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U.S. Citizenship
and Immigration
Services

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File: WAC 07 191 51371 Office: CALIFORNIA SERVICE CENTER Date: NOV 03 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, 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 visa petition seeking to extend the employment of the beneficiary 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 Nevada and is allegedly in the agriculture business. The beneficiary was 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.

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 petitioner and the foreign employer are qualifying organizations.

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, the petitioner asserts that the director erred, that the beneficiary will perform primarily qualifying duties in the United States, and that the petitioner and the foreign employer are qualifying organizations as "affiliates."

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 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 does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed in either a managerial *or* an executive capacity and will consider both classifications.

The petitioner failed to describe the beneficiary's proposed duties as "president and chief executive officer" in the initial petition. Accordingly, on July 23, 2007, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the United States operation, which includes job descriptions for all of the beneficiary's subordinate employees; a more detailed description of the beneficiary's proposed duties, including a breakdown of the percentage of time devoted to each ascribed duty; quarterly wage reports; and a list of all United States employees.

In response, the petitioner submitted an organizational chart for the United States entity. The chart portrays the petitioner as a multi-tiered, complex organization involving at least 17 different employees and contractors. However, the petitioner also submitted its quarterly wage reports for the quarter in which the instant petition was filed. These reports indicate that the petitioner employed three workers, including the beneficiary, in the month in which the petition was filed, i.e., June 2007. The reports also indicate that two of the workers were hired in May 2007. Prior to their employment, the beneficiary was the petitioner's only employee. The beneficiary's two subordinates are identified in the organizational chart as the field supervisor and the bookkeeper.

The petitioner also submitted evidence indicating that it has established relationships with various individuals who have agreed to sell the petitioner's agricultural products as "independent distributors." However, these individuals are not employees of the petitioner, and the record is devoid of evidence establishing that the petitioner exerts any supervisory control over these distributors.

The petitioner also described the beneficiary's proposed duties as follows:

Administrative:

- Incharge [sic] of all Office and administrative matters of [the petitioner]
- Establish Office, Warehousing and delivery system in California Distributorship
- Facilitate orders from different country representatives namely:
[examples omitted]
- Hire Employees and develop Independent Marketing Distributors
- Incharge [sic] of Staff/employees' payroll

Sales & Marketing:

- In-charge of company expansion plans for the whole of United States
- Intensify Promotion and Marketing of AZ41 Organic Based Foliar Blend in the State of California and the whole United States.
- Train staff and personnel in Product knowledge and sales & marketing
- Develop Business and marketing plan
- Make marketing Analysis
- Open new markets for AZ41 distribution like cooperatives, organizations and stores
- Research on more crops to have the claims

Logistics

- Acts as Liaison Officer with Suppliers
- Coordinate with Supplier regarding formulation/s, contract and arrange payments
- Arrange and facilitate movement/transfer and distribution of products from Supplier to customers.
- Make arrangements for distribution and delivery.

Finally, the petitioner described the duties of the two subordinate workers allegedly employed at the time the petition was filed. The duties of the bookkeeper are described as administering bills, accounts, and the payroll. The field supervisor is described as assisting the distributors in promoting products, taking orders from distributors, submitting reports, and collecting payments. Although both the bookkeeper and the field supervisors are described as reporting to the "executive vice president," this individual is not listed as an employee in any of the current or past wage reports. Accordingly, it appears that these workers report directly to the beneficiary.

On November 26, 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 will primarily perform qualifying duties in the United States.

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.* A petitioner cannot claim that some of the duties of the

position entail executive responsibilities, while other duties are managerial. Again, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

Title 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 Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the beneficiary is not performing qualifying duties within one year of petition approval, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not established that the United States operation has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

As a threshold issue, it is noted that employees hired after the filing of the initial petition may not be considered in determining whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, the petitioner's claim in the organizational chart that it may employ additional workers in the future is not relevant and will not be considered.

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 be in charge of "all [o]ffice and administrative matters," develop "[b]usiness and marketing plan," and engage in "marketing analysis." However, the petitioner does not specifically describe the business and marketing plan or explain what, exactly, the beneficiary will do to engage in market analysis or to manage all office and administrative matters. Importantly, the petitioner has not established that any of the beneficiary's duties pertaining to administration, sales, marketing, and logistics are qualifying duties. The fact that a petitioner has given a beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that a 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).

Consequently, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties in his operation of the business. As noted above, the petitioner asserts that the beneficiary will "manage" the petitioner's business operations through two subordinate workers. However, the record does not establish that the beneficiary will be relieved of the need to perform many of the non-qualifying tasks inherent to his ascribed duties by a subordinate staff. For example, many of the beneficiary's vaguely described duties appear to involve marketing, logistics, customer relations, and first-line supervision of the petitioner's two recently hired workers. Not only are the beneficiary's two subordinates not described as

performing tasks which will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to his duties, the petitioner failed to establish how much time the beneficiary will devote to these non-qualifying tasks, even though this evidence was specifically requested by the director. 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). Accordingly, it appears more likely than not that the beneficiary will primarily perform non-qualifying first-line supervisory, administrative, and operational tasks in his administration of the business. 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). 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. § 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

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 record, the beneficiary will directly supervise two subordinate workers. However, it has not been established that either of these workers is truly a supervisory or managerial worker given that neither supervises a subordinate staff. Also, the job descriptions provided for these workers indicate that each of them performs the tasks necessary to the provision of a service or the production of a product. Although the field supervisor is vaguely described in the organizational chart as supervising the distributors, it does not appear that the distributors are employees or, importantly, under the direction or control of either the beneficiary or the field supervisor. Finally, as the petitioner failed to establish the skills and educational level required to perform the duties of the subordinate positions, even though this evidence was also requested by the director, the petitioner has not established that the beneficiary will manage professional employees. Once again, 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).¹ Accordingly, as it appears that the beneficiary will be, at most, a first-line supervisor of non-professional workers, 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).

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

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. 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.

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 1313, 1316 (9th Cir. 2006) (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).

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 will manage an essential function, the petitioner must furnish a written 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(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary will manage the function rather than perform the tasks 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 indicates that the beneficiary will primarily be a first-line supervisor of non-professional employees or will perform non-qualifying 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).

The petitioner lists the owners of the petitioner as follows:

██████████ (32.79%)
██████████ (22.23%)
The beneficiary (19.45%)
██████████ (13.9%)
██████████ (4.0%)
██████████ (1.98%)
██████████ (1.98%)
██████████ (1.389%)
██████████ (1.389%)
██████████ (1.389%)
██████████ (0.99%)
██████████ (0.55%)
██████████ (0.55%)
██████████ (0.197%)

On November 26, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

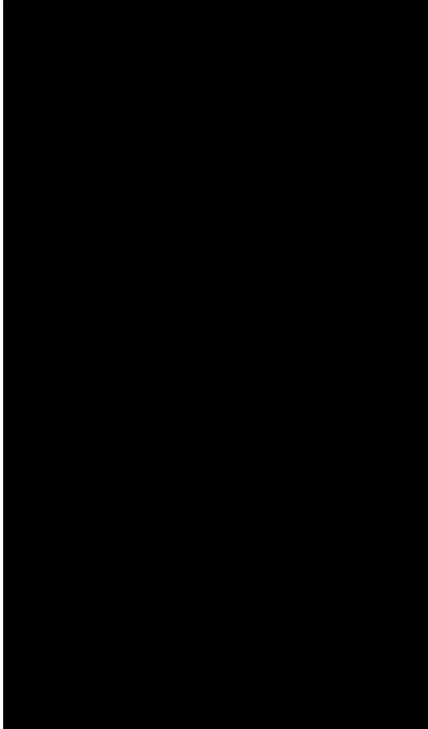
On appeal, counsel asserts that the record establishes that the two entities are "affiliates" as defined in the regulations. Specifically, counsel argues that since the same shareholders own 51.79% of the petitioner and 73.83% of the foreign employer, the two entities are "affiliates."

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; *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.

In this matter, the record fails to demonstrate that there is majority ownership and control, directly or indirectly, of both companies by any one individual or parent. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). The petitioner and the foreign employer do not share common ownership and control and, therefore, are not "qualifying organizations" as "affiliates" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). As noted above, an "affiliate" is defined in pertinent part as "[o]ne 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." *Id.* In this matter, the same group of individuals does not own and control approximately the same share or proportion of each entity. For example, while ██████████ is the second largest shareholder in the foreign entity (13.75%), she does not own any shares in the petitioner. Likewise, while ██████████ owns 22.23%

of the petitioner, making her the second largest shareholder, she only owns 4.84% of the foreign employer. Moreover, the following are all claimed to be stockholders of the foreign entity but are not alleged to own any shares in the petitioner:



As clearly indicated in the regulations, while it is not required that each individual own the exact same percentage of each entity, it is required that the group of individuals who own each entity, albeit directly or indirectly, be the same. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). It is important the same group of individuals own and control both entities to ensure that both entities are part of the same organization as intended by Congress. Otherwise, CIS faces a situation in which diversely-held business associations would meet the requirements of a qualifying affiliate relationship, through means "such as ownership of a small amount of stock in another company without control, exchange of products or services, and membership of the directors of one company on another company's board of directors." 52 Fed. Reg. 5738, 5742 (Feb. 26, 1987).

To establish eligibility under 8 C.F.R. § 214.2(l)(1)(ii)(L), the burden is on the petitioner to show that the foreign employer and the petitioning entity share common ownership and *control*. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289. As recognized in *Matter of Hughes*, where each of the individuals owns a small amount of stock in the two companies without individually controlling the companies, the individuals control only if their shares are legally consolidated by a proxy agreement that guarantees that one individual will vote the shares in concert. 18 I&N Dec. at 293 (discussing proxy votes).

In this matter, six individuals jointly owning 73.83% of the United States company may or may not vote in concert to retain "de jure" or 51% control. Likewise, these same individuals owning a total of 51.79% of the foreign entity may or may not vote in concert to retain "de jure" control of that corporation. Although the six

individuals may vote in concert due to some type of outside familial or business relationship, the regulations do not recognize these types of relationships as a basis for a qualifying relationship or as a means of legally consolidating the shares of individual owners. Thus, the companies are not affiliates as the petitioner has not established that the same individuals control both companies. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

Accordingly, as the petitioner has failed to establish that it and the foreign employer are qualifying organization as "affiliates," the petition may not be approved.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.