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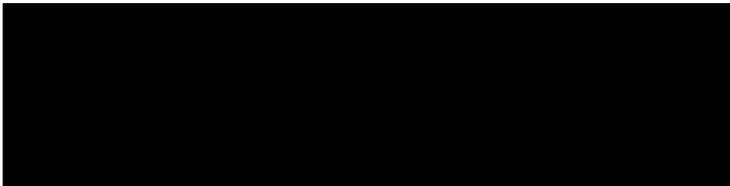
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File: WAC 04 081 51120 Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2007

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 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 managing 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 petitioner is a corporation organized under the laws of the State of California and is engaged in computer consultation services. The petitioner asserts that it is the subsidiary of Anorak, Ltd., located in the United Kingdom. The beneficiary was initially granted a one-year period in L-1A status to open a new office in the United States, from February 11, 2002 until February 11, 2003. The Director, California Service Center denied the petitioner's request for an extension of the new office petition on July 14, 2003 (WAC 03 101 50060). The petitioner now seeks to continue to employ the beneficiary until February 11, 2007.

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, or (2) that the U.S. company and the foreign entity have a qualifying relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner met its burden of proof and that the beneficiary qualifies for the classification sought. Counsel submits a brief and additional documentary 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 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 petition was filed on January 29, 2004. In a supporting letter from petitioner's counsel, the beneficiary's duties were described as follows:

As CEO and Business Strategist, [the beneficiary] is able to freely exercise his substantial authority in the capacity of creating both generalized and categorized policy for the organization. [The beneficiary's] duties include seeking out new opportunities for the firm by developing market research regarding competitors and analyzing the demographic of potential clients. Thus [the beneficiary] has discretion to make contracts for the company with a high potential for high profits or losses. [The beneficiary] is also responsible for hiring and supervising contractors who perform work for clients. [The beneficiary's] management strategy is to "lead from the front" and thus he has provided hands-on assistance to clients and technicians alike, but only to show others what can be accomplished. Although [the beneficiary] also engages in non-management functions within the company, this is not unusual for a start-up business; notably, seventy percent of [the beneficiary's] job duties are of a managerial or executive nature.

* * *

In the capacity of CEO, [the beneficiary's] work is managerial rather than production or service-oriented. [The beneficiary] is responsible for developing the business. He does this by researching business opportunities and potential clients, performing market research on competitors, and by negotiating consulting and sales contracts. He also generally supervising [sic] subcontractors who actually provide the services or products he has sold. As the sole executive in the US office, he is also responsible for all other executive tasks, such as

company policy and operations. Because the company is new, and has only 4 employees, on occasion [the beneficiary] must also perform administrative tasks.

The petitioner stated that the petitioner utilizes the services of an account manager and three technicians, who are all employed on a contract basis. The petitioner submitted evidence related to services provided by three individuals. The most recent evidence submitted was dated in August 2003, approximately six months prior to the filing of the petition.

On February 10, 2004, the director requested additional evidence. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties including the percentage of time the beneficiary spends on each duty; (2) an organizational chart for the U.S. company clearly identifying the beneficiary's position and the names, job titles, and job duties of all employees working under his supervision; (3) copies of the petitioner's California Forms DE-6, Quarterly Wage and Withholding Report, for the last four quarters; and (4) a list of all employees who worked for the U.S. company since the date of establishment, including names, job titles, beginning and ending dates of employment, and source of wages (salary, wage, or commission).

In a response received on May 4, 2004, the petitioner stated that the beneficiary is responsible for the following job functions:

1. **Staff hiring** – Since the beginning he has been responsible for the interviewing and hiring of all [the petitioner's] staff. . . . As the leader in developing a small business, he has been figure heads [sic] for each one of these positions, and managed each person individually on a daily basis. He spends as much time as necessary to interview project staff for project work, this is not a daily need, but can be time consuming during busy periods.
2. **Job distribution** – As the manager for each individual in the business, he allocates work schedules and provided direction on how each aspect of work is to be done. . . . He would oversee the negotiations with clients in creating business opportunities and visited with [the former account manager] when out discussing sales strategies with business partners and customers. . . . He . . . is currently negotiating a global partnership contract on behalf of [the petitioner] in the US and UK that would vastly increase the business profile within the integration market. This job is a regular and consistent role which involves [the beneficiary] actively managing the daily routine of technical staff. He is regularly coordinating with staff to assess work order requirements, problem resolution and time management. . . .
3. **Project planning** – When developing integration projects, [the beneficiary] uses his years of Project Management skills to design and develop an end to end project plan, for the purpose of integrating client systems. Once the plan has been approved by the client, [the beneficiary] will hire the necessary staff to fulfill the plan as written and [the beneficiary] will oversee the integration of the project plan on behalf of his clients. . . . When new projects are initiated, [the beneficiary] can be involved for up to 3-4 hours per day in the development of project plans & staff recruitment, prior to initiating the physical project.

4. **Fund raising** – As the senior executive in the United States, [the beneficiary] is responsible for planning the growth strategies for the business . . . [The beneficiary] is actively and continually seeking ways to grow the business and spends a number of hours (10 – 15 approx) per week writing business plans and researching strategic growth opportunities for the company's future
5. **Budgeting** – He is solely responsible for the success of this business venture in the United States. In order to do this [the beneficiary] is responsible for balancing the check books, and ensuring funds are available for daily business needs. He budgets carefully, ensuring that there are more funds coming in then [sic] going out. He will attend to financial matters on a monthly basis, reviewing the company books with the company accountant to ensure targets are met.

The petitioner indicated that it currently employs a technical engineer who has worked for the petitioner on a contract basis since August 2002, and a Unix database administrator who was hired as a contractor on February 23, 2004. The petitioner stated that it employed [REDACTED] as an account executive from March 2002 through September 2002, and [REDACTED] as a server technician from July 28, 2003 through August 15, 2003. The petitioner's organizational chart depicts the technical engineer, Unix specialist and a secretarial assistant under the beneficiary's supervision. The petitioner states that the secretary is a "shared office resource" included in the cost of its sub-leased office. The evidence submitted indicates that the petitioner took occupancy of its current lease on March 1, 2004, subsequent to the filing of the petition.

On May 17, 2004, the director denied the petition. The director determined that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director observed that the beneficiary is the only permanent employee of the company, and noted that the fact that the beneficiary manages IT projects for the petitioner's office does not establish eligibility for this visa classification. The director concluded that the beneficiary would be performing many of the day-to-day operations and tasks necessary to provide services, including planning IT projects and marketing the petitioner's services, and that such non-managerial duties would require the majority of the beneficiary's time.

On appeal, counsel for the petitioner asserts that the beneficiary can be considered to be employed in both an executive capacity and a managerial capacity because he "directs the U.S. entity" and manages two subordinate employees who are professionals by virtue of their bachelor's degrees. Counsel asserts that only an executive would have the authority to meet with "high level corporate executives" and talk to potential business partners. Counsel contends that the beneficiary "only provides technical input through industry knowledge to the subcontracting firms that he uses to provide technical services." Counsel further alleges that the contractors the beneficiary directs are "either professionals or managers and executives and not first line employees." In addition, counsel states that the beneficiary is negotiating the stock and intellectual property purchase of another firm, which would result in his role as chief executive officer expanding to cover both W-2 and 1099 employees.

Counsel asserts that although the petitioner's organizational structure is not complex, the beneficiary will still be employed in a qualifying capacity because he plans, organizes, directs and controls the organization's major functions through other employees. Counsel states that the petitioner's four contracted employees

provide the services and products of the company while the beneficiary manages their work and performs "all executive tasks." In addition, counsel emphasizes the beneficiary's responsibility for negotiating all sales and consulting contracts as evidence of his employment in a managerial or executive capacity, noting that such contracts have the potential to be worth "many tens or hundreds of thousands."

Finally, counsel stresses that U.S. Citizenship and Immigration Services must consider the reasonable needs of the petitioning company in light of its overall purpose and stage of development if it takes staffing factors into account as a factor in determining whether a beneficiary is employed in a managerial or executive capacity. Counsel states that the petitioner is just over two years old and "is operating in a period of significant economic turmoil." Counsel asserts that it is reasonable for the company to employ the beneficiary and three contract workers at its current stage of development, and that such contractors "perform the sales and consulting services provided by [the petitioner]." Counsel cites an unpublished matter in which a sole employee of a U.S. company was found to be qualified as a manager or executive.

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(1)(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 specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove 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).

Here, the petitioner repeatedly emphasizes that the beneficiary exercises authority over the petitioning company as its chief executive officer and sole full-time employee. While the AAO does not doubt the beneficiary's discretionary authority over the company, the record fails to establish that the beneficiary's actual duties are primarily managerial or executive in nature.

The petitioner's description of the beneficiary's duties indicates that he is personally responsible for developing market research regarding competitors and analyzing the demographic of potential clients, marketing and selling the petitioner's services, performing the day-to-day financial operations of the company, and designing customer projects. The petitioner has not persuasively demonstrated that any of these operational tasks would fall under the statutory definitions of managerial or executive capacity. The petitioner emphasizes that the sales negotiations performed by the beneficiary are not routine sales tasks that could be performed by a lower-level sales employee because of their potentially "high value." However, as discussed further below, there is no evidence that the petitioner employed any lower-level employees to sell its products and services on a day-to-day basis. While the petitioner may require the beneficiary to perform management-level duties associated with business development activities occasionally, the record does not establish that these are his primary duties. In addition, activities such as "project design" and seeking client approval constitute providing a service to a company's clients as opposed to primarily acting in a managerial or

executive capacity over the employees who manage and provide the service or product to the customer. Further, activities centered on marketing or managing a company's "checkbook" are routine functions and have not been demonstrated to constitute managerial or executive duties. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, portions of the beneficiary's position description are not plausible when considered in the context of the company's organizational structure at the time of filing. As discussed below, at the time of filing the petitioner had one employee and what appeared to be one or two irregular contract employees and yet counsel asserts that beneficiary's position is a "regular and consistent role which involves [the beneficiary] actively managing the daily routine of technical staff" and "technicians are out in the field resolving problems, [the beneficiary] is in the office, providing direction and guidance where necessary." Such assertions are unpersuasive as the underlying factual presumptions (that the petitioner has a staff of employees) is not supported by any documentary evidence. As noted above, the description also reveals that the petitioner is actively involved in market research, financial, sales, marketing and project design activities, and may on occasion act as a first-line supervisor for the irregular contract employees that are utilized.

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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them, other than repeating the unsupported assertion that 70 percent of the beneficiary's time is allocated to managerial duties. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See, e.g., IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for U.S. Citizenship and Immigration Services (USCIS) 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.*

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties

represents a credible perspective of the beneficiary's role within the organizational hierarchy. The record does not demonstrate that the beneficiary has subordinate employees who could market and sell the company's products and services, provide networking and computer consultancy services, and perform the routine administrative, clerical, and financial operations inherent in operating the business.

While counsel correctly notes that contract employees may be considered in determining whether the beneficiary has a subordinate staff to relieve him from performing non-qualifying duties, the petitioner in this matter has not adequately documented its regular use of contract workers, and appears to have misrepresented the actual number of employees as of the date of filing. At the time of filing, the petitioner indicated that an account manager assisted the beneficiary with sales operations and business development tasks, while two to three technicians provided the petitioner's consulting services. However, in response to the director's request for evidence, the petitioner revealed that the account manager had not worked for the petitioner since September 2002, more than a year before the petition was filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

One of the petitioner's claimed contracted technicians worked for the company for 18 days in July and August 2003 and could no longer be considered a contract employee in January 2004. The petitioner's Unix database administrator was hired subsequent to the filing of the petition. 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). Regardless, there is no evidence of wages paid to this employee. The only contracted worker whose claimed employment dates coincide with the filing of the petition is [REDACTED] the technical engineer. While he received a Form 1099 from the petitioner for 2003, there is insufficient evidence that the petitioner was regularly utilizing his services in January 2004 when the petition was filed, particularly since the petitioner did not claim to employ a technical engineer in its initial description of its staffing levels. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record through the submission of 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. at 591-92. The petitioner did not submit a copy of a contract with the technical engineer, invoices for his services, or evidence of recent payments made to him by the petitioning 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)).

Overall, the lack of evidence of the petitioner's regular use of contracted employees to provide the services of the company undermines the petitioner's claim that the beneficiary is relieved from providing such services. The petitioner has neither presented sufficient evidence to document the existence of its claimed contract employees nor identified how often they work for the petitioner and how they relieve the beneficiary from having to perform the routine functions necessary to provide the petitioner's product or service (such as

project design or sales). Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's administrative, financial and marketing functions. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The AAO acknowledges the petitioner's claim that the sub-lease for its current office includes the services of a secretarial assistant as a shared resource with its lessor. However, since the petitioner did not sign its current lease until after the petition was filed, any services provided by the secretarial assistant are not relevant to this proceeding. 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.*, *supra*.

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary alone, or by the beneficiary and one contract employee whose terms of employment have not been established. 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) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On appeal, counsel cites a number of unpublished decisions and asserts that the AAO previously approved petitions involving facts that are similar to those in the instant matter. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel has not cited any precedent AAO decisions. Counsel cannot rely on unpublished decisions as a substitute for the petitioner's burden to show eligibility in this particular case. These citations are not persuasive and will not be granted any evidentiary weight in these proceedings.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Counsel indicates that the petitioner intends to hire additional employees and may acquire another company in the future. However, 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). As of the date of filing, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity. Accordingly, the appeal will be dismissed.

The second issue in this matter concerns whether the petitioner established the existence of a qualifying relationship between the U.S. company and the beneficiary's foreign employer, as required by 8 C.F.R. § 214.2(l)(3)(i). 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 terms "parent," "subsidiary," and "affiliate" as follows:

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

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

On the Form I-129, the petitioner stated that it is a subsidiary of [REDACTED] located in the United Kingdom, and indicated that the both companies are owned by the same three individuals in equal proportions. The petitioner submitted its articles of incorporation, indicating that the U.S. company is authorized to issue 2,000 shares of common stock. The minutes of the petitioner's organization meeting held on October 30, 2001, states that 1,040 shares would be issued to [REDACTED] for consideration of \$15,600, while the beneficiary, [REDACTED] and [REDACTED] would each be issued 320 shares in exchange for \$4,800. The petitioner also submitted its stock transfer ledger indicating the same ownership structure.

The director subsequently requested additional evidence to establish the claimed qualifying relationship, including copies of the U.S. company's stock certificates, and evidence to show that the claimed foreign parent company has paid for its interest in the U.S. entity. The director noted that the evidence should include copies of the original wire transfers from the parent company, as well as canceled checks, deposit receipts or other evidence detailing monetary amounts for the stock purchase, as well as an explanation regarding any funds not originating with the foreign entity.

In response, the petitioner stated that the funds for the purchase of stock in the petitioning company were provided from the beneficiary's United Kingdom bank account, through the beneficiary's attorneys. The

petitioner submits a copy of the beneficiary's personal bank account statement for November 2001, which reflects a wire transfer in the amount of \$49,589.33 originating with the U.K. law firm. Counsel indicates that the beneficiary transferred \$30,000 from these funds to an investment account, and subsequently withdrew funds from this account in the amounts \$7,000, \$5,000, \$6,500 and \$1,800, which were deposited into the petitioning company's checking account between January 24, 2002 and April 25, 2002. The petitioner stated: "This is a total of \$20,300.00 made to [the U.S. entity] which is the equivalent of full payment for shares for Anorak Ltd (1040 shares) and [the beneficiary] 320 shares." The evidence submitted included deposit receipts and bank statements.

The petitioner also submitted copies of four stock certificates issued by the petitioning company, including an un-numbered certificate issued to the foreign entity for 1,040 shares, an un-numbered certificate issued to the beneficiary for 320 shares; certificate number 3 issued to [REDACTED] for 320 shares; and certificate number 2 issued to [REDACTED] for 320 shares. The AAO notes that the petitioner's stock ledger indicates that stock certificate number 4 was issued to [REDACTED], while stock certificate number 2 was issued to the beneficiary. 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. at 591-92.

The director denied the petition concluding that the petitioner had failed to establish that the U.S. company and the foreign entity have a qualifying relationship. The director noted that the petitioner did not demonstrate that its claimed parent company had actually paid for its stock ownership, as the evidence submitted indicated that all funds came from the beneficiary's personal accounts. The director determined that since the petitioner had failed to show any participation of the foreign entity in the purchase of stock in the petitioning company, no parent-subsidiary relationship could be established.

On appeal, counsel for the petitioner asserts that the U.S. company is both a subsidiary and an affiliate of the foreign entity. Counsel asserts that the foreign entity owns more than 50 percent of the U.S. company's stocks thereby establishing ownership and control of the petitioner by the U.K. company. Counsel further states that the petitioner could be characterized as an affiliate of the foreign entity because the same three individuals ultimately own an equal share in both companies. Counsel asserts that the two entities are controlled by the same group of individuals, with each individual owning and controlling approximately the same share or proportion.

Counsel contends that the petitioner did, in fact, provide evidence of the foreign entity's purchase of the U.S. company's stock, and explains as follows:

In the instant case, [the beneficiary] entered into an oral agreement with [REDACTED] and [REDACTED]. [REDACTED] then the sole owners of [REDACTED], to receive an ownership interest in [REDACTED] and the newly-formed [U.S. company] in exchange for [the beneficiary] providing the funds for [REDACTED] to purchase shares of [the U.S. company].

Counsel states that "we may infer the existence of the oral agreement based upon the beneficiary's purchase of the stocks using his own funds and subsequent assignment of ownership of the stocks to the foreign entity."

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.

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. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Upon review, there is inconsistent evidence of ownership in the record. As noted by the director, the petitioner has not been able to demonstrate that the foreign organization paid the stated \$15,600 purchase price for the stocks purportedly issued to it. Although counsel now tries to explain why the beneficiary paid for both his share in the U.S. company and the foreign entity's share, the petitioner was specifically instructed to provide an explanation for any funds not originating with the foreign entity when responding to the request for evidence. It is not clear why the alleged oral agreement was not mentioned at that time.

Further, counsel's explanation regarding the terms of the alleged oral agreement contradicts documentary evidence in the record which establishes the means by which the beneficiary acquired an ownership interest in the foreign entity. Specifically, counsel states that the oral agreement provided that the beneficiary would receive an ownership interest in Anorak and the U.S. company in exchange for providing the funds for Anorak to purchase shares of the U.S. company. However, in response to the request for evidence, the petitioner submitted the minutes of an extraordinary board meeting of the foreign entity held on September 20, 2000, which included the following resolution:

As agreed by the current board of Directors of [REDACTED] and [REDACTED] [REDACTED] of [REDACTED]. it has been proposed that [the beneficiary] of [REDACTED] be offered a full time position to the board of Directors of [REDACTED] as of 31st December 2000.

[The beneficiary] will join [REDACTED] through the purchase of [REDACTED] in exchange for 33.33% of the shares of [REDACTED] and the waiver of salary for the year 2001

and being his tenure with the company in accordance with conditions laid out in a separate contractual employment agreement.

The petitioner also submitted a copy of the beneficiary's employment agreement with the foreign entity, which stipulated that the beneficiary would waive his salary for 2001, "in lieu of good will and investment into the Company and the Subsidiary," and that "such waiver shall be taken as the balance of the transaction giving the employee full and equal shares in the Company."

Thus, while counsel asserts that the beneficiary made an oral agreement to acquire an ownership interest in the foreign entity by investing funds in the petitioning company on ██████'s behalf, the foreign entity's documentation indicates that the beneficiary's ownership interest in the foreign entity was given in exchange for his agreement to waive his salary for one year, and his agreement to sell a business known as "████████████████████" to the foreign entity. The AAO finds the written resolution and employment agreement submitted more persuasive than counsel's unsupported claim of an oral agreement between the beneficiary and the foreign entity. 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 petitioner has not submitted evidence on appeal to overcome the director's conclusion that the petitioner's claimed parent company did not in fact pay for its interest in the U.S. company.

Finally, counsel's assertion that the petitioner and foreign entity have an affiliate relationship due to common direct and indirect ownership by the same three individuals is not persuasive, as such argument would also be predicated on a finding that the foreign entity, and the two other individual shareholders, actually paid for their interests in the U.S. company. As discussed above, the record does not establish that anyone other than the beneficiary invested in the petitioner. The inconsistencies between the petitioner's stock certificates and stock transfer ledger, as noted above, further call into question the actual ownership of the U.S. company. Based on the foregoing discussion, the petitioner has not established that the U.S. and foreign entities have a qualifying relationship. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the beneficiary was employed by the foreign entity for one continuous year within the three years preceding the filing of his initial petition for L-1A status. The evidence submitted with this petition, including resolutions from the foreign entity, corporate documents, and the beneficiary's employment agreement, indicate that the beneficiary's full-time employment with the foreign entity commenced on December 31, 2000. The beneficiary was admitted to the United States as a visitor in B nonimmigrant status on November 4, 2001 and was subsequently granted a change of status to L-1A on February 11, 2002. The time the beneficiary spent in the United States as a visitor cannot be considered in calculating his period of qualifying employment with the foreign entity. Therefore, he was not employed by the foreign entity for one year and he is ineligible for this visa classification. For this additional reason, the petition cannot be approved, and the approval of the initial petition is subject to revocation based on the evidence submitted with this petition. *See* 8 C.F.R. § 214.2(l)(9)(iii).

Finally, the AAO notes that the regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's authorized period of stay expired on February 11, 2003. Although the petitioner previously filed a timely request for an extension, that petition was denied on July 14, 2003. This petition was filed on January 29, 2004. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, it is noted for the record that the beneficiary is ineligible for an extension of stay in the United States.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.