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

U.S. Citizenship and Immigration Services

D7

[redacted]

DATE: JUN 27 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 beneficiary's employment as a 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 limited liability company established in 2009, intends to operate a travel agency and claims to be a subsidiary of Green International Joint Stock Co., located in Vietnam. The petitioner seeks to employ the beneficiary in the position of marketing manager in its new office in the United States for a period of three years.[1]

The director denied the petition based on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the petitioner has a qualifying relationship with the beneficiary's foreign employer; and (2) that the foreign entity has continuously employed the beneficiary on a full-time basis in a managerial or executive capacity for at least one year within the three years preceding the filing of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the petitioner submitted sufficient evidence to establish the required qualifying relationship and suggests that the director overlooked evidence of the actual ownership of the U.S. company. Counsel further maintains that the beneficiary was employed by the foreign entity in an executive and managerial capacity for two years prior to her admission to the United States in B-2 status. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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.

[1] Pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(*2*), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

(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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

II. The Issues on Appeal

A. Qualifying Relationship

The first issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S.

employer are the same employer (i.e. 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 pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means 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[.]
>
> * * *
>
> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
>
> * * *
>
> (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 indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it a subsidiary of Green International Joint Stock Co. (Vietnam), and that the foreign entity owns a 99 percent interest in the company.

In a letter dated April 23, 2009, the petitioner stated that "Green International Tourism Services & Commercial Joint Stock Company," a Vietnamese company registered in 2001, owns 99% of the U.S. company, which was organized as a limited liability company in California in April 2009. The petitioner submitted the following evidence relating to the establishment of the U.S. company:

1. Minutes of a Special Meeting of the Board of [redacted] dated March 9, 2009, in which the Board resolved to appoint the beneficiary and [redacted] to purchase a company abroad and serve as its Marketing Manager and Executive Director, respectively.
2. Evidence that the shareholders of the foreign entity, as of November 10, 2008, are the beneficiary, [redacted], and [redacted].
3. The petitioner's Limited Liability Company Articles of Organization filed with the California Secretary of State on April 10, 2009.
4. The petitioner's Limited Liability company Operating Agreement dated April 10, 2009, signed by the beneficiary and [redacted] as members.
5. Certificate of Interest Number 1, issued on April 12, 2009, indicating that Green International Tourism Service & Commercial Joint Stock Company owns a 99% interest in the U.S. company.

The director issued a request for additional evidence ("RFE") on May 8, 2009, in which she requested, *inter alia,* additional evidence to establish that the U.S. and foreign entities have a qualifying relationship. Specifically, the director requested: (1) proof of stock purchase, including evidence to show that the claimed foreign parent company has paid for its ownership interest in the U.S. entity; (2) copies of the U.S. company's ledger showing all stock/membership certificates, including names of shareholders/members and purchase price; and (3) a detailed list of owners for the U.S. company, including names and percentages of ownership. The director also requested bank statements and evidence of U.S. bank account activities for the U.S. company, and copies of all business plans prepared by the foreign entity for the new office in the United States, and the minutes of meetings for any Board of Directors' resolutions regarding the set-up of the U.S. office.

The petitioner's response included a letter from the foreign entity indicating that its Board of Directors decided to establish a branch in California with an initial investment amount of $100,000.00 to be used as capital for all expenses and marketing requirements. The petitioner submitted a letter from Bank of America indicating that the U.S. company opened two checking accounts on April 21, 2009, and had a balance in excess of $102,000 as of May 15, 2009. The petitioner provided a wire transfer receipt showing that the foreign entity transferred $77,966.00 to the U.S. company's account on May 20, 2009. The "remittance info" noted on the receipt is "Pmt for Chapman Executive Suites Office Suite Lease DD.18.05.2009."

These documents were accompanied by a Bank of America Balance Summary showing that the petitioner's account was opened with a deposit of $100 on April 21, 2009. The company account shows a $40,000 deposit on May 13, a $41,000 deposit on May 14, and a $20,000 deposit on May 14.

The petitioner also submitted the minutes of the U.S. company's organizational meeting held on April 17, 2009, at which it was resolved that the foreign entity would be apportioned a 99% membership interest in the company in exchange for consideration of $100,000 and [redacted] would receive a 1% interest in

the company for $1.00. The petitioner provided a copy of its membership interest transfer ledger indicating the issuance of membership certificates numbers one and two in the stated percentages.

According to the minutes of a Special Meeting of the Board of Directors of the petitioning company held on May 15, 2009, the directors resolved that the beneficiary and [redacted] "being majority shareholders in [redacted] will provide a shareholder loan in the amount of $101,000 ($60,000 from [redacted], and $41,000 from [the beneficiary]) to [the U.S.. company] to be repaid by company profits within the first three (3) years of operation at zero (0%) interest." This loan was stated to be "in addition to the $100,000 capital infusion from the parent company."

The director denied the petition on June 10, 2009, concluding that the petitioner failed to establish that the U.S. and foreign entities have a qualifying relationship. The director acknowledged receipt of the petitioner's membership certificate indicating majority ownership by the foreign entity, but found insufficient evidence to establish that the foreign entity actually paid for its ownership interest in the U.S. company. The director noted that the only evidence the petitioner provided which indicated a wire transfer from the foreign entity was the transfer in the amount of $77,966 made on May 20, 2009, subsequent to the date the petition was filed. The director emphasized that, pursuant to 8 C.F.R. § 103.2(b)(12), a petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

On appeal, counsel for the petitioner asserts that the evidence establishes that the U.S. company "is clearly a creation of [the foreign entity] and no other." Counsel asserts that "this relationship was manifest, in one pressing fashion, by [the foreign entity's] payment of 100,000 shares of [the U.S. company] in two payments of $90,000.00 and $77,966.00 on May 19, and May 20, 2009, respectively."

Counsel contends that submission of "additional evidence of [the foreign entity's] ownership and control after the date of the petitioner does not deny existence of this fact *before* that date." Counsel further notes that the foreign entity did in fact disburse funds in the amount of $100,194.46 to the petitioning company on April 21, 2009, and specifically dispatched the beneficiary and [redacted], two of its officers, to the United States to establish the U.S. company.

The petitioner submits new evidence on appeal including a Bank of America record that appears to show a wire transfer in the amount of $41,012 to the beneficiary's personal account on May 13, 2009 and a subsequent withdrawal of $41,000 on May 14, 2009. The petitioner submits records for [redacted] also reflecting a wire transfer in the amount of $41,099 into his account on May 12, 2009, and a subsequent transfer of $41,000 out of his account on May 13, 2009. Finally, the petitioner submitted a similar receipt for one of the petitioner's accounts which shows total deposits and transfers of $101,000 made on May 13 and 14, 2009, including a $40,000 transfer, a $41,000 deposit and a $20,000 transfer, resulting in an account balance of $101,194 as of May 14, 2009. The petitioner's account activity statement also shows a $90,000 online banking transfer from a different company checking account on May 19, 2009. The statement indicates that the petitioner transferred this amount to an account designated "[redacted]" on May 18, 2009 and then transferred it back to the same account on May 19, 2009.

Upon review, the AAO concurs with the director's determination that the petitioner failed to establish the qualifying relationship between the U.S. and foreign entities based on its failure to document that the foreign entity actually paid for its ownership interest.

As general evidence of a petitioner's claimed qualifying relationship, stock or membership certificates alone are not sufficient evidence to determine whether a stockholder or member maintains ownership and control of a corporate entity. The corporate stock or membership certificate ledger, stock certificate registry, corporate bylaws, operating agreement and the minutes of relevant annual shareholder or member meetings must also be examined to determine the total number of shares or membership units issued, the exact number issued to the shareholders or members, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). 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 or membership certificates into the means by which stock ownership or membership 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 or membership.

According to the minutes of the U.S. company's organizational meeting held on April 17, 2009, it was agreed that the foreign entity would be issued 99 percent ownership in the petitioning company in exchange for consideration of $100,000. Given that the U.S. company issued a certificate of interest to the foreign entity at that time, it was reasonable for the director to request evidence that the foreign entity had in fact provided the funds to the U.S. company in exchange for its ownership interest. The petitioner has not provided evidence of a payment in this amount from the foreign entity contemporaneous with the issuance of the membership certificate. Counsel's claim on appeal that the foreign entity disbursed $100,194.46 to the U.S. entity on April 21, 2009 is not supported by the evidence of record.

Further, while the petitioner was able to provide evidence that the U.S. company had $100,000 in its bank account as of May 15, 2009, approximately two weeks after the date the petition was filed, these funds appears to have been provided by the beneficiary and [redacted] not by the foreign entity. These same two individuals executed the petitioner's operating agreement as "members."

The record remains devoid of evidence of a $100,000 payment that can be traced to the foreign entity. The foreign entity's transfer of $77,966 to the petitioning entity subsequent to the issuance of the RFE, as noted by the director, does not establish the petitioner's eligibility as of the date of filing the petition. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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 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).

Finally, we note that counsel's claim that the foreign entity disbursed "$167,966.00 in two payments of $90,000.00 and $77,966.00" on May 19 and May 20, 2009 is simply not supported by the record. The foreign entity did wire transfer $77,966 to the U.S. company's account on May 20, 2009. However, the $90,000 transaction referenced by counsel appears to be an internal transfer from one of the U.S. company's accounts to another. The funds themselves appear to have originated with the above-referenced deposits from the beneficiary and [redacted]. Therefore, even if the AAO considered financial transactions that took place subsequent to the date of filing, the petitioner has not provided evidence of a payment of $100,000 or more from the foreign entity.

The AAO acknowledges that the record contains evidence that the foreign and U.S. companies are related in terms of their business name and officers, and it would be erroneous to state that no evidence of a qualifying relationship was provided. 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.

Here, the petitioner failed to document one of the essential elements of the foreign entity's claimed ownership of the U.S. company, and the record contains unsupported and inconsistent claims about when, how or whether the foreign entity ever paid for such ownership interest. For these reasons, the AAO will affirm the director's decision and dismiss the appeal.

B. Continuous Year of Employment Abroad

The second issue to be addressed is whether the petitioner submitted evidence that the beneficiary 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, as required by 8 C.F.R. §§ 214.2(l)(3)(iii) and 214.2(l)(3)(v)(B).

The petitioner indicated on the Form I-129 that the beneficiary has been employed by the foreign entity since February 2007 as a Member of the Board of Directors and "manager of marketing for company branch." The petitioner submitted a copy of the beneficiary's resume which indicates that she is "marketing director and shareholder" of the foreign entity since 2007. The resume lists previous experience as marketing director for two unrelated travel companies between 1999 and 2007.

The petitioner also submitted an employment certificate from the foreign entity in which it states that the beneficiary has been employed in the full-time position of Marketing Director from 2007 to the present, at a monthly salary of VND 9500.00.

In the request for evidence issued on May 8, 2009, the director advised the petitioner as follows:

> Information received from the U.S. Embassy: The record indicates that the beneficiary has applied for her B1/B2 visa three times in the years 2006, 2007 and 2009 at the U.S. Embassy in Hanoi, Vietnam. In all three occasions, the beneficiary claimed that she works for her family enterprise [redacted]. as vice director of trade, marketing director and sales director. As such, the petitioner's claim that the beneficiary has been working for the Vietnam entity Green International Tours since the year 2007; also for two other companies Sasco Tourism Company and Vietravel Company, has raised a substantial doubt. Please submit sufficient documentary evidence to explain this discrepancy.

In response to the RFE, counsel noted that the petitioner submitted an employment verification letter from the foreign entity at the time of filing, attesting to the duration of the beneficiary's tenure with the company. Counsel emphasized that the beneficiary was not employed by the foreign entity when she applied for her first B1/B2 visa in 2006, and therefore, there is no discrepancy. Finally, the petitioner submitted a letter from the beneficiary dated May 1, 2009, in which she stated:

> I . . . was invited by my brother [redacted] who works for Goldman Sachs in the U.S. for a family visit in April 2009. When I applied for this visa, I did not mention my other business [redacted] because there is room for one employer name and address. I only included my family business [redacted] which is an import and export company in Vietnam run by my parents and myself. I have been working for [redacted] since 2007 as Marketing Director.
>
> When I applied for my visitor's visa in 2006, I had not started working for Green International Tourism.

The director denied the petition, determining that the petitioner failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with the foreign entity in the three years preceding the filing of the petition. In denying the petition, the director acknowledged the beneficiary's statement and stated:

> [I]t is unclear why in two occasions December 2007 and April 2009; the beneficiary did not place Green Tours International as her employer. It is further unclear why the beneficiary did not name [redacted], a company that she worked [for] during [the] period from 2002 to 2007, as her employer during the interview in April 2006. The beneficiary's mere statement that there is not enough space for more than one employer and address to claim the foreign entity as her employer does not sustain the burden of proof in this preceding.

On appeal, counsel maintains that the statements the beneficiary made on her previous nonimmigrant visa applications do not contradict the statements made in the instant petition. Counsel asserts that the beneficiary was not employed by the foreign entity in 2006 and therefore did not indicate her employment with the foreign entity on her visa application in 2006. Counsel notes that in April 2009, when applying for her most recent B1/B2 visa application, "the beneficiary listed her family business . . . simply because she was taking a

family trip to visit her brother, who was working at Goldman Sachs in the United States; it was not an official business visit."

Counsel contends that the visa application only permitted a listing of one employer, and claims that the beneficiary's "past involvement with her family business is not formal nor does it command the full amount of her knowledge, skills and resources as her work with [the foreign entity]." Counsel describes her work with the petitioner and foreign entity as the beneficiary's "utmost professional endeavors."

In support of the appeal, the petitioner re-submits the beneficiary's statement dated May 1, 2009. The petitioner also submits copies of four tourism contracts executed by the foreign entity which list the beneficiary as the company representative. The contracts are dated January 20, 2008, January 21, 2008, April 14, 2008 and March 1, 2009.

Upon review, the AAO concurs with the director's determination that the petitioner has failed to establish that the beneficiary had at least one year of continuous full-time employment with the foreign entity within the three years preceding the filing of the petition.

As noted by the director, the beneficiary's statements with respect to her employer on her B1/B2 visa applications reasonably raises questions regarding the reliability of the petitioner's statements regarding her employment history. If the beneficiary's claimed employment with the foreign entity is her "utmost professional endeavor," then it follows that she would provide U.S. consular officials with the name, address and contact information of her primary employer when applying for a visitor visa, particularly considering the relatively short lapse in time before the beneficiary's most recent visa application in February 2009 and the filing of this petition and a request for a change of status from B-2 to L-1A in April 2009. At a minimum, the contradictory information in the record raises questions as to whether the beneficiary's employment with the foreign entity was on a full-time basis.

While the evidence of record indicates that the beneficiary is an officer and a shareholder of the foreign entity, the date of her initial association with the company has not been established through documentary evidence. The record does not support the petitioner's statements that the beneficiary is a "founding shareholder" of the company, or that she has been a shareholder since 2007, as claimed.

The petitioner submitted a partially translated Vietnamese business registration certificate that appears to be dated February 17, 2009. The certificate indicates that the company has 29,680 purchased shares and charter capital of VND 2.968,000,000. The document identifies three shareholders, [redacted] (16,320 shares), [redacted] and [redacted], with a note indicating that the latter two individuals "implemented to transfer share." Both the English translation and the original Vietnamese document are incomplete. 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 petitioner submitted a separate document titled "Announcement on Changes in Contents of Business Registration" indicating that as of November 10, 2008, the beneficiary is a 50 percent shareholder of the foreign entity, the beneficiary's name does not appear on either the partial English version or partial Vietnamese version of the Business Registration Certificates issued in February 2009. The petitioner

submitted a separate Capital Contribution Certificate, which indicates that the beneficiary became an official shareholder" from November 10, 2008, less than six months prior to the filing of the petition.

If the beneficiary was in fact a full-time employee of the foreign entity since 2007 at a salary of VND 9,500.00 per month as stated in the foreign entity's employment verification letter, the best evidence to demonstrate this fact would be payroll and tax records reflecting such payments to the beneficiary over a twelve-month period. Instead, the petitioner has twice sought to rely on the beneficiary's own statement, and a letter from the foreign entity. In light of the information the beneficiary provided to U.S. Consular officials in support of her nonimmigrant visa applications, such statements, even when considered with the newly submitted company contracts bearing her name, are insufficient to establish her eligibility, and will not be accepted in lieu of objective evidence confirming a full year of employment with the foreign entity within the three years preceding the filing of the petition. 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 non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

For the foregoing reasons, the petitioner has not overcome the director's determination, and the appeal will be dismissed.

C. Employment Abroad in a Managerial or Executive Capacity

The third and final issue addressed by the director is whether the petitioner established that the beneficiary was employed abroad in a qualifying managerial or executive capacity, as required by 8 C.F.R. §§ 214.2(l)(3)(iv) and 214.2(l)(3)(v)(B).

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

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

supervisor's supervisory duties unless the employees supervised are professional.

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

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

As a preliminary matter, we note that, in light of the director's finding that the petitioner failed to establish that the beneficiary was employed by the foreign entity on a full-time basis for at least one continuous year within the three years preceding the filing of the petition, this issue could be considered moot. Nevertheless, we will address the director's findings and the petitioner's response on appeal as they relate to the beneficiary's role with the foreign entity.

In its letter dated April 23, 2009, the petitioner indicated that the beneficiary currently serves as General Director and Marketing Manager for the foreign entity's branch office in Ho Chi Minh City, where she has been responsible for:

- Operations management and advising the company board members of company objectives and plans
- Oversee marketing, promotion and expansion of services
- Managing the organization's resources within budget guidelines according to current laws and regulations
- Effectively managing the human resources of the organization according to authorized personnel policies and procedures that fully conform to current laws and regulations
- Assuring the organization and its mission, programs, products and services are consistently presented in strong, positive image to relevant stakeholders
- Negotiating with potential business partners
- Promoting company image and marketing of company services
- Developing a pricing strategy to aid in the maximizing of profits, and acquire a share of the market

In the RFE issued on May 8, 2009, the director requested a more detailed description of the beneficiary's duties abroad, including the percentage of time the beneficiary allocates to each of her specific duties. The

director also requested a detailed organizational chart for the foreign company, as well as names and job titles of all employees under the beneficiary's supervision. Finally, the director requested a brief description of job duties and educational level for the beneficiary's subordinates.

In response to the director's request, the petitioner submitted an organizational chart for the foreign entity which identifies the beneficiary as "Duty General Director." The chart appears to depict that she manages the company's representative office in Ho Chi Minh City. The chart indicates that this office "make the transaction and marketing including 8 employees" but does not further elaborate on the composition of the office. The beneficiary also appears to be shown as the supervisor of all other company departments, including a sales department with eight employees, a human resources department with four employees, inbound and outbound departments with a total of nine employees, a ticketing department with six employees, a visa consultant department with two employees, a "carrential" [*sic*] department with two employees, and an accounting department with four employees.

The petitioner indicated that a total of 41 employees work for the foreign entity. The organization chart identifies approximately 45 positions and the petitioner provided a list of 17 employees who are claimed to work under the beneficiary's supervision. The job titles of these claimed subordinates are visa consultant (1 employee), operator (3 employees), customer care (1 employee), sales (5 employees) and ticketing (7 employees). The petitioner indicated that 15 of these employees have bachelor's degrees in business management, while the remaining employees have degrees in finance and accounting.

Finally, the petitioner submitted an expanded job description for the beneficiary's role as marketing director and member of the Board of Directors of the parent company. The petitioner indicated that the beneficiary has been leading the expansion of the company's [redacted] branch office, with responsibility for the "management, recruitment and development of the company profile." Specifically, the petitioner described the beneficiary's duties as the following:

- Advising the company board members of company objectives and plans (5%)
- Operations management and overseeing the marketing, promotion, development and expansion of services (45%)
  - Business development coordination and presentation
  - Working with both company offices on designing and implementing a client contact systems.
  - Managing resources and budgeting of resources for marketing
  - Development and administration of marketing database which includes client and prospect client information, mailing list and reports.
- Managing the human resources of the [redacted] city offices according to authorized personnel policies and procedures that fully conform to the applicable laws and regulations (10%)
- Assuring that the organization, its mission, programs, products and services are consistently presented in a strong, positive image to relevant stakeholders; including implementation of client relations: (25%)
  - Promoting company image and marketing of company services
  - Identification of target market
  - Client satisfaction surveys

- Client development activities
- Client skills training
- Special events

- Developing a pricing strategy to aid in the maximizing of profits, and acquiring the desired share of the market (15%)

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director found that the petitioner's description of the beneficiary's duties was vague and failed to convey an understanding of the beneficiary's day-to-day duties, such that they could be classified as primarily managerial or executive in nature.

The director further found that the petitioner failed to provide the requested job descriptions for the beneficiary's subordinates and thus failed to establish that the beneficiary supervises a subordinate staff that relieves her from primarily performing non-managerial duties. Finally, the director observed that, while the beneficiary's job title is marketing director or marketing manager, the organizational chart provided fails to show that the foreign entity has a marketing team, department or marketing staff to carry out the non-managerial aspects of the marketing function.

On appeal, counsel asserts that the beneficiary is employed by the foreign entity as an executive, majority shareholder and member of the board of directors, with "broad discretion and powers to direct" both the foreign and U.S. entities. Counsel notes that in addition to her executive role and responsibility to expand the foreign entity into international markets, the beneficiary also fulfills a managerial role by leading "a cadre of professionals" who perform work in "consulting, sales and account management" and enable her to carry out plans for the company's growth.

In support of the appeal, the petitioner re-submits the position description that was provided in response to the RFE, along with the previously provided list of 17 employees claimed to report to the beneficiary. The petitioner also submits a separate chart titled "task of marketing staff" with brief position descriptions for these same employees.

Upon review, the AAO concurs with the director's determination that the evidence submitted is insufficient to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 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 in either an executive or a managerial capacity. *Id.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his 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 or directs 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. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Accordingly, the petitioner cannot rely on the beneficiary's claimed majority ownership of the foreign entity as evidence that she was employed by the foreign entity in a primarily executive capacity.

Here, the petitioner's description of the beneficiary's position fails to establish that her actual duties are primarily managerial or executive in nature. The petitioner indicated that the beneficiary devotes the largest portion of her time (45 percent) to "operations management and overseeing the marketing promotion, development and expansion of services." However, the duties associated with this responsibility include tasks that have not been shown to be managerial in nature. For example, the petitioner has not identified what is entailed by "business development coordination and presentation," or identified at what level the beneficiary is "negotiating with potential business partners." Without further explanation, the AAO cannot conclude that the beneficiary is not personally responsible for routine business presentations and negotiations. The remainder of the beneficiary's duties associated with this broad responsibility appears to require her direct involvement in implementing internal client contact systems and databases, rather than managing the company's marketing and promotion activities or subordinate staff responsible for such activities.

The petitioner indicates that the beneficiary allocates an additional 25 percent of her time to "promoting company image and marketing of company services," as well as identifying target markets, and implementing client satisfaction surveys, client development activities, client skills training and special events. As stated, it appears that the beneficiary directly performs these tasks, and, as noted by the director, the evidence of record does not identify subordinate marketing staff or a marketing department that would relieve the beneficiary from performing these non-managerial functions related to the marketing of the company's travel products and services.

Based on the foregoing, these two areas of responsibility, which, according to the petitioner account for up to 70 percent of the beneficiary's time, appear to consist primarily of marketing, research, business development and information systems-related tasks that do not fall under the definitions of managerial or executive capacity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services or other non-qualifying duties 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). 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). The petitioner failed to demonstrate that the beneficiary's actual duties are primarily managerial or executive in nature. For this additional reason, the appeal will be dismissed.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the

nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The petitioner has not adequately or consistently articulated or documented the number and types of employees the beneficiary supervises in her position with the foreign entity. The petitioner has claimed that the beneficiary is responsible primarily for oversight of the Ho Chi Minh City branch office, which, according to the foreign entity's organizational chart, has eight employees. The petitioner has also submitted an organizational chart which appears to depict the beneficiary's oversight of nine departments and more than 40 employees. Finally, the petitioner has submitted a list of 17 employees who are claimed to be the beneficiary's direct subordinates. These employees are engaged in sales, ticketing, inbound and outbound operation, customer care, and visa consulting. The petitioner indicates that the beneficiary oversees the human resources function, but does not claim that she manages the four employees who are claimed to be in the department. Similarly, the organizational chart depicts a total of nine employees in the inbound and outbound departments and the beneficiary is claimed to supervise only three inbound or outbound operators. 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 AAO cannot make any determination regarding the beneficiary's supervision of subordinate staff based on the contradictory evidence submitted.

Finally, as noted by the director, regardless of the actual number of employees under the beneficiary's supervision, none of the foreign entity's employees are claimed to be marketing staff who would relieve the beneficiary from the non-managerial tasks outlined in her job description above. Even if the beneficiary spends some portion of her time supervising subordinate professional or supervisory employees, the fact remains that the majority of the beneficiary's actual duties, as described by the petitioner, are not managerial or executive in nature. Accordingly, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, and the appeal will be dismissed.

III. Conclusion

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.