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

[redacted]

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DATE: DEC 2 4 2012 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 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, an Oregon corporation established in February 2010, states that it operates a trucking and dispatch business. The petitioner claims to have a qualifying relationship with [redacted] located in Kemerovo City, Russia.[1] The petitioner has employed the beneficiary as its Chief Executive Officer since August 2010, and now seeks to extend his L-1A status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the petitioner has a qualifying relationship with the foreign entity; and (2) that the petitioner will employ the beneficiary in a primarily managerial or executive capacity.

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 evidence is sufficient to establish the foreign entity has a qualifying relationship with the petitioner as its parent company, and that the beneficiary is employed in a managerial or executive capacity. Specifically, counsel claims the director misunderstood the evidence submitted to show the foreign entity provided funds to the petitioner. Counsel submits a brief and additional evidence.

## 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.

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[1] The record contains numerous translations and transliterations of the foreign entity's name. [redacted] is transliterated in the record as both [redacted] is translated as [redacted]." The AAO finds the translations refer to the same foreign entity.

(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.

## II. Issues on Appeal

### A. Qualifying Relationship

The first issue addressed by the director is whether the petitioner has established that it has a qualifying relationship with the beneficiary's last 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 filed the instant petition on May 23, 2011. The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it is a subsidiary of the Russian company [redacted] where the beneficiary was employed from 1998 until his transfer to the petitioner as CEO in August of 2010. The petitioner claims the foreign entity owns 50,000 shares of its stock, or 80% of the U.S. company.

The U.S. entity's 2010 IRS Form 1120, U.S. Corporation Income Tax Return, submitted in the initial filing, states that the company has two shareholders. The officers named in the tax return are [redacted] and [redacted] and Schedules E and G indicate their individual ownership interests as 80% [redacted] and 20% [redacted] Schedule K of the same return states no foreign or domestic corporation or partnership owns more than 20%, directly, or more than 50%, indirectly, of the stock entitled to vote, and Schedule G provides only the names of the abovementioned individuals though information is specifically requested for any foreign corporations or partnerships with direct ownership of 20% or more or indirect ownership of 50% or more.

On July 14, 2011, the director issued a Request for Evidence (RFE) instructing the petitioner to submit additional evidence to establish a qualifying relationship between the U.S. entity and the foreign entity. Specifically, the director requested: (1) a copy of the U.S. company's articles of incorporation; (2) copies of the minutes of the meetings listing the stock shareholders and number and percentage of shares owned; (3) copies of all the U.S. company's stock certificates issued to present date; (4) copies of the U.S. company's stock ledgers showing all stock certificates issued to the present date; (5) evidence to show that the foreign parent company provided funding for the U.S. company including copies of original wire transfers, bank certified copies of cancelled checks, deposit receipts, etc. detailing the monetary amounts for the stock purchase; and (6) a detailed list of owners and percentages owned for the foreign company.

The petitioner submitted the U.S. entity's articles of incorporation authorizing the issuance of 100,000 shares of capital stock and a stock ledger showing the company had only issued 62,000 of the allowable shares. According to the ledger, [redacted] holds 50,000 shares and [redacted] holds the remaining 12,000. The petitioner included purchase agreements, stock certificates, and minutes from the U.S. entity's board meeting held February 19, 2010 approving the purchase of the abovementioned stock.

The petitioner also provided an affidavit from [redacted] attesting that the foreign entity provided funds to the petitioner, through its purchase of 50,000 shares of stock and a $100,000 loan. The affidavit states that due to bureaucratic difficulties in the Russian federation the foreign entity provided funds using wire transfers to [redacted] personal checking account, and that [redacted] then issued several cashier's checks to deposit into the account of the U.S. company. To support the affidavit's claims, the record contains: minutes from the [redacted] of Participants dated December 18, 2009, authorizing the financing of [redacted] receipts for cash withdrawals from [redacted] account totaling $96,000; copies of bank checks issued from February 2010 through May 2010 to "Condor Enterprises Re: Loan from [redacted] totaling $148,000; and a deposit ticket for $2,000 for a Bank of America account including the handwritten name [redacted]" and no other identifying information.

In regards to the ownership of the foreign entity, the petitioner submitted a letter written by [redacted] The Chairman's letter confirmed the ownership interests as listed in the general meeting minutes as: [redacted] 43%, [redacted] 40%, and [redacted] 17%.

The director denied the petition on December 16, 2011, finding, in part, that the petitioner failed to establish a qualifying parent subsidiary relationship between the petitioner and the foreign company. The director specifically noted that the evidence was insufficient to show the foreign entity provided funding to the petitioner and that the record did not establish that the originator of the funds owned the shares of stock.

On appeal, counsel for the petitioner contends that the director did not properly consider the evidence submitted in response to the RFE. Counsel claims the director incorrectly believed the [redacted] and [redacted] were separate entities rather than differing translations and transliterations of a single entity's Russian name. Therefore, counsel asserts the "Contract of Loan" for $100,000 from [redacted] along with the share purchase agreements, stock certificates, stock ledger, and board meeting notes showing the sale of stock to [redacted] in consideration for $50,000 is sufficient evidence that the foreign entity provided the funding for the U.S. company. The petitioner submits an additional letter from [redacted] stating that [redacted] provided funding to the U.S. company through a transfer of funds to the personal bank account of [redacted]

Upon review, the petitioner has failed to establish a qualifying relationship between the petitioner and the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (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'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Throughout the record, the petitioner claims that the foreign entity owns 50,000 shares of the U.S. company. The petitioner submitted a Share Purchase Agreement and minutes from the February 19, 2010 board meeting indicating the sale of 50,000 shares of stock to [redacted] and two stock certificates dated February 22, 2010. Certificate C-1 states that [redacted] owns 50,000 shares and certificate C-2 states that [redacted] owns 12,000 shares. The stock ledger indicates 62,000 shares of common stock were issued at the time the petition was filed, giving [redacted] an 80% ownership interest and [redacted] a 20% ownership interest.

However, the U.S. entity's Form 1120, U.S. Corporation Income Tax Return is inconsistent with the petitioner's claim that the foreign entity is the parent company. The Form 1120 at Schedule K, which includes questions related to the petitioner's ownership and control, states that there are two shareholders. The form also states that a foreign corporation, partnership, or trust did not directly own 20% or more of the total voting power of all classes of the corporation's stock. Instead, the petitioner's tax documents state that the U.S. entity is owned individually by [redacted] and [redacted]. The IRS Form 1120 is inconsistent with the stock certificates, stock ledgers, and Board Meeting minutes asserting that the petitioner is a foreign-owned subsidiary of the Russian company. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Id. at 591. The petitioner has not provided an explanation or objective evidence sufficient to establish that the U.S. entity is a subsidiary of the foreign entity, and is not owned by [redacted]

Further, the AAO concurs with the director's determination that the petitioner has not provided sufficient evidence showing the foreign entity provided the funding for the U.S. company, or paid for the ownership interest claimed. The petitioner claims through an affidavit written by the director of the foreign entity, [redacted], that money was transferred from the foreign entity to her personal bank account, and [redacted] then used cash and bank checks to transfer the money to the U.S. entity. The petitioner further claims that $50,000 was provided as payment for the purchase of the 50,000 shares of stock owned by [redacted]

[redacted] and $100,000 was provided as a loan to the U.S. entity. However, the evidence on record is insufficient to corroborate the petitioner's claims.

Though the petitioner has provided the receipts for cash withdrawals from [redacted] personal bank account, there is no evidence that the funds in [redacted] personal account originated from the foreign entity. Although requested by the director, the petitioner has not provided account information, wire transfer receipts, or any other bank documentation to show a transfer of funds to the personal account from the foreign entity as evidence of the source of the funds. Likewise, the petitioner has not provided sufficient evidence to show the money was ultimately transferred to the U.S. entity. The petitioner provides customer copies of the bank checks purchased by [redacted], but no evidence is provided to show the funds were deposited into U.S. entity's bank account. There is no account information provided for the petitioner, nor did the petitioner provide copies of the processed checks provided. 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'r 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Further, the director specifically requested documentary evidence pertaining to any indirect fund transfers through third parties and the petitioner has failed to submit the types of evidence requested. 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 foreign entity's meeting minutes agree to the financing of the U.S. entity, but do not provide the specific terms of the financing. The document states that [redacted], "shall be financed in the amount of 150,000 US dollars through the chairman of the Board of Directors [redacted] for adequate spending of funds." However, the document does not explain what money would be used to provide the financing or provide an ownership interest in consideration for the money. The document also states that the U.S. company will be an "affiliated company" of [redacted], not a subsidiary company.

The contract for loan contains inconsistent information. The first paragraph of the loan agreement names the U.S. entity as "the Lender" and the foreign entity as "the Borrower," contrary to signature blocks at the end of the document where the U.S. entity is listed as the borrower and the foreign entity is listed as the lender. Bank checks show that the foreign entity's payments made to the petitioner total $148,000, though the contract states the loan amount is $100,000. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and 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). Even if the contract were considered, it does not indicate the foreign entity acquired an ownership interest in the U.S. entity in consideration for the funding. Instead, the loan contract states the U.S. entity is to repay the foreign entity at an annual interest rate of three percent.

For the above reasons, the petitioner has failed to establish the foreign entity, and not individual shareholders, own the U.S. organization. Therefore, the evidence is insufficient to show that the U.S. entity qualifies as a subsidiary of the foreign entity.

The evidence on record is also insufficient to establish a qualifying relationship between the two entities as affiliates. As previously discussed, the U.S. company's IRS Form 1120 states that [redacted] owns 80% and [redacted] owns 20% of the U.S. entity. Meeting minutes from the foreign entity and a letter from the Chairman of the Board state that the foreign entity is owned by [redacted] (43%), [redacted] (40%), and [redacted] (17%). As the two entities are owned by different groups of individuals in varying proportions, they are not affiliates due to ownership and control by the same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Further, the petitioner's documentation does not support a finding that a single individual exercises control over the two entities, such that an affiliate relationship could be established due to ownership and control by the same individual. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the United States and foreign organizations.

B. Managerial or Executive Capacity

The second issue in this proceeding is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity under the extended petition.

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 Form I-129 states that the beneficiary is the CEO of a trucking and dispatch business with 31 employees. In the RFE issued July 14, 2011, the director requested additional evidence to establish that the beneficiary's employment with the U.S. entity has been and will be in a managerial or executive capacity. The director specifically requested: (1) a more detailed specific description of the beneficiary's duties and percentages of time to perform the managerial or executive duties; (2) a line and block organization chart listing the names, job titles, education levels, salaries, and job titles for each current employee; and (3) State Quarterly Wage Reports for the fourth quarter of 2010 and first quarter of 2011.

In response to the RFE, the petitioner provided a more detailed breakdown of the beneficiary's duties and the percentage of time the beneficiary allocates to each duty. The organization chart provided shows twelve direct employees working for the petitioner and indicates the beneficiary and the President/CFO, [redacted] are directly subordinate to the Board of Directors. The chart indicates that the beneficiary directly supervises the safety director, manager of the transportation department, and the manager of dispatch and brokerage. According to the organizational chart, the safety director supervises three directly-employed drivers, the dispatch and brokerage manager supervises two dispatchers, and the manager of the transportation department shares supervision of the three directly-employed drivers along with the five named contract drivers and fourteen named contract transportation companies. Altogether, the chart identifies a total of 31 employees and contractors. The petitioner provided evidence of wages paid to 10 employees during the second quarter of 2011. In addition, the petitioner's 2010 IRS Form 1120 shows the U.S. company paid $1,912,084 in "owner operator expenses" to contracted drivers and transportation companies.

The director denied the petition, finding that the petitioner failed to demonstrate that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. The director noted that the number of employees listed in the payroll records were inconsistent with the employees identified on the organization chart and that the U.S. position of Chief Executive Officer appears to be primarily assisting with the day-to-day non-supervisory activities of the business.

On appeal, counsel for the petitioner contends that the director misconstrued the nature of the beneficiary's duties and asserts that the organization chart shows a sufficient number of departments and employees to establish that the beneficiary is not involved in day-to-day operations directly. On appeal, the petitioner submits additional evidence of payments to contracted employees.

Upon review, the AAO finds sufficient evidence that the beneficiary has been and will be employed in a primarily managerial capacity. Upon review of the totality of the evidence, the petitioner has established that

the beneficiary primarily manages the organization, supervises and controls the work of subordinate supervisors, has the authority to hire and fire employees and exercises discretion over the day-to-day functions of the company.

While the petitioning company is not large and relies heavily on contractors to provide its services, the evidence of record is sufficient to establish that the beneficiary will spend at least half of his time performing managerial duties, and will not be primarily engaged in operational or non-qualifying first-line supervisory tasks. The petitioner need only establish that the beneficiary will spend more than 50 percent of his time on qualifying duties. The AAO will withdraw the director's determination as it pertains to this issue only.

## III. Conclusion

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. With respect to the question of whether the beneficiary would be employed in a primarily managerial capacity, the petitioner has sustained its burden. Accordingly, the director's decision is withdrawn in part.

Nevertheless, since the petitioner failed to establish that it has a qualifying relationship with the foreign company, the appeal must be dismissed.

The petition will be denied and the appeal dismissed for the above stated reasons. 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.