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U.S. Citizenship
and Immigration
Services

B4

[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: DEC 04 2007

EAC 06 074 51230

IN RE:

Petitioner:

[Redacted]

Beneficiary:

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:

[Redacted]

INSTRUCTIONS:

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

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 filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the Commonwealth of Massachusetts that claims to be engaged in the operation of a dry cleaning business. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition on January 23, 2007, concluding 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; (2) that the beneficiary was employed in a managerial or executive capacity with a qualifying foreign entity for at least one year in the three years preceding the filing of the petition; or (3) that the U.S. company has a qualifying relationship with the beneficiary's previous foreign employer.

On appeal, counsel for the petitioner asserts that all evidence required to establish the beneficiary's eligibility for the benefit sought was provided. Counsel contends that the director did not give proper weight to the submitted evidence, and inappropriately based his decision on the petitioner's failure to submit evidence that the petitioner could not reasonably be expected to provide. Counsel submits a brief and documentary evidence in support of the appeal.

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 to be addressed in this proceeding is whether the petitioner established that the beneficiary would 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 January 9, 2006. The petitioner stated on Form I-140 that the U.S. company, which operates a dry cleaning establishment with three employees, seeks to employ the beneficiary as its general manager. In an attachment to the Form I-140, the petitioner provided the following description of the beneficiary's proposed duties:

The duties of the General Manager are to oversee the management of the organization and its growth and development. The director must plan, develop [sic], and establish policies and objectives of the organization in accordance with the organizational charter. The director must confer with vendors and clients to promote the business plan objectives. In addition, the General Manager is responsible [sic] for developing organizational policies, functions, and operations that maximize the organization's efficiency.

The General Manager must also create and review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. The director must also coordinate the formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and insure increasing productivity.

The petitioner did not submit additional evidence in support of the petition. Accordingly, on July 21, 2006, the director issued a request for additional evidence. The director instructed the petitioner to submit the following evidence: (1) a complete position description for all employees in the United States, including one for the beneficiary's position, to include a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; (2) evidence of the staffing of the U.S. company, including copies of IRS Forms W-2 and 1099 issued in 2005; (3) documentation to establish that the position to be held by the beneficiary will encompass duties that are primarily those of a manager or executive, as opposed to being operational duties.

In a letter from the petitioner dated September 14, 2006, the beneficiary's duties were further described as the following:

[T]he Beneficiary is responsible for providing the organization with the vision and leadership to carry out its mission and to balance organizational priorities through an inclusive strategic planning and management system. [The beneficiary] improves organizational operations and programs. She develops policies and strategies for management including all revenues, expenses, and hiring and firing of personnel [sic]. [The beneficiary] has the duty to ensure fiscal accountability and long-term stability through the conservative management of resources. Furthermore, she negotiates terms of all major contracts with vendors and exercise[s] judgment and discretion in connection with hiring and firing employees.

The business, property, and affairs of [the petitioner] are managed exclusively by the Beneficiary. She has full, complete and exclusive authority, power, and discretion to manage and control the business, property and affairs of the Company, and makes all decisions

regarding these matters and to perform any and all other acts or activities customary or incident to the management of the Company's business, property, and affairs.

In a separate statement, the petitioner provided a different position description, noting that the beneficiary's proposed role "encompasses the full range of managerial actions directly concerned with the operation of the business dry cleaning corporation," and is the "highest technical level, insofar as management of the laundry activity is concerned." The petitioner explained that the duties blend "office-type administrative duties" and "direction of plant production activities." The "office-type" duties include: (1) adjusting workload to eliminate "uneconomical peaks and valleys"; (2) reviewing cost of operations against budgeted costs and determining action needed to correct deficiencies; (3) maintaining good customer relations by noting incidence of claims for lost or damaged articles, complaints regarding late deliveries and reports of inferior quality work; and (4) carrying out responsibilities for personnel, supply and records.

The petitioner indicated that the beneficiary's responsibilities in directing the plant production activities would include the following:

- (1) seeing that a balance is maintained between workload and the equipment in use . . . ;
- (2) keeping work force in balance with workload by authorizing overtime or obtaining authorization from an appropriate official, negotiating for additional positions to meet increasing volume, or declaring unnecessary positions surplus;
- (3) ensuring adequate plant maintenance by determining kind and frequency of equipment lubrication and cleaning requirements, supervising overhaul of equipment, arranging the timing of equipment overhaul and installation . . . ;
- (4) working out or approving master work schedules and ensuring that the lot sizes are kept compatible with equipment facilities of the various departments;
- (5) making or arranging for studies of plant layout to ensure efficient locating of new machines or equipment . . . ;
- (6) ensuring that effective dry cleaning processes are used by keeping informed of results of tensile-strength tests. . . ;
- (7) ensuring proper observance of standardized washing formulas, dry cleaning formulas, extractor and tumbler cycle times, ironer speeds, etc., and taking action on reports of substandard supplies.

The petitioner did not respond to the director's request for evidence regarding the job titles and duties of any subordinates to be supervised by the beneficiary, nor did it submit evidence of wages paid to its employees, such as the requested IRS Forms W-2 or 1099. The petitioner provided a copy of its IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which shows that the U.S. company paid salaries and wages in the amount of \$20,800, and compensation of officers in the amount of \$24,000 in 2005.

Finally, counsel for the petitioner submitted a memorandum in support of the petition, in which he recited the statutory definition of managerial capacity and stated that the beneficiary "is responsible for each of the duties identified in the Immigration and Nationality Act."

The director denied the petition on January 23, 2007, concluding that the petitioner had not established that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director found that the petitioner had offered "no verifiable information" to support its contentions that the beneficiary "has been" or would be employed in such a capacity. The director noted that the beneficiary at the time of filing was "a nonimmigrant student living in a different state from that of the intended employment, exhibiting no managerial/executive background" to qualify her for the intended position.

On appeal, counsel for the petitioner focuses on the director's statement that the petitioner had not established that the beneficiary "has been" employed by the petitioner, noting that there is no requirement that the beneficiary be currently employed by the U.S. company. Counsel states that "the regulations and statutes are silent as to whether the petitioner must provide 'independently verifiable evidence' that the beneficiary will prospectively perform such services." Counsel asserts that the fact that the beneficiary has filed an application for adjustment of status is sufficient to establish that she intends to remain in the United States and undertake employment with the petitioning company.

In addition, counsel contends that USCIS requested evidence beyond what is required in the statute and regulations and what the petitioning company could reasonably provide. Counsel contends that the regulations do not require "independently verifiable evidence," but only "a statement from an authorized official of the petitioning United States employer that the beneficiary meets the appropriate qualifications."

Upon review, the petitioner has not established that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. Preliminarily, the AAO acknowledges that the director erred in concluding that the petitioner failed to establish that the beneficiary "has been" employed by the petitioner. There is no requirement that the beneficiary is currently an employee of the prospective U.S. employer, and the fact that the beneficiary appeared to be living in a different state at the time of filing is irrelevant to the adjudication of this matter. The director's comments regarding whether the beneficiary is currently or has been employed with the U.S. company are withdrawn.

Notwithstanding these comments on the part of the director, a review of the director's decision in its entirety makes it clear that the substantive issue is whether the petitioner submitted sufficient evidence to establish that the beneficiary will be employed in the United States *in a managerial or executive capacity*, not simply whether the beneficiary will be employed by the petitioning company. Counsel's arguments on appeal do not address the director's finding that the beneficiary's employment would not be in a qualifying capacity. The AAO concurs that there is no reason to doubt that the petitioner intends to employ the beneficiary if the petition is approved, and notes that the director did not determine otherwise.

When determining whether a beneficiary will be employed in a primarily managerial or executive capacity, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. Here, the inconsistent position descriptions for the beneficiary's proposed position, considered with the petitioner's failure to submit evidence requested by the director regarding the petitioner's staffing levels, prohibit a conclusion that the beneficiary's duties would be primarily managerial or executive in nature.

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's initial description of the beneficiary's duties was excessively vague and provided little insight into the nature of the duties to be performed by the beneficiary as general manager of a dry cleaning business. The petitioner's statements that the beneficiary will "oversee the management of the organization," "plan, develop [sic] and establish policies and objectives," "develop organizational policies, functions and operations," and "coordinate the formulation of financial programs" essentially paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. 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.).

As noted above, the immigrant petition was filed without supporting evidence, other than the general position description attached to the Form I-140. Accordingly, the director reasonably requested a complete position description for the beneficiary's position, and a breakdown of the number of hours she will devote to each of her duties on a weekly basis. The petitioner's response included two completely different descriptions of the same position. The description included in the petitioner's letter dated September 14, 2006, was similar to the initial position description, in that it was overly general and failed to identify with specificity the managerial or executive duties to be performed. For example, the petitioner stated that the beneficiary would have "full, complete, and exclusive authority, power and discretion to manage and control the business," "exercise judgment and discretion," "develop policies and strategies for management," and provide the organization with "vision and leadership." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's proposed activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The other position description submitted in response to the director's request for evidence includes none of the same duties as the other two descriptions, but the AAO finds it to be more persuasive as it identifies specific tasks to be performed within the context of a dry cleaning establishment. Nevertheless, the petitioner provided no explanation for the simultaneous submission of two different descriptions for the proposed position of general manager. 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 majority of the duties included in the alternate position description provided in response to the request for evidence encompass administrative and first-line supervisory tasks that do not rise to the level of managerial or executive capacity. This position description does not suggest that the beneficiary would exercise the

appropriate level of authority over the organization or a component or function of the organization, as contemplated by the statutory definitions. Rather, the duties described reflect the beneficiary's proposed responsibility for making employee work schedules, scheduling equipment maintenance, performing customer service tasks, administrative record-keeping, and direct supervision of dry cleaning personnel. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not submitted evidence or claimed that the beneficiary would supervise professional workers within the three-person dry cleaning business, and therefore, any supervisory duties she may perform would not be considered managerial in nature.

As each of the position descriptions submitted were deficient, the director reasonably sought to review additional evidence, such as the petitioner's staffing levels, in an effort to determine whether the petitioner could reasonably support a managerial or executive position. 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 perspective of the beneficiary's role within the organizational hierarchy. The petitioner has not submitted sufficient evidence to establish the size and organizational structure of the U.S. entity and therefore it cannot be concluded that the company has a reasonable need for the beneficiary's services in a primarily managerial or executive capacity.

The AAO acknowledges counsel's objections to the director's request for additional evidence. Counsel contends that the regulations specifically request nothing more than "a statement from an authorized official of the petitioning United States employer" demonstrating that the beneficiary meets the qualifications, pursuant to the regulation 8 C.F.R. § 204.5(j)(3)(i). The AAO notes that the petitioner did not submit such a statement or any evidence in support of the initial petition. As noted by counsel, the regulation at 8 C.F.R. § 204.5(j)(3)(ii) allows the director to request additional evidence in appropriate cases. Furthermore, the regulations state 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).

Upon review of the director's request for evidence, the AAO finds that the director did not request anything that is beyond what is contemplated by the statute or regulations, nor did he request evidence that could not reasonably be provided by the petitioner. The director requested a detailed description of the beneficiary's duties and evidence regarding the staffing of the U.S. company, including description of the duties to be performed by the beneficiary's subordinates, and evidence of wages paid to the U.S. employees. The statute specifically allows USCIS to consider a petitioner's staffing levels when evaluating a petitioner's claim that a beneficiary would be employed in a primarily managerial or executive capacity. *See* section 101(a)(44)(C) of the Act (requiring USCIS to take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity). The petitioner's failure to respond to the director's request for documentary evidence related to the petitioner's staffing levels cannot be excused.

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).

At the time of filing, the petitioner was a two-year old company that appears to operate a single dry cleaning establishment. It claims to employ a staff of three workers, which presumably includes the individual identified as the company president, [REDACTED]. The petitioner has chosen not to provide any evidence regarding the job titles and duties of its existing employees, or indicate how the newly-created position of general manager offered to the beneficiary would fit into its current organizational structure. Although counsel insists that nothing other than the petitioner's statements is required, the AAO cannot conclude based on the evidence submitted that a dry cleaning establishment with one president and two lower-level employees has a need for a full-time general manager to perform duties consistent with the criteria set forth in the statutory definitions of managerial and executive capacity. 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)).

Furthermore, although counsel insists that USCIS rely solely on the petitioner's unsupported statements, the petitioner has not provided a consistent account of the nature of the beneficiary's proposed duties. The most credible of the three descriptions provided suggests that the beneficiary will perform administrative tasks and supervise the non-professional employees providing the dry cleaning services. Finally, the AAO notes that, given the labor-intensive, service-oriented nature of the petitioner's business, it is questionable whether a staff of two lower-level employees would even relieve the beneficiary and the company president from performing such routine tasks as operating dry cleaning equipment or handling customer transactions. The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. *See Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003).

Overall, based on the limited evidence available for review, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a president, a general manager and two other employees whose duties have not been defined. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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

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

The initial petition filing did not include a supporting letter or evidence identifying the beneficiary's employment history, such as the dates of her claimed qualifying employment abroad, the name of the company that employed her, or her job titles or job duties. The limited evidence submitted indicated that the beneficiary had been in the United States since March 15, 2004, for nearly 22 months, as of the date of filing, initially as a visitor, and currently as an F-1 student. According to the beneficiary's Form G-325A, Biographic Information, submitted in conjunction with her concurrently filed Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary was employed by "Private Company, Seoul Korea" as general manager from March 2000 until March 2004.

In the request for evidence issued on June 21, 2006, the director requested "verifiable documentary evidence" to establish that the beneficiary had been employed abroad on a full-time basis with a qualifying entity for one full year within the three years preceding the filing of the petition, as well as additional evidence showing the management structure and personnel structure of the foreign entity. Specifically, the director instructed the petitioner to provide: (1) an organizational chart for the foreign entity identifying all employees by name and position title; (2) complete position descriptions for all foreign employees, including the beneficiary, to include a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; and (3) information regarding the number of subordinate supervisors under the beneficiary's management and the beneficiary's level of authority while employed by the foreign entity.

In a response received on September 18, 2006, the petitioner submitted an undated letter from [REDACTED] the representative of [REDACTED], located in Seoul, Korea. Mr. [REDACTED] stated that the foreign company offers real estate, investment and relocation services to individuals and businesses. Mr. [REDACTED] indicated that the beneficiary was hired by the foreign entity as a "Team Manager" and was promoted to the position of "Executive Manager" but did not provide her dates of employment in either position. Mr. [REDACTED] provided a position description, an organizational chart, and an "employee profile" for the beneficiary which indicates that she joined the foreign company on March 10, 2000.

The director denied the petition, concluding that the petitioner had not established that the beneficiary was employed full time for at least one year with a qualifying entity within the three-year period preceding the filing of the petition. The director noted his request for "comprehensive verifiable evidence," to establish that the beneficiary met this eligibility requirement. The director found the statements from [REDACTED] to be "devoid of any validation" and thus of "no intrinsic adjudicative value."

On appeal, counsel states the petitioner is submitting an employment record from the foreign entity in the form of a "salary card." Counsel asserts that the documentation "establishes by clear and convincing evidence that beneficiary meets the standard requiring employment with an affiliated organization one of the last three years abroad."

The attached "Employee's Salary Card" is on the letterhead of [REDACTED] and is dated March 15, 2007. The document references the beneficiary and indicates that she was hired on July 1, 1995 and received bi-annual adjustments to her monthly salary until resigning from the company on January 25, 2004. The document is signed by Young-Sook Kim as representative of the company.

Upon review, the petitioner has not submitted sufficient evidence to establish that the beneficiary was employed by the foreign entity for one year within the three years preceding the filing of the petition. Neither the evidence submitted in support of the initial petition nor the petitioner's response to the director's request for evidence included documentary evidence of the beneficiary's employment with the foreign entity. The undated statements submitted by ██████████ did not specify the beneficiary's dates of employment, and thus were clearly not responsive to the director's request for verifiable documentary evidence to establish that the beneficiary was employed for one full year during the three-year period preceding the filing of the petition. 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. 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 was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits additional evidence on appeal in the form of a "salary card." However, the AAO need not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

The AAO further notes that the "salary card" submitted on appeal is really nothing more than a letter from ██████████, who is claimed to be the sole proprietor of the foreign company. The company name on the letter is different from the company name that appeared on Mr. ██████████ previous statement, but no explanation has been provided for the change. The beneficiary's hire date on the salary card is indicated as July 1, 1995, while the previous "employee profile" indicated that she was hired on March 10, 2000. The employee profile also suggested that the beneficiary was still an employee of the foreign entity, while the "salary card" indicates that she resigned on January 24, 2004. 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). Given these unexplained discrepancies, the "salary card" is not sufficient to establish the beneficiary's employment with the foreign entity. The petitioner's inability to produce any evidence of the beneficiary's employment with the foreign entity other than the unsupported statements of ██████████ is questionable. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Based on the foregoing, the petitioner has not submitted evidence on appeal to establish that the beneficiary was employed by the foreign entity for a one-year period within the three years preceding the filing of the petition. Accordingly, the appeal will be dismissed.

The third issue in this matter is whether the petitioner established that the U.S. company 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. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

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 did not submit any supporting documentary evidence at the time of filing, nor provide a statement identifying a foreign company with which it could claim a qualifying relationship. In the request for evidence issued on June 21, 2006, the director advised the petitioner that it must submit documentary evidence to establish that the U.S. company has a qualifying relationship with a foreign entity. Specifically, the director instructed the petitioner to submit: (1) copies of all issued and outstanding stock or share certificates for the foreign entity and the United States entity; (2) documentary evidence to show that the foreign entity has been in contact with the U.S. company's incorporator and representatives through the U.S. entity's incorporation process; and (3) copies of canceled checks, letters of credit, monetary transfers, etc. that were used by the foreign entity to fund the incorporation of the U.S. entity.

In response, counsel for the petitioner submitted a memorandum in which he explained that the foreign entity is a sole proprietorship owned and operated by [REDACTED]. Counsel noted that the foreign entity is "not encumbered with the legalistic formalities of other business organizations." Counsel stated that [REDACTED] is the majority shareholder of the petitioning company, therefore the companies qualify as affiliates.

In support of these assertions, the petitioner submitted a letter from [REDACTED] in which he stated that he is the sole proprietor of the foreign entity, [REDACTED]. With respect to the U.S. company, the petitioner submitted the following:

- A copy of the U.S. company's stock certificate #1001, issuing 7,501 shares to [REDACTED]. The stock certificate is dated September 1, 2005.

- The U.S. company's bylaws, which are executed by [REDACTED] as President. The document is undated.
- The U.S. company's operating agreement, dated "September 1," which indicates that the company will be managed by the Manager, who shall be elected by the Member(s). [REDACTED] signed the document as the sole member of the company. The year in which the document was signed cannot be determined.
- An Agreement of Financial Support, whereby a "Lead Investor" committed to provide the U.S. company "any amount necessary to operate the business operations up to and including \$100,000." The agreement states at section 7.7 that the company "has two principle [sic] partners that own 100% of the outstanding capital stock of all classes of the company." The document is signed by [REDACTED] on behalf of Othe petitioner, and signed by [REDACTED], who is presumed to be the "lead investor." The document is not dated, and it does not include exhibits A and B, which are referenced throughout the document.
- Minutes of the organizational meeting of the U.S. company, which is also undated. The meeting minutes indicated that the beneficiary was elected "managing member 1" of the company, on behalf of [REDACTED]. The minutes include a resolution to issue certificates representing ownership in the company to [REDACTED]
- Copies of the U.S. company's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation for the 2003 and 2005 tax years. Both documents include Schedule K-1, Shareholder's Share of Income, Credits, [REDACTED] as the sole shareholder of the U.S. company.

The director denied the petition concluding that the documentation submitted was not supported by substantive independent corroboration as to its validity, such as relevant dates, appropriate seals by state or federal business commissions or authorities or current related tax documents. The director therefore determined that the petitioner had not established the requisite qualifying relationship between the two entities.

On appeal, counsel asserts that the petitioner has established an affiliate relationship between the U.S. and foreign entities. Counsel asserts that the petitioner has presented a stock certificate that establishes that Young Kim controls the majority of shares of the U.S. entity, and provided evidence that Mr. [REDACTED] controls the organization in Korea. Counsel contends that "the government is not permitted to disregard [sic] the documentation that the petitioner provided related to the qualifying affiliation of the organizations." Counsel emphasizes that it is "well known that sole-proprietorships are not incorporated entities and therefore do not have documentation as such." Counsel again relies on the regulation at 8 C.F.R. § 204.5(j)(3)(i), noting that the regulations only require "a statement from an authorized official of the United States employer" as an accommodation to small organizations which "may not be able to provide the same materials as a large corporation."

In support of the appeal, counsel re-submits the petitioner's stock certificate #1001 issued to [REDACTED] and a Korean Certificate of Local Tax Assessment showing that [REDACTED] paid property, education and

urban planning taxes for "building, land" in July 2006. It is not clear whether the document represents a personal or business tax, as the "Name of Firm" is not indicated on the document.

Counsel's assertions are not persuasive. The petitioner has not submitted sufficient evidence to establish that the U.S. and foreign entities have a qualifying relationship.

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*. 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. § 204.5(j)(3)(ii). As the petitioner did not submit the required evidence of a qualifying relationship between the petitioner and a foreign entity, the director's request for documentary evidence was justified.

Contrary to counsel's assertions on appeal, the petitioner has not documented the ownership and control of the United States and foreign entities. With respect to the foreign entity, the AAO recognizes that a sole proprietorship will not be able to provide copies of stock certificates. However, it was clear from the director's request that documentary evidence of the ownership of the foreign entity must be submitted. A letter from the claimed sole proprietor stating that he owns the foreign company is not sufficient. It is reasonable to expect that Mr. Young Kim has registered to do business as a sole proprietor with local government authorities in Korea, was assigned a registration number, or has some other government-issued evidence unequivocally identifying him as the owner/operator of the foreign entity. The certificate of local tax assessment submitted on appeal simply shows that Mr. Kim paid property taxes in Korea. Other than Mr. Kim's statements, there is no evidence in the record of the existence or ongoing operation of a company known as Kumsung Immovable Agency, Co. 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.

The evidence submitted to establish the ownership and control of the United States company is replete with discrepancies and inconsistencies that raise serious questions regarding its credibility.

The petitioner was incorporated in May 2003 and appears to have been active since that time. The petitioner's 2003 income tax return identifies [REDACTED] as the company's sole shareholder. It is reasonable to expect that Mr. [REDACTED] would have been issued a stock certificate when the company was established in 2003, but the petitioner has submitted no stock certificate issued to him, nor has it provided a copy of its initial articles of organization that were filed in 2003. Instead, the petitioner has presented the minutes of an "organizational meeting" held on some unspecified date in which it was agreed that a certificate of ownership would be issued to [REDACTED]. The petitioner presents its stock certificate #1001 issued on September 1, 2005 as evidence of Mr. [REDACTED]'s ownership, but provides no explanation as to why the company would hold its organizational meeting more than two and one half years after it was incorporated. Doubt cast on any aspect of the petitioner's proof may undermine 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).

At the same time the petitioner represents Mr. [REDACTED] as an original owner of the company, it has submitted an incomplete, undated "agreement of financial support" indicating that he made an investment in the company at a time when it had "two principle [sic] partners that own 100% of the outstanding capital stock of all classes of the Company." These two "principle [sic] partners" are not identified, and it was not clear from the agreement whether any transfer of ownership would occur. However, it is clear based on the totality of the evidence submitted that more than one stock certificate has been issued by the U.S. company, and Mr. [REDACTED] was not the original owner. 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* at 591-92. Furthermore, as noted by the director, the bylaws, organizational meeting minutes, and agreement of financial support were all undated, which raises further questions regarding their validity. Finally, the AAO notes that the petitioner did not submit evidence of monetary transfers from the claimed owner to the U.S. company, or explain why it was providing only one stock certificate, in light of its claim that Mr. [REDACTED] is the majority owner, not the sole owner, of the U.S. company.

The evidence that is most damaging to the petitioner's claims is the U.S. company's 2005 tax return, which identifies Mr. [REDACTED] as the sole shareholder of the company. Given the dubious nature of the petitioner's corporate documentation, the AAO finds the tax return more credible than any other evidence submitted with respect to the ownership of the U.S. company.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's or petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility,

both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, for the reasons discussed, the submitted evidence with respect to the ownership of the U.S. and foreign companies is not relevant, probative, and credible, and therefore, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

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.