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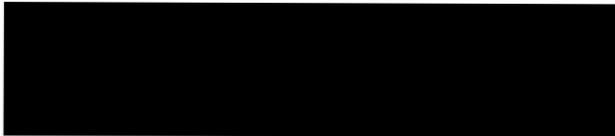
File: WAC 05 114 51733 Office: CALIFORNIA SERVICE CENTER Date: **DEC 06 2006**

IN RE: Petitioner:
Beneficiary



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF THE 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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its director as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The U.S. entity, a California corporation, claims to be engaged in the import, export and wholesale of general merchandise and gift items. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for three additional years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; (2) that the U.S. company has a qualifying relationship with the foreign entity; or (3) that the U.S. company was doing business for the previous year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's decision and asserts that the petitioner submitted sufficient evidence to establish the petitioner's and beneficiary's eligibility for the benefit sought. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant visa petition was filed on March 15, 2005. The petitioner indicated on Form I-129 that the company has one employee. In a letter dated March 14, 2005, counsel for the petitioner submitted the following description of the beneficiary's duties as "Director (Overall Operations):

1. Oversee the Company's day to day operations,
2. Assure that the set standards and guidelines are met,
3. Promote and organize import, export activities,
4. Coordinate the work of outside vendors who are engaged to perform services,
5. Ensure that the inventory is up-to-date,
6. Maintain good relations with the Clients and cater to their needs,
7. Active involvement in the Company's overall business growth.

The petitioner noted that the beneficiary had recently attended "several trade shows" and noted that he would attend four trade shows in 2005. The petitioner further stated that the beneficiary "is involved in undertaking any turnkey projects for wholesale and ensuring the smooth and effective operation of U.S. Company and performing his other executive duties."

On May 5, 2005, the director issued a request for evidence, in part instructing the petitioner to submit the following evidence in support of its claim that the beneficiary would be employed in a managerial or executive capacity: (1) the total number of employees in the United States; (2) a detailed organizational chart identifying each employee under the beneficiary's supervision by name and job title; (3) a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision, as well as the source of remuneration for all employees; (4) a more detailed description of the beneficiary's duties including the percentage of time spent in each of the listed duties; and

(5) copies of the U.S. company's California Form DE-6, Quarterly Wage and Withholding Report, for the last four quarters that were accepted by the State of California.

In a response dated July 21, 2005, counsel for the petitioner stated that the beneficiary "is responsible for achieving profitable growth by implementing successful import/export activities, as well as for identifying and exploiting opportunities to develop business into new market sectors." Counsel reiterated the job description recited above, and noted that the beneficiary "is also responsible for developing customers, and establishing long lasting business relationships."

The petitioner did not provide an employee list, organizational chart or quarterly wage reports. Counsel noted that the beneficiary is currently the only employee of the U.S. company.

The director denied the petition on August 29, 2005, concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director noted that the beneficiary's job description was too broad to establish the actual duties performed by the beneficiary. The director further found that the beneficiary, as the only employee of the company, would necessarily perform non-qualifying sales and marketing duties, as well as other routine tasks associated with the day-to-day operation of the petitioner's business.

On appeal, counsel for the petitioner states that the beneficiary "does establish the goals and policies of the organization, has exercised wide latitude in discretionary decision making and has received minimal general supervision or direction from the higher level executives" in support of his assertion that the beneficiary will be employed in an executive capacity under the extended petition. Counsel also reiterates verbatim all previous job descriptions submitted in support of the petition, and emphasizes lines of credit negotiated by the beneficiary as evidence of his employment in a managerial capacity. Counsel states that the beneficiary will "be able to practice the managerial aspect and be able to grow the business with the granting of this three year extension." Counsel concludes that the record is "completely clear and abundant that the beneficiary manages the business in an Executive capacity."

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees, performance of the duties of another type of non-managerial or non-executive position, or other involvement in the operational activities of the company.

Here, the petitioner's description of the job duties fails to establish that he would perform primarily managerial or executive duties under the extended petition. For example, the petitioner initially stated that the beneficiary oversees the company's day-to-day operations, assures that "set standards and guidelines are met," and coordinates the work of "outside vendors who are engaged to perform services." The petitioner did not explain its "standards and guidelines," identify the number or type of "outside vendors" utilized by the petitioner, or indicate what day-to-day tasks the beneficiary performs to oversee the company's operations. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the job description suggested that the beneficiary would perform a number of non-qualifying duties associated with the company's sales, marketing, inventory and import/export functions, including attending trade shows, promoting and organizing import and export activities, monitoring inventory, customer relations and sales, customer service, and "active involvement in the Company's overall business growth." Based on the vague description provided, the director was unable to determine what specific role the beneficiary had in carrying out the routine day-to-day functions of the company and could not reasonably determine that these duties are managerial or executive in nature, particularly in light of the petitioner's indication on Form I-129 that the company had only one employee as of the date of filing. 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).

Accordingly, the director requested a detailed statement regarding the beneficiary's specific job duties and the percentage of time the beneficiary devotes to each duty, as well as the duties performed by each of the beneficiary's subordinates. The petitioner was also afforded an opportunity to describe its organizational structure, and to provide evidence of payments to any outside employees who may be paid as contractors or on commission. In response, the petitioner simply reiterated the job description that was already found to be insufficient by the director, and confirmed that the beneficiary is the sole employee of the company at the end of its first year of operations.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Here, the evidence requested by the director regarding the beneficiary's specific job duties and the amount of time allocated to each job duty is critical, as whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. This failure of documentation is important because several of the beneficiary's described duties, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel re-iterates the previous job description as evidence that the beneficiary will serve in a primarily managerial capacity, and asserts that the beneficiary will also serve in an executive capacity. In support of this assertion, counsel merely paraphrases the statutory definition of executive capacity, noting that the beneficiary "establishes the goals and policies of the organization, has exercised wide latitude in discretionary decision making and has received minimal general supervision from higher level executives." See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(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. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In the instant matter, the petitioner has failed to show that non-qualifying duties will not occupy the majority of the beneficiary's time. The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform such that they can be classified as managerial or executive in nature. As the record is devoid of a comprehensive description of the actual duties, it cannot be concluded that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. 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 activities in the course of his 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.

Absent a comprehensive description of the beneficiary's duties, the director reasonably looked to the petitioner's staffing levels to ascertain the credibility of the petitioner's claims that the beneficiary would be employed in a primarily managerial or executive capacity. While company size cannot be the sole basis for denying a petition, that element can nevertheless be considered, particularly in light of other such pertinent factors as the nature of the petitioner's business, which, together, can be used as indicators which help determine whether a beneficiary can remain focused on managerial or executive duties or whether that person is needed, in large part, to assist in the company's day-to-day operations.

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. However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Moreover, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the

petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

In the instant matter, the beneficiary is the sole employee of a company that claims to be engaged in import, export and wholesale activities. It is therefore reasonable to assume, and has not been shown to be otherwise, that the beneficiary himself is responsible for all routine sales, marketing, purchasing, administrative, financial tasks, and all other operational duties associated with coordinating imports and export activities on behalf of the company. Absent evidence of the petitioner's employment of lower-level employees or its use of outside workers to perform the administrative and operational tasks of the business, the AAO cannot conclude that the reasonable needs of the petitioning company require the services of an employee who performs primarily managerial or executive duties. Rather, it is evident based upon a review of the record that the petitioner reasonably requires the beneficiary to perform all operational and administrative tasks associated with operating the business on a day-to-day basis, which would necessarily preclude him from performing primarily managerial or executive duties, as required by the statutory definitions. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner indicates that the company intends to expand and hire additional employees in the future. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Further, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner established that the U.S. company has been doing business in the United States for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The term "doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office. 8 C.F.R. § 214.2(l)(1)(ii)(H).

The nonimmigrant petition was filed on March 14, 2005. The beneficiary's "new office" petition was previously granted for a one-year period commencing on March 16, 2004. On the Form I-129 Petition, the petitioner stated that its gross annual income is \$901,000 and its net annual income is \$154,140. The petitioner also submitted a projected profit and loss statement for the period from March 2005 through December 2005, which indicated the same figures as projected gross sales and net profit. In support of the petition, the petitioner also provided: a seller's permit issued on September 10, 2004; a business license issued on September 16, 2004; a fictitious business name statement issued on August 27, 2004; a commercial lease for office and warehouse space, which commenced on October 1, 2004; a letter from a Hong Kong-based supplier confirming that the company had done business with the U.S. company since September 2004, with

attached copies of packing lists for shipments of goods imported by the petitioner; the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for the 2002, 2003 and 2004 years; invoices and bills of lading for goods imported by the petitioner, dated from September 2004; and letters from two additional suppliers who confirmed supplying the petitioner with goods on credit during the months of December 2004 and January 2005, and stated that the petitioner had been extended credit for goods valued up to \$500,000. The petitioner's 2004 income tax return indicated total assets of \$27,057, no gross receipts or sales or other income, no salaries or wages, no compensation to officers, \$2,834 in rents paid, and \$7,094 in purchases. The petitioner's 2003 income tax return showed gross sales of \$36,784 and \$20,390 in rents, but also indicated that no salaries were paid.

In the request for evidence issued on May 5, 2005, the director stated:

The petition claims that the US company's gross annual income is \$901,000.00. However Federal Tax Returns of 2002, 2003, 2004 are contradict [sic] to this claim. Provide clarification of the above-mentioned discrepancies with certified documents to establish that the U.S. company is doing business.

In response, counsel for the petitioner emphasized that "the figure of the \$901,000 was clearly stated as the **projected** gross sales from March 2005 – December 2005. . . . and not the actual income earned." (Emphasis in original). Counsel stated that it is doing business with several companies which had granted it an extended line of credit. In support of its response, the petitioner submitted a brochure; a purchase order dated April 27, 2005; a June 7, 2005 sales contract which did not list the petitioner as a party; and other documents related to the same sales transaction. The petitioner stated that the company intends to open a wholesale outlet in the near future, and submitted a "Proof of Credit Application for Lease " for wholesale/retail space signed on June 17, 2005.

The director denied the petition on August 29, 2005, concluding that the petitioner had not submitted sufficient evidence to establish that the petitioner was doing business for the previous year. The director noted that the petitioner's evidence did not overcome the fact that the 2004 income tax return showed no business activities. The director noted that the application for credit for a lease further supported a conclusion that the petitioner has not been doing business.

On appeal, counsel for the petitioner asserts that the beneficiary "has clearly been conducting business in this country." Counsel emphasizes that the petitioner has continuously maintained valid lease agreements since 2003, and notes that a credit application was submitted because the executed lease for a new location was not available at the time the petitioner submitted a response to the request for evidence. Counsel asserts that "the beneficiary has filed timely tax returns, conducted business expos, and attended several trade shows of which were substantially documented." Counsel further states "the schedule K was not properly reported on the tax return, it was an oversight, and was brought to the attention of the preparer." As further evidence that the U.S. company is conducting business, the petitioner submits: evidence of online banking activities for the period from March 15, 2005 through September 15, 2005; invoices for goods sold in August 2005; import shipment details from courier service providers, dated from April to June 2005; photographs of the company's new premises, and other documents, all of which post-date the filing of the petition.

Upon review, the petitioner has not established that the U.S. company has been doing business for the previous year. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

The beneficiary was granted L-1A status in March 2004 and must show that the company has been doing business as defined in the regulations since that time. The record is devoid of any evidence that the company was engaged in the regular, systematic and continuous provision of goods and services during 2004. Although it appears that the petitioner imported some goods late in 2004, the petitioner reported no sales or purchases during that year on its corporate tax returns and has not adequately explained the complete lack of business activity in 2004. Counsel's suggestion that there was an error on the petitioner's tax returns is not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The majority of the evidence submitted to support the petitioner's claim of doing business is dated after the filing of the petition on March 14, 2005. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has not submitted evidence on appeal to overcome the director's decision on this issue. Accordingly, the appeal will be dismissed.

The third and final issue to be discussed in this matter is whether the petitioner has established that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
 - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

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

* * *

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

In a letter dated March 14, 2005, counsel for the petitioner stated: "[The petitioner] is a subsidiary of B.H. Patel & Co. and Indu Biri Company, both located in India. [The petitioner] holds 49% of stock shares." In support of the petition, the petitioner submitted: (1) its articles of incorporation, dated January 9, 2002, which indicate that the company is authorized to issue 100,000 shares of stock; (2) its by-laws; (3) minutes of the organizational meeting dated January 9, 2002 which indicates that 499 shares would be issued to the beneficiary and 501 shares to B.H. Patel & Co., in exchange for consideration of \$1.00 per share from each shareholder; (4) the petitioner's stock certificate number one, issuing 499 shares to the beneficiary on June 18, 2002; and (5) stock certificate number two issuing 501 shares to B.H. Patel & Co. on June 18, 2002.

The petitioner also submitted its 2003 IRS Form 1120, U.S. Corporation Income Tax Return which indicates at Schedule K, Line 7 that the company is not at least 25% owned by a foreign individual or company, and indicates at Schedule K, Line 11 that the company has one shareholder. Schedule L, Line 22b of the Form 1120 indicates that the value of the company's stock is \$10,000. The company's 2004 Form 1120 contained similar information.

In the request for evidence issued on May 5, 2005, the director observed that the petitioner's tax returns indicate that the U.S. entity has no foreign control or ownership, and advised the petitioner to provide evidence to provide clarification of this discrepancy, in light of its claim that it is a subsidiary of a foreign entity.

Specifically, the director instructed the petitioner as follows:

The evidence should include copies of the original wire transfers from the parent company. Also, cancelled checks, deposit receipts, etc., detailing monetary amounts for the stock purchase should be submitted. Provide the account holder names and affiliation to the foreign entity for all persons making purchases and the bank accounts that were used. The originator(s) of the monies deposited or wired must be clearly shown and verifiable by name

with full address and phone/fax number. For all funds not originating with the foreign company, explain the source and reason for receiving such funds, and provide the names of all account holders depositing these funds, and their affiliation to the foreign or U.S. company.

In his July 21, 2005 letter, counsel for the petitioner re-iterated that the B.H. Patel & Co. owns 51 percent of the petitioning company and submitted the following documents: (1) a Bank of America customer receipt showing a \$4,000.00 deposit into the petitioner's account on June 18, 2002; and (2) five "Foreign Exchange Division Cash Memos" dated December 21, 2000, for U.S. currency sold to H.C. Patel, R.H. Patel, A. Patel, and K. Patel, totaling \$16,800. The petitioner also resubmitted its stock certificates numbers one and two.

The director denied the petition concluding that the petitioner failed to establish a qualifying relationship between the U.S. and foreign entities. The director acknowledged the submission of the bank deposit receipt for \$4,000, but noted that the deposit receipt did not indicate the source of the funds. The director also noted that the cash memos were dated in 2000, more than one year prior to the incorporation of the U.S. entity, and were submitted with no explanation. Finally, the director observed that the petitioner had not resolved the discrepancies in the petitioner's income tax returns, which indicated no foreign ownership or control.

On appeal, counsel asserts that the petitioner submitted sufficient evidence to demonstrate that the foreign entity owns 51 percent of the U.S. company and therefore established a qualifying parent-subsidary relationship between the two entities. Counsel discusses much of the documentation that was previously submitted, emphasizing that \$4,000 was deposited into the petitioner's account on June 19, 2002. Counsel further submits evidence in the form of a bank statement to show a deposit of \$10,500 into the petitioner's account on February 27, 2003. Counsel states: "The stock purchase price was \$1.00 per share more than adequate to cover the cost of the purchase of the stock for the number of shares purchased by the Overseas Company." In addition, as noted above, counsel stated "the schedule K was not properly reported on the tax return, it was an oversight, and was brought to the attention of the preparer." Finally, counsel asserts "clearly, the qualifying relationship exists and has existed and as a result the Original L1 application was approved."

Upon review, counsel's assertions are not persuasive. 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, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

Although the petitioner submitted copies of a bank deposit of \$4,000 made in June 2002, no evidence has been provided to establish that the funds originated with the foreign entity. Similarly, the \$10,500 bank deposit made in February 2003 has not been linked in any way with the claimed shareholders of the company. Finally, the petitioner offers no explanation regarding the four cash memos for foreign currency exchanges made by four individuals in India 13 months before the incorporation of the U.S. company, which were also submitted as evidence that the foreign entity has in fact paid for its interest in the U.S. company. 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)).

Moreover, the petitioner has failed to overcome the discrepancies noted by the director with reference to the U.S. company's tax returns, which indicate that the company is not owned by a foreign entity, and also indicate that the company has a single shareholder. Counsel's statement that the U.S. tax return was prepared incorrectly is not persuasive. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO further notes that the income tax returns indicate that the value of the petitioner's common stock is \$10,000, while the stock certificates issued by the petitioner indicates that the petitioner has issued 1,000 shares of stock valued at \$1.00 per share, or stock valued at only \$1,000. As such, it is unclear whether all issued stock certificates have been submitted. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, the director very clearly instructed the petitioner to provide clear evidence to establish that the funds used to purchase the U.S. entity's stock were provided by the foreign entity. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has not adequately substantiated its claim that the petitioner is owned by the claimed foreign parent company. For this additional reason, the appeal will be dismissed.

The AAO acknowledges that CIS previously approved an L-1A petition filed by the petitioner on behalf of this beneficiary, and, as noted by counsel, therefore appears to have found that a qualifying relationship existed between the U.S. and foreign entities. The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of the beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). It must be emphasized that each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. See 8 C.F.R. § 103.8(d). Due to the lack of evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approval by denying the present request to extend the beneficiary's status.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

ORDER: The appeal is dismissed.