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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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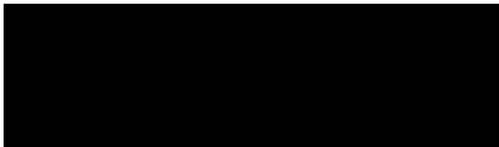
OCT 06 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant petition and 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 employ 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, a New Jersey corporation that intends to manufacture and distribute a patented window product, claims to be a subsidiary of Yovelle Window, LLC, located in Yehud, Israel. The petitioner seeks to employ the beneficiary in the position of production manager in its new office in the United States for a period of one year.

The director denied the petition on three independent and alternative grounds. Specifically, the director determined that the petitioner had failed to establish: (1) that the U.S. company and the foreign entity have a qualifying relationship; (2) that the beneficiary has been employed in a managerial capacity with a qualifying entity for one continuous year during the three years preceding the date the petition was filed; and (3) that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity within one year or that the new office would support such a position within one year. In denying the petition, the director emphasized that the petitioner failed to provide most of the information and documentation specifically solicited in a request for evidence (RFE) issued on February 12, 2008.

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 former counsel failed to submit documentation provided to him by the petitioner and foreign entity, and made numerous other errors in the preparation of the petition and supporting documents, resulting in the denial of the petition. The petitioner submits additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

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

* * *

(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.

The petitioner stated on Form I-129 that it is a subsidiary of "Yovelle Window, LLC," located in Yehud, Israel, and that the foreign entity owns 60 percent of its stock. In a letter dated January 28, 2008, the petitioner stated that the U.S. company "has joint ventured" with the foreign entity.

In support of the petition, the petitioner submitted a copy of its certificate of incorporation, which indicates that the company was established in New Jersey on April 2, 2007 and is authorized to issue 600 shares without par value.

The petitioner also submitted an unsigned copy of a shareholder agreement between [REDACTED], Yovelle Windows, LLC and the petitioner, dated June 13, 2007. The agreement does not indicate the total number of shares issued to [REDACTED] and the foreign entity. The agreement does contain the following provision:

Management of the Corporation

- 7. The Board will consist of a number of directors equal to the number of Shareholders however, only [REDACTED] will be entitled to appoint one person to the Board and will have the sole right to remove and replace such appointee. As such [REDACTED]

shall have the unilateral right to make any and all management decisions on behalf of the corporation.

The agreement indicates that [redacted] will hold the offices of president, vice president, treasurer and secretary of the company through July 1, 2008.

The director issued a request for additional evidence on February 12, 2008, in which he requested that the petitioner submit additional documentation to establish the ownership and control of the petitioning and foreign entities, including copies of all share certificates, stock ledgers, joint venture agreements, articles of incorporation, or any other relevant evidence. The director also requested copies of canceled checks, letters of credit, monetary transfers, etc. that were used by the foreign entity to fund the incorporation of the U.S. company.

In a response received on May 9, 2008, the petitioner re-submitted a signed copy of the above-referenced shareholder agreement and the petitioner's certificate of incorporation. The petitioner also submitted a document labeled "business plan" which appears to be the joint venture agreement between the foreign and U.S. entities. The agreement, dated June 17, 2007, indicates that the foreign entity "hereby agrees to purchase 50% of all outstanding stock in [the petitioning company] for the sum of \$100,000.00, the payment of which shall be secured by a promissory note guaranteed by [redacted]"

The agreement states that "the parties create a joint venture for the sole purpose of manufacturing [the foreign entity's patented window product] in its present state of development and selling it throughout the United States." The agreement further indicates that the U.S. entity "shall have full authority to manage the entire venture, using its own facilities and employees," while [redacted] "will participate in active prosecution of the venture only as a general consultant." The agreement states that net profits and losses from the venture will be divided equally between the companies for units sold of the product. The joint venture was to continue for an initial term of 3 years, and "may be terminated by either party at any time on 12 weeks written notice to the other party." The petitioner did not submit copies of the U.S. company's stock certificates, stock transfer, or other evidence of the ownership and control of the company, nor did it provide evidence that the foreign entity had funded the U.S. company.

The director denied the petition on May 22, 2008, concluding that the petitioner failed to establish that the U.S. and foreign entities have a qualifying relationship. In denying the petition, the director determined that the petitioner had not established that the two companies have established a 50-50 joint venture in which both companies have equal control and veto power over the entity, as contemplated by the regulatory definition of "subsidiary" at 8 C.F.R. § 214.2(l)(1)(ii)(K). Rather, the director determined that it appears that the entities established a "non-equity joint venture," a contractual arrangement in which one or more of the contributing companies provides non-capital resources, such as manufacturing processes, patents, or other essential contributions. The director further noted that the petitioner failed to provide the requested copies of its stock certificates, stock transfer ledgers, or other evidence of ownership and control specifically requested in the RFE.

On appeal, counsel for the petitioner asserts that the director "reached an erroneous conclusion regarding the relationship between the foreign company and the U.S. entity due to considerable errors made by [the petitioner's] previous attorney." Counsel alleges that the petitioner received faulty advice and incompetent representation from both a business attorney and former immigration counsel.

Counsel asserts that the beneficiary's foreign employer and the petitioner's parent company is "Halnot Hayovel, Ltd.," and that the name was translated literally to "Yovelle Windows, LLC" in some of the submitted documentation. Counsel asserts that neither the joint venture agreement nor the shareholder agreement accurately reflects the true intentions of the parties, and that they are "now revising these documents."

In support of the appeal, the petitioner submits a declaration from [REDACTED] who states that he "never intended to manage the operations of the new venture," but instead sees himself as an "investor and promoter." He indicates that the parties agreed that the beneficiary would be responsible for managing the operations of the new company, and had understood that "all corporate documents would be amended as soon as [the beneficiary] had permission to work." He states that the shareholder agreement "placed me as the sole board member and only person in power at the company solely for the convenience of filing those documents quickly." [REDACTED] also states that the petitioner's former counsel failed to advise the petitioner that he had received a request for evidence until the date on which the petitioner's response was due. Finally, he states that the petitioner now understands that all of the items requested in the RFE should have been submitted with the original petition and that "it all could have been arranged quite easily" had the petitioner received proper advice from counsel. [REDACTED] requests that USCIS reopen the case and allow the petitioner to present the necessary documents.

The petitioner also submits a letter dated July 10, 2008 from [REDACTED] who states the following with respect to the agreement between the U.S. and foreign entities:

We told the lawyer that wrote up the agreement that I do not wish to have any personal involvement and asked him to write that into the agreement. What he did was that he wrote that [REDACTED] will run the business all by himself with no involvement from [the foreign entity]. But that was NOT what we asked for. [The beneficiary], who managed the business for me for so many years, is going to be the one involved for [the foreign entity], not me. We re-wrote the agreement to make that absolutely clear. The lawyer sent the original draft with the L1 application, apparently without enough knowledge of immigration law to understand what he was doing.

[REDACTED] further states that the petitioner owns 60 percent of the shares in the U.S. company, while Mr. [REDACTED] owns 40 percent of the shares.

Upon review, and for the reasons discussed herein, the petitioner has not established that the U.S. and foreign entities have a qualifying relationship.

As a preliminary matter, the AAO notes that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has not provided evidence that its former counsel has been informed of the allegations leveled against him and been given an opportunity to respond, nor does the appeal reflect whether a complaint has been filed with appropriate disciplinary authorities. Thus, the petitioner has not adequately supported its claim that it received ineffective assistance from former counsel.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

As noted by the director, and acknowledged by counsel, the record does not contain sufficient documentary evidence of the ownership and control of the petitioning company. The petitioner claims to own a 60 percent interest in the petitioning company, and the joint venture agreement indicates that the foreign entity owns a 50 percent interest in the U.S. company, which was acquired in exchange for \$100,000. While the petitioner and foreign entity now state that the joint venture agreement does not adequately reflect the parties' intentions with respect to the management of the U.S. entity, neither has specifically stated that the joint venture agreement inaccurately reflects the ownership structure of the entity. Thus the foreign entity's actual ownership interest in the U.S. company remains uncertain. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner acknowledges that it is now aware of the documentation required to establish a qualifying relationship, yet it has failed to supplement the record on appeal with copies of its stock certificates, stock ledger and evidence that the foreign entity actually paid for its claimed ownership interest in the U.S. entity. Moreover, the petitioner has provided no explanation for its failure to submit the requested stock certificates, stock ledger and other documents on appeal. 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)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The foreign entity's actual ownership interest in the U.S. entity remains entirely unsubstantiated. For this reason alone, it cannot be concluded that the two companies have a qualifying relationship.

Instead, the petitioner requests that the AAO reopen the matter and allow the petitioner an opportunity to submit the required evidence. As the petitioner did not properly document its claim of ineffective assistance of counsel, and as the director's notice of decision provided adequate notice of the evidentiary deficiencies in this matter, the AAO will not remand the petition to the director to allow the petitioner the opportunity to submit additional evidence. If the petitioner has additional evidence for consideration, it should have submitted such evidence in support of the appeal.

Furthermore, counsel and the petitioner readily acknowledge that the evidence submitted to date was inadequate to demonstrate the claimed qualifying relationship, and suggest that the petitioner is still in the process of making corrections to critical documents such as its shareholder agreement and joint venture agreement. The AAO concurs with the director's determination that the minimal evidence submitted in support of the petition suggested that the companies do not have a qualifying joint venture relationship because the foreign entity would lack the requisite equal control over the management of the company.

Finally, the AAO emphasizes that 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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.

Based on the foregoing discussion, the petitioner has not established that it has a qualifying relationship with the foreign entity. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that the beneficiary has been employed by the foreign entity for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

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 instant petition was filed on January 31, 2008. The petitioner indicated on the L Classification Supplement to Form I-129 the beneficiary has been employed by the foreign entity since January 2003. In its letter dated January 28, 2008, the petitioner stated that the beneficiary served as area manager of the foreign entity responsible for "accounts, marketing decisions, sales goals, promotion of the product line, handling distribution systems and overseeing the manufacture, assembly and production of the window systems."

In the request for evidence issued on February 12, 2008, the director requested: (1) a letter from the foreign employer describing the nature of the beneficiary's employment, including a complete position description, dates of employment and all positions held; (2) a description of the typical managerial responsibilities

performed by the beneficiary during his employment abroad, accompanied by documentary evidence of his managerial decisions; (3) an organizational chart for the foreign entity; (4) complete position descriptions for all of the foreign entity's employees; (5) a copy of the beneficiary's last annual tax return and tax withholding statement reflecting the employer; (6) copies of payroll documents reflecting the beneficiary's period of employment and salary; and (7) other unequivocal evidence establishing the foreign employment by the beneficiary.

In response, the petitioner submitted copies of the beneficiary's Israeli income tax withholding reports for the years 1999 through 2005, with English translations. The reports for 1999 through 2004 identify the beneficiary's employer as "Halonot Hayovel Ltd." and the report for 2005 identifies the beneficiary's employer as "Olbright Venetian Shields Ltd." It appears that the petitioner submitted a report for 2006, but did not provide an English translation for that document.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign employer for one continuous year within the three years preceding the filing of the petition. The director noted that the submitted documentation does not reflect "Yovelle Windows, LLC" as the beneficiary's foreign employer. The director further determined that the petitioner failed to submit evidence that the beneficiary was employed abroad in a primarily managerial or executive capacity, based on the petitioner's failure to submit the evidence requested in the RFE.

On appeal, counsel for the petitioner asserts that "Yovelle Windows" is a literal translation of "Halonot Hayovel Ltd.," and therefore the evidence reflects that the beneficiary was employed by the foreign entity. As noted above, the petitioner claims that it was unaware that the director had requested additional evidence regarding the beneficiary's foreign employment until the day the RFE response was due. The petitioner states that the beneficiary has been managing the foreign entity since its inception.

The petitioner submits new translations of the same Israeli income tax statements previously provided in response to the RFE. The new English translations indicate that the beneficiary was employed by "Khalonot Hayovel Ltd." from 2000 until 2006. The petitioner also submits a copy of current business licenses issued to "Khalonot Hayovel Ltd." in April 2007. The AAO notes that these documents identify the company's identification number as [REDACTED] and the same company identification number appears on each of the translated income tax statements submitted. However, a review of the original tax documents reveals that this company number appears on the tax statements for the years 2000 through 2004. However, the company identification number on the beneficiary's tax statements for 2005 and 2006 is [REDACTED]." As noted above, the previously submitted translation of the beneficiary's 2005 tax statement identified the name of his foreign employer as "Olbright Venetian Shilds Ltd."

The petitioner also submits a letter from [REDACTED], who states that he is the owner of "Yovelle windows also known as [REDACTED]." He provides additional information regarding the beneficiary's duties with the foreign entity as follows:

In 1998, I opened [REDACTED] to manufacture and market my invention. Like with the other companies, my son, [the beneficiary] managed all aspects of the business from

supervising the manufacturing to negotiating contracts. We had four manufacturing employees, an accountant, a bookkeeper, and a tax advisor. [The beneficiary] was in charge of all of them and reported to me. He was also responsible for getting the product line to the market, showing it to developers, architects, contractors, etc. negotiating prices, receiving orders, making sure that the orders were filled on time and without defects and shipped on time.

██████████ indicates that in 2004, his company was approached by Holis Metal Industries, Ltd. a larger window and door manufacturing company, which was subsequently granted a license to manufacture and market the foreign entity's product in Europe and Israel. He further stated:

A condition in our contract with Holis is that [the beneficiary] must teach and train their staff in the manufacturing process, installation, and customer support since no one knows the product better than him now. Every contractor that purchases the product from Holis has to come to Israel to get trained by [the beneficiary]. [The beneficiary] supervised Holis' operations in connection with my product.

The petitioner also submits a letter from ██████████ of Holis Ltd., who confirms that the beneficiary has been providing his company and staff with training, technical advice and other services as part of its contract with ██████████

Finally, the petitioner submitted an organizational chart for the foreign entity, which depicts the beneficiary as general manager and plant manager, supervising four manufacturing employees, a bookkeeper, and two accounting employees.

Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for one continuous year in the three years prior to the filing of the petition.

As stated above, the petitioner must establish that the beneficiary was employed by the foreign entity for one continuous year during the three years preceding the filing of the petition. The record shows that during the year immediately preceding the filing of the petition, from February 1, 2007 until January 31, 2008, the beneficiary was in the United States as a visitor for pleasure in B-2 status.

The petitioner has not provided sufficient evidence to establish that the beneficiary was employed by the foreign entity during 2005 or 2006. As noted above, the petitioner has submitted two different translations of the same income tax statements, which identify different employers during this period of time. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO is not in a position to determine which translation is correct. The director specifically noted in his decision that the beneficiary's tax statements identify his foreign employers as "Halonot Hayovel Ltd." and

"Olbright Venetian Shields, Ltd." The petitioner has submitted a reasonable explanation and the AAO is satisfied that Halonot Hayovel Ltd. and "Yovelle Windows" are in fact the same company. The petitioner has provided no explanation as to why the beneficiary's tax statements would identify his foreign employer as "Olbright Venetian Shields" in 2005. This omission, when considered with the above-referenced discrepancy in the company identification numbers reported in the original tax statements, makes it impossible for the AAO to conclude that the beneficiary was employed by the foreign entity for one continuous year during the relevant time period. For this additional reason, the appeal will be dismissed.

Furthermore, even if the petitioner had established that the beneficiary was employed by the foreign entity during the requisite time period, the record is lacking in evidence that his duties were primarily managerial or executive in nature.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercised discretion over the foreign entity's day-to-day operations and had the appropriate level of authority, the petitioner has failed to show that his actual duties were primarily in a managerial or executive capacity.

Prior to the adjudication of the petition, the beneficiary's position description consisted of the petitioner's vague statement that the beneficiary was responsible for "accounts, marketing decisions, sales goals, promotion of the product line, handling distribution systems and overseeing the manufacture, assembly and production of the window systems." This brief statement provides little insight into the specific managerial or executive tasks the beneficiary performed in his position abroad. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

As noted by the director, the petitioner failed to respond to the RFE in which he requested a comprehensive description of the beneficiary's duties, an organizational chart depicting the staffing of the foreign entity, and

job descriptions for the foreign entity's employees. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner now attempts to clarify the duties on appeal, and asserts that the beneficiary "managed all aspects of the business from supervising the manufacturing to negotiating contracts" and was also responsible for "getting the product line to market," showing it to developers, architects, contractors," as well as negotiating prices, receiving orders, and making sure that orders were filled and shipped on time. The petitioner indicates that the beneficiary supervised four manufacturing employees, and accounting/bookkeeping staff, but it has not provided position descriptions for these employees. Given that the petitioner did not employ any sales, marketing, installation or warehouse/distribution staff, the AAO cannot conclude that the subordinate staff would have relieved the beneficiary from performing these non-managerial duties. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Furthermore, the letter from [REDACTED] submitted on appeal, suggests that the nature of the beneficiary's duties changed significantly following the licensing of the foreign entity's product to Holis Metal Industries Ltd. in 2004 or 2005. Based on the information provided, it appears that that Holis is now the primary manufacturer, marketer and distributor of the product, and the beneficiary's duties have been limited to assisting Holis with training employees and contractors and other technical issues associated with the manufacture and installation of the products. The petitioner has not explained how such duties fall under the statutory definition of managerial or executive capacity, or how the beneficiary qualified as a manager, other than in position title. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Based on the foregoing discussion, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity, or that he was employed by the foreign entity for one continuous year within the three years preceding the filing of the petition. For this additional reason, the appeal will be dismissed.

The third and final issue addressed by the director is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity within one year of commencing operations, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not

normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(I)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(I)(3)(v)(B).

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner indicated on Form I-129 that the beneficiary will serve in the position of "production manager" responsible for overseeing the manufacture of the petitioner's patented window product. The petitioner stated that the U.S. company was established in 2007 and has six employees.

In its letter dated January 28, 2008, the petitioner stated that the beneficiary will serve in the position of "U.S. Manager" responsible for "development of the market for local sales and installation of their window products and the motion of [the petitioner's] product nationwide." The petitioner further stated that the beneficiary will perform the following duties:

This position requires that [the beneficiary] develop local guidelines set by the company, including overall marketing plan and philosophies of the joint venture; promote [the

petitioner's] name to be synonymous with their patented window products; and identify new markets for penetration and act as a liaison with distributors to insure that these markets are properly accessed; develop marketing strategies to reach both retailers and consumers; educate wholesalers' sales teams regarding the characteristics of the product line; oversee manufacture, distribution, assembly and inventory control of the product in the United States, and maintain regular communications with [the foreign entity] regarding the production and transfer of the product.

In the request for evidence issued on February 12, 2008, the director requested additional evidence pertaining to the beneficiary's proposed employment and the evidentiary requirements for new office petitions pursuant to 8 C.F.R. § 214.2(1)(3)(v)(C). Specifically, the director requested: (1) evidence of the financial status of the U.S. company, including bank statements, income tax return, and evidence of funding from the foreign entity; (2) copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the last two quarters of 2007; (3) evidence to show how the company will grow to be of sufficient size to support a managerial or executive position; (4) a description of the staff of the new office, including the number of proposed employees, their job titles and duties, and anticipated salaries and wages; (5) a comprehensive description of the beneficiary's proposed duties; and (6) information regarding the number of subordinate supervisors to be managed by the beneficiary and the amount of time he will allocate to managerial duties.

The director denied the petition on May 22, 2008, based on the petitioner's failure to submit the evidence requested in the RFE.

On appeal, the petitioner and counsel claim that the petitioner's former counsel did not timely provide the petitioner with notice of the evidence requested. Although the petitioner claims that all of the documents required "could have been arranged quite easily," the petitioner has not opted not to provide the additional evidence in support of the appeal. The record as presently constituted does not contain a business plan, evidence of the current and proposed staffing of the U.S. office, evidence of the size of the investment in the U.S. entity and its financial goals, or other evidence to show how the company will grow to support the beneficiary in a managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(1)(3)(v)(C). Again, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO acknowledges that the petitioner has provided a letter dated July 10, 2008 from [REDACTED] the claimed owner of the foreign entity, who states that the beneficiary will be performing the following duties in the United States:

[The beneficiary], on our part, is responsible for working with contractors to adapt the work space to our needs – for example, one room must be sterile and free of all dust and debris; showing the products to architects, developers and contractors who may use it; getting future orders; train the personnel that will be working on the assembly line and work on a marketing plan. Once the production line is running, [the beneficiary] will be responsible for supervising showrooms throughout the United States, managing the production line and quality control supervisors, overseeing the personnel and reviewing the books.

While this position description suggests that the petitioner expects the beneficiary to eventually oversee subordinate supervisors and various functions of the company, there is no evidence to support a conclusion that he would be performing such duties within one year. The petitioner does not indicate how many or what types of employees will be hired, when they will be hired, or when it intends to open "showrooms throughout the United States." Although the petitioner previously indicated that the U.S. company already has six employees, it has not identified their job titles, job duties, or provided evidence of their employment. 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)).

For all of the above reasons, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year, or that the U.S. company could support such a position. For this additional reason, the petition will be denied.

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

ORDER: The appeal is dismissed.