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File: EAC 07 058 51891 Office: VERMONT SERVICE CENTER Date: APR 03 2008

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the 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 visa petition seeking to employ the beneficiary as its vice president and general manager 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 Texas and is allegedly in the wireless telecommunications business as a retailer.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or a manager.

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 primary issue in the present matter is whether 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 petitioner describes the beneficiary's proposed duties in a letter dated December 19, 2006 as follows:

At [the petitioner], [the beneficiary] will hold the position of Vice President and General Manager. In that capacity, [the beneficiary] will have overall executive responsibility for developing, organizing, and establishing the purchase, sale, and marketing of merchandise for sale in the U.S. market. His other duties will include: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. retail market; (ii) negotiating and supervising the drafting of purchase agreements; (iii) marketing products to

consumers according to [foreign entity] guidelines; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by [the foreign entity]; (vi) developing and implementing plans to ensure [the petitioner's] profitable operation; and (vii) negotiating prices and sales terms, developing pricing policies and advertising techniques.

Percentage of time spent on each duty:

Description of Duties	Time Spent %
Management Decisions	40%
Company Representation	15%
Financial Decisions	10%
Supervision of day-to-day company functions	10%
Business Negotiations	15%
Organizational Development of Company	10%

The petitioner also submitted quarterly wage reports, which indicate that the petitioner employed six people in the quarter immediately preceding the petition's filing date, and an organizational chart for the United States operation. The chart shows the beneficiary reporting to the president and directly supervising a "director – sales & marketing." The "director – sales & marketing" is, in turn, portrayed as supervising a "manager – retails sales" and a "manager – service and distribution." Each of these "managers" is, in turn, portrayed as supervising a subordinate employee. The petitioner states that it employs six people in both the letter dated December 19, 2006 and in the Form I-129.

On January 3, 2007, the director requested additional evidence. The director requested, *inter alia*, descriptions of the job duties of the beneficiary's proposed subordinate employees, a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis, and educational credentials for the subordinate employees.

In response, the petitioner submitted an expanded organizational chart for the United States operation apparently incorporating two employees hired after the filing of the instant petition (a "credit manager" and a "marketing manager").

The petitioner also described the duties of the "director – sales & marketing" as follows:

Oversee operations and sales. Handle all customer complaints. Deal with vendors. Maintain inventory and equipment[.] Interview, hire and train employees. Ensure compliance with applicable regulatory agency requirements. Listen to customer complaints, resolve problems to restore and promote good public relations. Schedule and assign task to workers. [The director – sales & marketing] has education equivalent to U.S. Bachelor's degree in Business Administration.

The petitioner described the duties of the "manager – service & distribution" as follows:

Research, compile and analyze statistical data to determine feasibility of buying merchandise for retail wireless stores. Establish price objectives for contract transactions. Interacts with vendors and analyzes vendors' operations to determine factors that affect prices. Prepares reports, charts, and graphs of findings. Evaluates findings and make[s] recommendations regarding feasibility of buying needed products. Draft service contracts for clients. Provide information about extended warranty and repairs.

The petitioner described the duties of the "manager – retail sales" as follows:

Oversee operation of food store and gas sales. Handle all customer complaints. Deal with vendors. Maintain inventory and equipment, reconcile accounts. Interview, hire and train employees. Ensure compliance with applicable regulatory agency requirements. Listen to customer complaints, resolve problems to restore and promote good public relations.

On April 4, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of an executive or a manager. In support, counsel submits a brief and letter dated May 2, 2007 allegedly from an associate professor of management science addressing the managerial and executive aspects of the beneficiary's ascribed job duties.

Upon review, counsel's assertions are not persuasive.

As a threshold matter, the petitioner's submission of an expanded organizational chart in response to the Request for Evidence which adds two new employees, and, consequently, another tier of subordinate supervisors, was inappropriate and will not be considered by the AAO on appeal. First, 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). Therefore, if these two additional employees were not employed by the petitioner at the time the petition was filed, their subsequent employment is not relevant to the instant matter. Second, the petitioner submitted an organizational chart with the initial petition showing the beneficiary working with six other employees. Likewise, the petitioner asserted in both the Form I-129 and the letter dated December 19, 2006 that it employs six people. When responding to a Request for Evidence, a petitioner cannot offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Accordingly, in addressing the instant appeal, the AAO will consider the organizational chart submitted with the initial petition, and the job descriptions pertaining to those six positions identified in the original organizational chart.

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.*

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will oversee "the legal and financial due diligence process," develop "trade and consumer market strategies," develop and implement plans to ensure "profitable operation," and develop pricing policies and advertising techniques. However, the petitioner does not specifically identify the object of the due diligence or specifically describe the market strategies, "profitable operation" plans, pricing policies, or advertising techniques to be developed and implemented. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the job description and breakdown of duties are not persuasive in establishing that the beneficiary will perform "primarily" qualifying duties. Many of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner asserts in the breakdown of duties that the beneficiary will spend only 40% of his time on "management decisions." Not only is this description so vague and conclusory that it cannot be concluded that he will actually devote 40% of his time to a qualifying duty, the remaining duties, while also vaguely described, do not appear to be qualifying managerial or executive duties. For example, the petitioner indicates that the beneficiary will devote 60% of his time to company representation, making financial decisions, supervising day-to-day functions, negotiating, and organizing the company's development. However, these duties appear to be tasks necessary to operate a small wireless retail business and are not qualifying managerial or executive duties. Therefore, it has not been established that the beneficiary will be "primarily" employed as a manager or an executive. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the organizational chart appended to the petition, the petitioner employs six people. The beneficiary will directly supervise one person, the "director – sales & marketing" who, in turn, supervises a "manager – retails sales" and a "manager – service and distribution." Each of these "managers," in turn, supervises one subordinate employee. However, the record is not persuasive in establishing that any of these managers is truly a managerial or supervisory employee. First, the job descriptions for each of these employees fail to describe any of them as having supervisory or managerial responsibilities. While the "director – sales & marketing" is vaguely described as scheduling and assigning tasks to workers, he is also described as dealing directly with customers and vendors. An employee will not be considered to be a

supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Second, the record as a whole does not describe the petitioner as having an organizational complexity which requires the employment of subordinate tiers of managers and supervisors. Even though the petitioner appears to be a six-employee wireless telecommunications retailer, it maintains that it will adopt a five-tier organizational hierarchy once the beneficiary is hired. However, artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not established that the reasonable needs of the United States operation compel the employment of a managerial or executive employee to oversee one or more subordinate supervisors. To the contrary, it is more likely than not that both the beneficiary and his staff will all primarily perform non-qualifying tasks related to the retail business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006).

In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner failed to establish the skills and education required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

¹In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In this matter, the petitioner has not established that a bachelor's degree is necessary to perform the duties of any of the positions subordinate to the beneficiary.

²While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce exactly what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears instead that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is also noted that the letter submitted on appeal and purportedly written by [REDACTED] Associate Professor of Management Science at the [REDACTED], is not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity. First, the job description considered by the author is materially different from the job description submitted by the petitioner. For example, the author lists "[d]evelop a chain of retail locations" as a duty of the beneficiary even though this duty was not previously listed by the petitioner. Second, the author considered the beneficiary's proposed supervision of the subordinate "managers" who were added to the organizational chart after the filing of the instant petition and whose alleged employment is not being considered here (*see supra*). Third, while the author concludes that the beneficiary will be employed as a "manager" or "executive," the author mostly relies on the same self-serving and inflated job duties listed in the petition. The author adds no useful facts or analysis to the record and simply attempts to draw an inadmissible and unpersuasive legal conclusion that the

job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees and will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

beneficiary will perform qualifying duties. *See generally Good Shepherd Manor Found. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) (cited in *Superior Aluminum Alloys, LLC v. United States Fire Insurance Company*, 2007 WL 1850858 at *8 (N.D. Ind. June 25, 2007)). Moreover, even if this could be classified as expert testimony, the discretion to use such advisory statements rests with the AAO. However, where, as here, an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept, or may give less weight to, that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In addition, the authority as to whether the petitioner has met its burden of proof rests with Citizenship and Immigration Services (CIS), and, in this matter, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, 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).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

The petitioner describes the beneficiary's duties abroad in a letter dated December 19, 2006 as follows:

[The beneficiary] has worked as a Managing Director for [the foreign entity] since 1995. In that role, [the beneficiary] develops, implements, and consistently applies business-related policies to optimize the quality of the organization and employees. [The beneficiary] also negotiates client contracts and promotes sales of products and services, oversees manufacture and distribution vehicles and auto parts, and is responsible for the recruitment, hiring, promotion, discipline, and discharge of the personnel. In addition, [the beneficiary] develops and implements marketing strategies using current market information, competitive and economic conditions, and innovative programs. Furthermore, [the beneficiary] develops pricing strategies, and responds to internal and external customer inquiry. [The beneficiary] also meets with the appropriate officials to propose transactions, negotiates confidentiality and service agreements, coordinates the due diligence process with in-house counsel and outside auditors, and directs the preparation and completion of sale contracts and other related documents.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary did on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties were 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, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad, if any. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Finally, the record indicates that the beneficiary is the 100% owner and proprietor of the foreign entity. It does not appear that the foreign entity has a legal existence separate and apart from the beneficiary as an individual. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). As the beneficiary cannot employ himself and as the statute specifically requires that the beneficiary have been an employee, the record is not persuasive in establishing that the beneficiary was truly "employed" abroad in a conventional master-servant relationship as understood by common-law agency doctrine. *See* §§ 101(a)(44)(A) and (B) of the Act; *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign employer are qualifying organizations.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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" and "is or will be doing business." "Affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(I).

In this matter, the petitioner asserts in both the Form I-129 and the letter dated December 19, 2006 that the beneficiary owns 100% of the foreign entity and 50% of the petitioner. Counsel repeats this assertion in his letter dated March 15, 2007. However, the record does not support this claim. The petitioner's 2005 Form 1120, U.S. Corporation Income Tax Return, indicates in Schedule E that it is 50% owned by [REDACTED] 30% owned by [REDACTED], and 20% owned by [REDACTED]. Therefore, it does not appear that the beneficiary has any ownership interest in the petitioner. The petitioner offers no explanation for this fundamental inconsistency in the record. 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

