

The petitioner also attached a separate "director of marketing and finance" position description, which states that this position is "responsible for identifying and developing strategic relationships." The petitioner further described the position as follows:

> The director will negotiate, structure, and close transactions with distribution and technology. This will include participation in the development of strategy, analysis of market opportunities and development of business plan.
>
> The Director of Marketing will collaborate across functional groups, such as products, sales, technology, and finance to further [the petitioner's] objectives and drive partnerships to successful completion.

The director denied the petition on March 14, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director noted that the petitioner failed to identify the beneficiary's proposed position on the organizational chart, failed to provide position descriptions for the U.S. company's employees, and failed to provide copies of quarterly wage reports and federal tax returns for the prior year as requested. The director found the evidence insufficient to establish that the U.S. company can support the addition of a managerial or executive employee.

On appeal, counsel asserts that it requires the beneficiary's services in order to expand beyond its current staffing levels. Counsel contends that the beneficiary will manage an essential function and directly supervise other employees, some of which will need to be hired as the petitioner expands to international markets.

Counsel explains that the petitioner did not have employees during 2004 and 2005 and instead relied on independent contractors. Counsel states that "as business increased over time, employees were hired, and Form W-2 for 2006, were issued later for these individuals in 2007." In support of the appeal, the petitioner submits a copy of its most recent Form 941, Employer's Quarterly Federal Tax Return, showing wages paid to five workers.

Upon review, and for the reasons discussed herein, the AAO concurs with the director's determination. The petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive position.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's 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 definitions of executive and managerial capacity 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 or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

As noted by the director, the petitioner has failed to provide a description of the beneficiary's proposed duties and level of authority sufficient to establish that she will be employed in a primarily managerial or executive capacity. At the time of filing, the petitioner stated that the beneficiary will serve as director of finance and administration, reporting to the "Executive Director." The petitioner indicated that the beneficiary will develop financial systems and procedures, prepare monthly financial statements and reports, be responsible for agency tax compliance, oversee space planning and lease negotiations, coordinate account, personnel and office functions, be responsible for deposit and recording of cash receipts, and reconcile bank statements. Many of these duties appear to be more akin to those of an office administrator, financial analyst and/or bookkeeper, as opposed to managerial or executive-level duties. Although the petitioner indicated that the beneficiary would be responsible for overseeing "the Finance and Administration Departments," there was nothing in the initial description to suggest that the beneficiary would supervise lower-level staff in the areas of finance or administration, and no evidence that the petitioner's company has a finance or administration department.

In response to the RFE, the petitioner inexplicably changed the beneficiary's job title to "President and Director of Marketing and Finance," responsible for the "entire functioning of the Finance and Marketing Administration Departments." The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the

petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition. As discussed above, the position description for the position of "Director of Finance and Administration" does not establish that the beneficiary would be performing primarily managerial or executive duties.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. As noted by the director, the petitioner failed to provide critical information regarding the nature of the positions held by the petitioner's current employees, and failed to identify the placement of the beneficiary's proposed position within the company's existing organizational structure. 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).

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 petitioner has not established that the beneficiary qualifies for L-1A classification as a personnel manager. The petitioner has not clearly indicated which employees, if any, the beneficiary would supervise, and only indicated that she would oversee the "finance and administration departments," which are not identified on the petitioner's organizational chart. 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)). Also, the petitioner has not indicated that the beneficiary's duties will include the authority to hire and fire employees or recommend these and other personnel actions.

On appeal, counsel indicates that the beneficiary will manage one or more essential functions of the petitioning company. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a job description that clearly describes the duties

to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

As noted above, USCIS reviews 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. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner has not clearly or consistently identified the function(s) to be managed by the beneficiary, much less established that she will perform primarily managerial duties related to such functions. As discussed above, the beneficiary's proposed duties as described at the time of filing do not fall under the definition of managerial or executive capacity and are primarily related to bookkeeping, financial analysis and administration, rather than managing the finance, administration or any other functions of the company.

Based on the petitioner's failure to provide a detailed, consistent description of the beneficiary proposed position within the U.S. company, and its failure to provide critical information regarding the company's organizational structure, the AAO concurs with the director's finding that the petitioner failed to corroborate its claim that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for at least one continuous year in the three years preceding the filing of the petition.

The petitioner stated on the L Classification Supplement to Form I-129 that the beneficiary has been employed by the foreign entity since January 1, 2000 with no interruptions in employment. Where asked to describe the beneficiary's duties for the past three years, the petitioner stated: "Manager of the entire organization, effectively leading the team into sales opportunities."

The petitioner submitted an organizational chart for the foreign entity which appears to depict a total of twenty positions in the company. The chart is in the Portuguese language and does not identify any employees by name. The petitioner attached position descriptions, also written in Portuguese, and identified the beneficiary as holding the top position of "*directoria geral*" but did not provide an English translation. 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.

In the request for evidence issued on November 21, 2007, the director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties abroad, including the percentage of time the beneficiary spends on each specific duty; (2) the total number of employees employed by the foreign company; (3) a detailed organizational chart for the foreign entity which clearly identifies the beneficiary's position and all employees working under her supervision by name and job title; and (4) brief position descriptions for each subordinate employee.

In response, the petitioner submitted an organizational chart for the foreign entity which indicates that the beneficiary holds the position of administrative director. The chart shows that she supervises an administrative manager who, in turn, supervises three sales representatives and a receptionist.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner failed to provide a detailed description of the beneficiary's duties, or any description of the duties performed by the beneficiary's subordinate employees.

On appeal, counsel states:

> The Decision at Pg. 4 concludes that there was insufficient evidence provided to USCIS regarding the Beneficiary's job duties, and states that it therefore was unable to determine whether Beneficiary was eligible for classification as an intra company transferee in a managerial or executive capacity with Section 101(a)(44) of the Act, however 8 CFR § 214(2)(8) [sic] required USCIS to provide a Notice of Intent to Deny to Petition in order to allow the opportunity to provide evidence which clarified this issue.

Counsel requests that the matter be reopened so that the petitioner may provide rebuttal evidence. Counsel's assertions are not persuasive. As noted above, the director issued a request for evidence in which he explicitly instructed the petitioner to provide a detailed description of the beneficiary's position with the foreign entity and the petitioner failed to submit the requested evidence in response. 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 director was not required to issue a notice of intent to deny based on the petitioner's failure to submit a complete response to the RFE.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's 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.*

Here, the only description provided of the beneficiary's duties abroad is that she is the "manager of the entire organization" and is responsible for "effectively leading the team into sales opportunities." The definitions of

executive and managerial capacity 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 or her 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 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"). While the AAO does not doubt that the beneficiary exercises some discretion over the foreign entity's day-to-day operations as its co-owner, the petitioner has failed to show that her actual duties have been in a primarily managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

As the record contains no description of the beneficiary's actual duties, the AAO cannot conclude that such duties have been primarily managerial or executive in nature. Accordingly, the appeal will be dismissed.

Furthermore, there is some confusion in the record as to whether the beneficiary has been employed by the foreign entity on a full-time basis for at least one year out of the last three years. On the L Classification Supplement to Form I-129, the petitioner indicated that the beneficiary was in the United States in L-2 status from December 30, 2003 until December 30, 2006, as a dependent of her father. It does not appear possible for the beneficiary to have been granted L-2 status as a dependent minor child in December 2003 as the record shows that the beneficiary was married and already 21 years old at that time. At the same time, the petitioner indicated that the beneficiary has been employed by the foreign entity since January 2000 without any interruption in employment. A three-year period of stay in the United States would in fact be interruptive of her employment with the foreign entity unless she was working for the petitioner during this time in a valid nonimmigrant status. *See generally*, 8 C.F.R. § 214.2(l)(ii)(A).

In addition, there is some evidence in the record to support the petitioner's statement that the beneficiary was residing in the United States during this time period. The petitioner's Schedules K-1 accompanying the petitioner's tax returns for 2005 and 2006 indicate that the beneficiary, a shareholder of the petitioner, resided at an address in Vallejo, California during these years. Where asked to indicate whether the beneficiary is a "nonresident of California," the petitioner indicated "No."

Therefore, the record as presently constituted does not establish that the beneficiary was employed by the foreign entity for one continuous year in the three years preceding the filing of the instant petition in November 2007. For this additional reason, the petition will be denied.

The third and final issue addressed by the director is whether the petitioner and the foreign entity have a qualifying relationship. 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. 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).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) defines the term "qualifying organization" as a United States or foreign firm, corporation, or other legal entity which:

(*1*) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(*2*) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(*3*) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides the following definitions:

(I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.

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

(K) "Subsidiary" means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) "Affiliate" means

(*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(*2*) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity . . .

The petitioner stated on Form I-129 that the petitioner is a branch office of the foreign entity, and that the beneficiary and [redacted] *each own 50% of the company.*

As evidence of the ownership of the petitioning company, the petitioner submitted:

- A copy of stock certificate # issuing 250 shares of the petitioning company to (undated)
- A copy of stock certificate # issuing 250 shares of the petitioning company to (undated)

  Minutes of First Meeting of Board of Directors, held on June 1, 2007, and attended by and which indicates that each shareholder paid $625.00 in exchange for the shares issued on stock certificates # and #.
- Certification from the California Secretary of State confirming that the petitioning company was incorporated on May 10, 2004.

The petitioner also submitted copies of its corporate tax returns (Forms 1120S) for the years 2004, 2005 and 2006. The tax returns indicate that the company has three shareholders, and with each shareholder owning one-third of the issued shares. According to Schedule L of the tax returns, the value of the issued capital stock is $2,800.

As evidence of the ownership of the foreign entity, the petitioner submitted the company's articles of association, indicating that it was formed in July 2001 and is owned in equal shares by and .

In the RFE, the director requested evidence to establish that the petitioner's shareholders have in fact paid for their ownership interest in the U.S. entity, as well as: a copy of the petitioner's articles of incorporation; copies of all stock certificates issued by the U.S. entity up to the present date; a copy of the petitioner's stock ledger showing all stock certificates issued to date including the total shares of stock sold, names of shareholders, and the purchase price; Notice of Transaction Pursuant to Corporations Code 25102(f); and, a detailed list of owners of the U.S. company.

In response, the petitioner submitted a copy of the petitioner's articles of incorporation dated May 10, 2004, which indicate that the company is authorized to issue 1,000 shares of common stock. The petitioner also re-submitted share certificates # and and other documentation already submitted with the initial filing.

In lieu of a stock ledger, the petitioner submitted a document titled "Record of Certificates Issued and Transferred," which provides the following information:

Certificate	Shares	Issued To	Date Issued	Amount Paid
	1,020		Inception	$ -
	990		Inception	$ -
	990		Inception	$ -
	11,628		06/13/2006	$ -
	11,172		06/13/2006	$ -
	250		05/25/2007	$ 650.00
	250		05/25/2007	$ 650.00

* **Note**: Certificates 1 thru 5 are for unauthorized shares since the 'Articles of Incorporation' authorized only 1,000 shares of properly issued certificates.

Finally, the petitioner submitted a Notice of Transaction Pursuant to Corporations Code 25102(f) (Electronic Version) indicating that the petitioner issued stock valued at $1,250 on May 25, 2007.

The director denied the petition on March 14, 2008, concluding that the petitioner failed to establish that the U.S. and foreign entities have a qualifying relationship. In denying the petition, the director noted that the record contains discrepancies with respect to the actual number of shares issued and the amount paid for such shares. Specifically, the director stated:

> According to the minutes of the meeting held on June 1, 2007 and stock certificates [redacted] and 250 shares were issued to [redacted] for $650 and 250 shares were issued to the beneficiary for the same amount. It is noted that the recall of the certificates #[redacted] issued at the petitioner's inception and of the certificates [redacted] issued on June 13, 2006 was not mentioned in this minutes. It is also noted that the Record of Certificates Issued and Transferred listed the consideration as $650, not $625. The petitioner did not explain how [redacted] and the beneficiary were still listed equal owners in the filing of Form 1120S for 2006 with the Internal Revenue Service when certificates [redacted] were issued on June 13, 2006. Moreover, no evidence that the beneficiary and [redacted] has actually paid for the ownership of these shares was submitted as requested.

The director concluded that the ownership reflected in the petitioner's Form 1120S for 2006, reflecting three owners, "is considered as the proper ownership of the petitioner for this proceeding." The director therefore concluded that the petitioner failed to establish that both organizations are owned and controlled by the same parent or individual or by an identical group of individuals who each own and control approximately the same share or proportion of each organization.

On appeal, counsel for the petitioner asserts that any shares issued by the petitioner prior to May 2007 were "not legally issued and have no force and effect." Counsel contends that the only shares authorized to be issued are those issued to the beneficiary and [redacted] on certificates #[redacted] and #[redacted] Counsel further asserts that "small family owned corporations are permitted to prepare minutes which ratified corporate actions and as such, any issues raised by USCIS can be resolved with the preparation of corporate records."

Counsel further notes that the Notice of Transaction Pursuant to California Corporations Code "conclusively establishes" that the assertions made in the petitioner's tax returns are incorrect. Counsel asserts that the director "decided by selecting evidence, and ignoring the legal . . . relationship between the two companies."

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*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

As noted by the director, the record is filled with inconsistencies and the petitioner's failure to fully disclose all documents relating to the ownership of the company since its inception raises questions regarding the actual current ownership of the company. Counsel's claim that any prior certificates issued have no legal force and are not relevant to this proceeding is not persuasive.

The petitioner has not explained why a company that has been operating since 2004, has apparently issued five stock certificates, and has filed two previous L-1A petitions based on a claimed qualifying relationship with a foreign entity in 2004 and 2005 would have its "First Meeting" of the board of directors on June 1, 2007 with no reference to any corporate records that preceded it. Counsel's claim that "any issues raised by USCIS can be resolved with the preparation of corporate records," suggests a willingness on the part of the petitioner to create stock certificates and meeting minutes to achieve a qualifying relationship "on paper."

The petitioner was specifically requested to provide copies of all stock certificates issued to date and a copy of its actual stock ledger, but failed to provide these documents. 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). It is reasonable to expect the petitioner to have retained copies of its stock certificates number 1 through 5 and to have maintained an official stock ledger on which it recorded the stock transactions as they occurred. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). It appears that counsel or the petitioner created the "Record of Certificates Issued and Transferred" specifically for the purpose of establishing a qualifying relationship in this matter.

The claim that the first five stock certificates were never paid for is belied by the petitioner's tax returns, which indicate that the petitioner's shareholders paid a total of $2,800 in exchange for the shares issued. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, while it may be convenient for counsel to claim that the initial five share certificates had no legal force because the issuance of such shares was unauthorized, the AAO notes that it is possible that the petitioner did in fact increase the number of authorized shares. The petitioner likely held its actual "first meeting" of the board of directors in 2004 when the company was formed, and would reasonably be expected to have other corporate documentation relating to the issuance of shares in 2004 and 2006. It has opted not to provide any other documentation for review. The AAO will not assume that the original articles of incorporation were never amended simply because the petitioner did not provide a copy of an articles of amendment.

In addition, as noted by the director, the petitioner has also failed to document that [redacted] and [redacted] have paid for the 250 shares claimed to be issued to each of them on May 25, 2007, although such evidence was specifically requested by the director. 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)). 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).

Absent full disclosure of all corporate documentation, the AAO will not conclude that prior stock certificates have been canceled or were never legally valid, that the most recent stock certificates have actually been paid for, or that the beneficiary and [redacted] are currently joint and equal owners of the petitioning company. The petitioner has not established that it has a qualifying relationship with the foreign entity.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.