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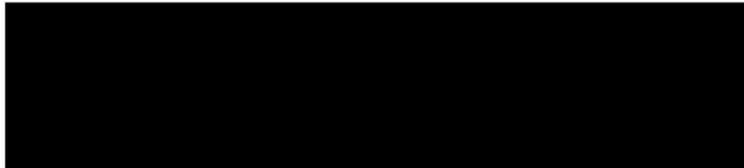
Office: VERMONT SERVICE CENTER

Date: **JUL 07 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

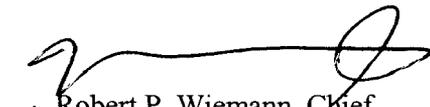
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of New Jersey in July 2002. It states that it is engaged in the manufacture of snack foods and frozen foods. It seeks to employ the beneficiary as its vice president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on September 6, 2005, determining that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States petitioner; or (2) that a qualifying relationship existed between the United States entity and the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity and submits additional evidence intended to clarify the beneficiary's duties and staffing levels. With respect to the petitioner's qualifying relationship with the foreign entity, counsel asserts that the petitioner's corporate tax returns contained typographical errors leading to a perceived discrepancy regarding the U.S. company's ownership. Counsel submits a brief, the petitioner's amended tax returns, and extensive documentary evidence in support of the appeal, and requests oral argument before the AAO.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

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 immigrant petition was filed on December 21, 2004. The petitioner stated on Form I-140 that the U.S. company has 19 employees and seeks to employ the beneficiary as its vice president responsible for directing “all management duties of [the petitioner] especially Marketing and Sales Divisions” as well as developing, expanding, organizing, and directing all “business activities.”

In its December 12, 2004 letter submitted in support of the petition, the petitioner provided the following description of the beneficiary’s proposed duties as vice president:

[The beneficiary] has a group of eight managerial employees reporting directly to him. [The beneficiary] exercises authority in regard to hiring, firing, training, delegation of assignments, according to capabilities, preferences and goals. He conducts performance reviews and ensures that his staff followed corporate procedures.

Functioning autonomously, [the beneficiary] is responsible for managing and directing all development activities of [the petitioner]. [The petitioner’s] new project for Frozen Food and Snack Food plant to be established within a short span of six months. In sum, [the beneficiary] has autonomous control over and exercises wide latitude and discretionary decision making in establishing the most advantageous courses of action for the successful management and direction of our development activities.

The petitioner submitted an organizational chart identifying the beneficiary and the petitioner’s president as the board of directors over a business and marketing operations department and a manufacturing operations department. Approximately 17 managerial, supervisory and administrative positions were identified on the chart subordinate to the beneficiary, but the petitioner did not identify any other employees by name. The petitioner attached job descriptions for all seventeen subordinate positions, but only identified one employee by name. The petitioner indicated that all positions were full-time. The petitioner submitted evidence that it had placed recruitment advertisements in a major newspaper for the positions of quality control manager, facilities manager, packing supervisor, marketing manager, and sales representative.

The petitioner also provided copies of its bi-weekly payroll journals for 2004. The most recent journal, for the pay period ended on December 3, 2004, showed a total of five employees, including the beneficiary and the president. The number of employees appears to have fluctuated during the year, as the petitioner reported as many as fifteen employees in July 2004.

The director issued a request for additional evidence on June 20, 2005. The director advised the petitioner that its supporting documentation did not support the petitioner’s statement that the U.S. company has 19 employees. Accordingly, the director instructed the petitioner to submit evidence of the present staffing of the United States organization, including the number of employees, a description of the position held by each employees, and the wages paid to them.

In a response dated July 12, 2005, counsel for the petitioner stated that the U.S. company had 18 employees in 2004 and currently employed 19 employees. The petitioner submitted its third and fourth quarter payroll reports provided by its payroll service provider. The fourth quarter report does show a total of eighteen

employees with earnings reported for the year, but only eight of the listed employees received wages during the quarter, including the beneficiary and the president. These employees were identified on the accompanying employee list as the chief technical manager, the quality control manager, the packaging supervisor, the technical supervisor, the sales service supervisor and one employee, [REDACTED] whose position title has not been provided. A total of fifteen employees received wages in the third quarter of 2004, but the petitioner's payroll fell from \$62,399 in that quarter to \$31,267 in the fourth quarter of 2004. The petitioner nevertheless provided job titles and descriptions for fifteen employees and noted that all were employed on a full-time basis. These descriptions are part of the record and will not be repeated herein.

The director denied the petition on September 6, 2005, concluding that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director noted that the petitioner identified the majority of its employees as "managers" or "supervisors" but found that, notwithstanding their job titles, the payroll documentation showed that only one employee was employed on a full-time basis, other than the beneficiary and the president. The director also found that the business had not "financially grown to a point whereby the actual duties of the beneficiary are primarily executive in nature."

On appeal, counsel for the petitioner asserts that the beneficiary is employed in a primarily executive capacity. Counsel notes that the petitioner currently employs 21 employees who receive compensation "in line with the stage of development of the petitioning company in this industry." Counsel reiterates that the beneficiary "directs the management duties of the United States corporation, especially the Marketing and sales divisions" and "develops, expands, organizes and directs all of the business activities" of the petitioner.

In support of the appeal, the petitioner submits a September 24, 2005 letter from its president, who describes the beneficiary's U.S. duties as follows:

Functioning autonomously, [the beneficiary] is responsible for managing and directing all development activities of [the petitioner]. [The petitioner's] new project for Frozen Foods and Snack Foods processing plant to be established within a short span of six months. In sum, [the beneficiary] has autonomous control over and exercises wide latitude and discretionary decision making in establishing the most advantageous courses of action for the successful management and direction of our development activities. . . .

[The beneficiary has a group of eight managerial employees reporting directly to him. [the beneficiary exercises authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences and goals. He conducts performance reviews and ensures that his staff followed corporate procedures.

The petitioner's president also provided an overview of the petitioner's activities in the United States to date and the beneficiary's role in the U.S. operations, noting that he: developed contacts with hundreds of Indian grocery stores all over America to sell the petitioner's products; "worked on" print and designs of outer packaging for the petitioner's products; sourced packaging materials and finalized suppliers for certain types of packaging, for which the petitioner will place orders by December 2005; sourced equipment to be

purchased for use in the United States; hired an architect and electrical engineer to prepare for reconstruction and renovation of the facilities purchased by the petitioner, expected to be completed by December 2005; hired professional engineers to design production and software systems; conducted market research in order to choose a site for the petitioner's manufacturing facility; and hired consultants to finalize the recipes and machinery required for manufacturing/marketing in the United States.

The petitioner also submits a September 19, 2005 letter from the beneficiary who states that he "took all the major decisions for the US company" and is responsible for:

- 1) To start up the USA subsidiary from scratch;
- 2) To coordinate with parent company in India and its US operations;
- 3) To make major decisions regarding investments including purchase of property to purchase of equipments. All executive decisions regarding marketing, sales and product developments;
- 4) To manage the organization, supervise and control the employees;
- 5) To hire and fire employees;
- 6) To exercise discretion over the day-to[-]day operations of company;
- 7) To hire professional agencies for implementation of project.

The petitioner submitted a separate statement describing these same duties, and adding that the beneficiary is also responsible for expanding the "existing value of the spices," making major policy decisions regarding implementation of future plans for the company, and launching products in "adjoining countries."

In addition, the petitioner submits a September 23, 2005 letter from the petitioner's accountant, who provides an analysis of the U.S. company's 2003 and 2004 payroll and notes an overall increase in the petitioner's payroll, noting that it is "normal phenomenon in frozen food industry for start up company as the payroll is minimum in first two years of operations and suddenly jumps from third-year as this industry requires initial ground work from setting up a plant to development of products." The accountant notes that the petitioner intends to employ over 35 staff during the next year. The petitioner provides a current organizational chart and complete payroll records for 2003 and 2004, including quarterly federal tax returns, state quarterly wage reports, and payroll journals. The petitioner also submitted over 30 exhibits comprising several volumes of supporting documentation, including in part the petitioner's business plan, copies of e-mail correspondence with suppliers, vendors and consultants detailing preparations for starting up manufacturing operations in the United States, research and development documentation, invoices for equipment purchased, invoices for foods sold to U.S. customers, floor plans for the petitioner's new facility, invoices for products imported from the foreign parent company, copies of recruitment advertisements, and responses received from applicants.

When examining the managerial or executive capacity of a beneficiary, CIS 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. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy. Upon review of the record in this matter and as discussed further below, the petitioner has not

established that the beneficiary's duties and those of his claimed subordinates as of the date this petition was filed elevate the beneficiary's position to 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. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner initially stated that the beneficiary would be responsible for "managing and directing all development activities," exercising "autonomous control over and exercise wide latitude and discretionary decision making" in directing such activities, and "exercise authority in regard to hiring [and] firing." These general statements merely paraphrase portions of the statutory definition of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The AAO will not speculate as to the managerial or executive job duties to be performed by the beneficiary in connection with managing all "development activities."

While the petitioner attempts to clarify the beneficiary's duties on appeal, the record still lacks a comprehensive description of the actual managerial or executive duties to be performed by the beneficiary in the United States as of the date the petition was filed. The petitioner again states that the beneficiary "manages the organization," exercises discretion over its day-to-day operations, makes "major decisions" regarding investments, marketing, sales and product development, coordinates with the claimed parent company in India, and is responsible for launching products in "adjoining countries." The petitioner, however, fails to identify the specific managerial or executive tasks the beneficiary will perform within the context of these broadly-drawn responsibilities. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

On appeal, the petitioner also indicates that the beneficiary has been responsible for personally developing contacts with hundreds of Indian grocery stores in the United States, assisting with development of package designs, sourcing packaging materials and suppliers, and performing market research duties. These duties are more indicative of an employee who is engaged in sales, marketing and product development duties rather than an employee who manages these functions, and, as discussed further below, the petitioner has not established that it had sufficient personnel as of the date of filing to relieve the beneficiary from performing non-qualifying duties associated with these routine functions. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one

“primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

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 test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties related to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company.

Based on the current record, the AAO is unable to determine whether the claimed managerial and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial duties related to the petitioner's sales, marketing and day-to-day operations. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Therefore, while it is evident that the beneficiary exercises a certain level of authority over the petitioner's operations, the fact that a 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)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Furthermore, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible description of the beneficiary's role within the organizational hierarchy. Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a two-year-old import and distribution company that claimed to employ nineteen workers. The petitioner has submitted extensive documentation demonstrating that it is also in the process of opening a manufacturing facility in the United States, which, based on the petitioner's representations on appeal, would not be operational prior to December 2005. The director specifically advised the petitioner that its initial evidence did not substantiate the employment of the claimed number of employees, and requested additional evidence to establish the number of employees, their job titles and their duties. In response, the petitioner claimed to employ the beneficiary, a company president, and 15 subordinate employees, 13 of who were assigned managerial or supervisory job titles. The petitioner's payroll records and quarterly tax returns and wage reports confirmed the employment of a total of eight employees during the

quarter in which the petition was filed, and only five employees, including the beneficiary and the president, during the month of December 2004. The three subordinate employees who received wages in December 2004 include: the chief technical manager, who appears to work full-time at minimum wage; the quality control manager, who appears to work full-time at an hourly wage of \$10.00; and the sales service supervisor, who appears to work part-time at an hourly wage of \$75.00. Although the petitioner identified the beneficiary's spouse, Radhika Shah as the "chief technical manager," a December 6, 2004 letter submitted in support of the initial petition indicated that she "handles clerical work" for the 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).

While the petitioner has submitted several impressive organizational charts, they do not correspond to the facts provided in the record regarding the petitioner's actual staffing levels. The petitioner has not submitted evidence that it employed the claimed customer service manager, facility manager, packaging supervisor, technical supervisor, facility supervisor, receiving supervisor, quality control inspector, inventory control supervisor, operational manager, marketing manager, accounting/clerical employee or secretary at the time the petition was filed. The majority of these employees did receive some wages in the second quarter of 2004, but the petitioner failed to acknowledge that they were no longer employed as of the date the petition was filed, much less explain the company's significant reduction in staffing between the third and fourth quarters of 2004. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner's lack of candor regarding its actual staffing levels raises questions regarding the credibility of its evidence as a whole. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Accordingly, the evidence shows that at the time the petition was filed, the petitioner employed: a president, whose duties have not been described; a vice president, the beneficiary, whose duties have been described in only general terms; a part-time "sales service supervisor," who is responsible for "supervision and coordination of activities of workers engaged in taking orders for frozen and snack food products;" a "quality control manager" who "plans, coordinates and directs quality control program" for production and "directs, through immediate personnel, workers engaged in inspection and testing activities"; and the beneficiary's spouse, whose position title has not been consistently identified. The petitioner has not identified that it employed any workers who would perform the day-to-day administrative, clerical, financial and operational functions of the enterprise, particularly, responsibility for import, sales, marketing and distribution of the parent company's products in the United States, which constituted the petitioner's primary business at the time the petition was filed. Collectively, this brings into question how much of the beneficiary's time could plausibly be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory,

professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner has not established that the three subordinate employees working for the petitioner as of the date the petition was filed possess or require a baccalaureate degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees, regardless of their job titles, supervises subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

While the petitioner emphasizes that its claimed parent company employs over 1,400 people and projects that the U.S. branch will employ at least 35 people in the next year, these assertions have no bearing on a determination as to whether the beneficiary's role within a company currently staffed by five employees will be primarily managerial or executive in nature. While the AAO is persuaded that the petitioning organization would eventually support a bona fide managerial or executive position if it realizes its objective of operating the planned manufacturing facility, the petitioner must show that it has sufficient staff to support the beneficiary in a managerial or executive capacity from the date of filing the petition. The petitioner must establish eligibility at the time of filing the visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Even though the enterprise may be in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements.

In sum, the record does not demonstrate that the petitioner has a sufficient number of employees in the United States who could perform the day-to-day activities associated with the company's import and distribution business. The petitioner's overly general description of the beneficiary's duties and the lack of personnel in the United States to perform the petitioner's operational functions undermine the petitioner's and counsel's claims that the beneficiary would perform primarily managerial or executive duties as of the date the petition was filed. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the U.S. company has a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate, or subsidiary of the foreign entity.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) 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.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

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.

The petitioner stated in its December 6, 2004 letter that it is a wholly-owned subsidiary of [REDACTED], located in Jalna, India. The petitioner submitted the minutes of the first meeting of the board of directors of the corporation, held December 12, 2002, which references the distribution of the petitioner's stock as follows: (1) 90 shares to [REDACTED] (the petitioning company); (2) one share to [REDACTED] and (3) nine shares to the beneficiary. The petitioner also provided copies of its stock certificate numbers one through three, showing that the foreign entity was issued 90 shares on December 12, 2002, while the beneficiary holds nine shares and the petitioner's president, [REDACTED] holds one share.

The petitioner also submitted copies of its 2002 and 2003 Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return. The 2002 income tax return indicates at Schedule K, line 5 that [REDACTED] owns 100 percent of the petitioner's stock. The 2003 tax return indicates at Schedule E and at Schedule K that [REDACTED] owns 91 percent of the petitioner's stock, while the beneficiary owns the remaining nine percent.

The director requested additional evidence on June 20, 2005, but did not specifically request further documentation to establish the claimed parent-subsidiary relationship between the foreign and U.S. entities. The petitioner's response to the request for evidence included the U.S. company's 2004 IRS Form 1120, which identifies [REDACTED] as the owner of 91 percent of the petitioner's shares.

The director denied the petition on September 6, 2005, in part concluding that the evidence submitted shows that there is no longer a qualifying relationship between the petitioner and the foreign entity. The director observed that the ownership information reflected on the petitioner's tax returns is inconsistent with the petitioner's stock certificates, and that the most recent documentation indicates that the foreign entity has no ownership interest in the U.S. company.

On appeal, counsel for the petitioner asserts that the U.S. company is wholly owned by SFP and provides the following explanation for the discrepancies observed by the director:

At the time of incorporation SFP was issued 90 shares, [the beneficiary] was issued 9 shares and [REDACTED] was issued 1 share. Due to a typographical error by the company's former CPA the percentage of shares were reversed on Petitioner's Schedule E of 2003 and 2004 U.S. corporation tax returns. The said 2003 and 2004 Corporation tax returns have been

amended by the petitioner's CPA to show the correct shareholding in Petitioner's Schedule E and have been filed with the Internal Revenue Service.

In support of the appeal, the petitioner submits IRS Forms 1120X, Amended U.S. Corporation Income Tax Return, for the 2002, 2003 and 2004 years, with accompanying Forms 5472, Information Return of a 25% Foreign-Owned U.S. Corporation. The amended tax returns indicate 90 percent ownership by the claimed foreign parent company, 9 percent ownership by the beneficiary, and one percent ownership by the petitioner's president.

Upon review, the petitioner has not submitted sufficient evidence to establish the claimed parent-subsiary relationship between the foreign and U.S. entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, 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*. 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 well as documentation of monies, property or other consideration furnished by the foreign entity in exchange for stock in the U.S. company. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner claimed to be a wholly owned subsidiary of the foreign entity and chose to submit limited and inconsistent documentation in support of this claim, namely the U.S. company's stock certificates, which appear to identify the foreign entity as the majority owner of the petitioner, and the minutes of the first meeting of the board of directors, which addresses stock issuance, but does not identify the foreign entity as a shareholder in the U.S. corporation. As noted by the director and discussed above, the petitioner's Forms 1120, U.S. Corporation Income Tax Returns for the 2002 through 2004 years indicate that the petitioner's president was originally the sole owner and subsequently the majority shareholder of the petitioner's stock.

While the petitioner has submitted amended tax returns on appeal, counsel's claim that the inconsistencies on the tax returns were based on a mere typographical error is not supported by sufficient documentary evidence to establish the actual ownership and control of the U.S. company. Further, the AAO notes that the complete omission of the petitioner's claimed parent company as a shareholder on the petitioner's tax returns cannot be considered a simple typographical error or "reversal of percentages" as asserted by counsel. Additionally, there is no evidence that the petitioner actually submitted the amended tax returns to the IRS.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the reported shareholders and shareholders' equity was a "typographical" error does not qualify as independent and objective evidence. 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. at 165 (Comm. 1998). Furthermore, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. The petitioner chose not to submit the documents generally accepted to establish ownership and control in the context of this visa classification, namely, the petitioner's stock transfer ledger, corporate bylaws, the meetings of relevant shareholder meetings, and documentation to establish that the claimed shareholders actually paid for their interest in the company.

The petitioner has not submitted sufficient evidence on appeal to overcome the director's determination on this issue. For this additional reason, the appeal will be dismissed.

The AAO acknowledges counsel's request for oral argument. However, the regulations at 8 C.F.R. § 103.3(b) provide that the requesting party must explain in writing why oral argument is necessary. CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. In this instance, counsel identified no unique factor or issues of law to be resolved. Consequently, the request for oral argument is denied.

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

ORDER: The appeal is dismissed.