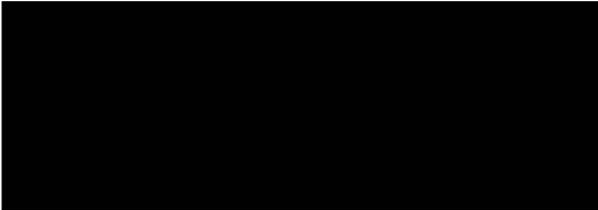




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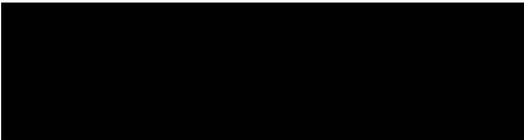
D7

File: WAC 09 019 51037 Office: CALIFORNIA SERVICE CENTER Date: OCT 21 2009

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)

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).

Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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, an Arizona limited liability company, intends to engage in the sale and service of heating, ventilation and air conditioning systems. It claims to be an affiliate of Busicor 86 CC, located in South Africa. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a period of one year.

The director denied the petition on three independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity; (2) that the U.S. company has secured sufficient physical premises to house the new office; and (3) that the United States and foreign entities have a qualifying relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that all requirements for the requested classification have been met, and that the director's findings to the contrary are unfounded. Counsel submits a detailed brief and additional evidence in support of these assertions.

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 the beneficiary has been employed by the foreign 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.

In a letter dated October 20, 2008, the petitioner stated that the beneficiary performs the following duties as general manager of the South African company:

[The beneficiary] has exercised complete control over all restaurant policies and has been directing four upper level managers in charge of three distinct divisions of the company, who themselves manage a group of 38 additional restaurant employees.

[The beneficiary] was charged with complete operational control, delegating management duties to the four upper level managers, with one Operations Manager, one Kitchen manager and two Floor managers, as indicated in the organizational chart of the restaurant. . . . As General Manager, [the beneficiary] was charged with overseeing and directing these subordinate managers who were in turn each in charge of their departments and employees. Accordingly, [the beneficiary] was primarily responsible for communicating and directing his subordinate managers to implement policies aimed at optimizing company efficiency and productivity.

Additionally, as General Manager, [the beneficiary] was engaged in an array of oversight and control responsibilities relating to essential company functions. [The beneficiary] was in charge of ultimate decision making as to purchasing decisions, pricing, and marketing strategies. Furthermore, as General Manager [the beneficiary] had complete authority over personnel decisions, which he would discuss with his upper level managers if certain concerns or needs arose.

[The beneficiary] also utilized his leadership abilities to motivate and lead his managers and other subordinate employees in departmental meetings aimed at entrenching company policies and objectives, all culminating in what is now an exceptionally successful restaurant.

The petitioner submitted an organizational chart for the foreign entity which indicates that the beneficiary directly supervises a kitchen manager, two floor managers and an operations manager, who in turn supervise 16 kitchen staff and 22 floor staff. The petitioner provided copies of recent pay slips for the beneficiary's direct subordinates.

The director issued a request for evidence (RFE) on November 7, 2008, in which he requested, *inter alia*, additional evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Specifically, the director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's job duties abroad, including the percentage of time the beneficiary allocates to each listed duty; (2) the total number of employees working for the foreign entity; and (3) a more detailed organizational chart for the foreign entity, including brief descriptions of job duties, educational level and annual salaries for all employees under the beneficiary's supervision.

In a response dated November 14, 2008, counsel for the petitioner stated:

[The beneficiary's] duties abroad include the oversight of four subordinate managers as well as oversight of marketing, personnel decisions such as hiring and firing, budgetary oversight, community and public relations and the general overall direction of the business.

Counsel emphasized that the beneficiary is not a first-line supervisor, but rather controls the work of four subordinate managers, who in turn control a staff of 32 subordinate employees. The petitioner provided a list of all staff by name, job title and salary, but did not provide the requested position descriptions for the subordinate employees. The petitioner indicated that its ten kitchen staff includes a kitchen manager, an assistant kitchen manager, two chefs, four "scullers," a salad prep employee and a "drinks" employee. The petitioner indicated that the two floor managers receive a salary, and the remaining 23 floor staff work on a "commission basis."

The petitioner also submitted a letter from the beneficiary who further describes his duties as general manager of the foreign entity as follows:

I have had responsibility for the oversight and direction of four lower level managers. . . . who themselves direct and manage our kitchen staff, floor staff, as well as the day to day operations of the restaurant. I have also spent the past three and one half years building the business name by overseeing quality control, marketing strategy, promotions, and public relations through my management.

* * *

I control and supervise business operations through weekly meetings with the four managers. I take this time not only to convey to management new business strategies, but to also listen

and gather information regarding the status of operations and be apprised of any challenges that our company faces from time to time. This takes up approximately 10% of my time.

* * *

I spend the vast majority of my time as General Manager in analyzing the efficiencies and inefficiencies of the restaurant. The macro-level focus includes productivity comparisons and evaluations, quality assurance, sales analysis, discussions with managers, creation of policies to address inefficiencies, and supervision of management's implementation of such policies. I am also engaged in an array of other oversight and control responsibilities relating to company functions such as direct involvement with [the kitchen manager] in making purchasing decisions. These duties take up roughly 70% of my time as general manager.

The beneficiary indicated that "personnel and marketing matters" required the remaining 20 percent of his time.

The director issued a second request for evidence on December 8, 2008, but did not request additional evidence related to the beneficiary's foreign employment. In denying the petition, the director emphasized that the petitioner described the beneficiary's duties in only broad and general terms, with insufficient detail regarding the duties he performed in the position of general manager. The director further emphasized that the petitioner failed to provide the requested position descriptions for the beneficiary's subordinate employees, and noted that the foreign entity does not appear to have anyone on staff who is responsible for marketing duties. The director found the evidence submitted insufficient to establish that the beneficiary has been primarily managing a subordinate staff of professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties, or that he manages an essential function of the organization.

On appeal, counsel for the petitioner asserts that the "California Service Center cannot deny this petition based on an issue addressed in the first Request for Evidence, with which they were satisfied as evidenced by no mention of the issue subsequently in the second Request for Evidence." Counsel asserts that the director should have addressed the beneficiary's job duties in its second request for evidence or denied the petition after reviewing the response to the first RFE. Counsel contends that the petitioner logically assumed that the beneficiary's job duties were no longer at issue when the second RFE was issued, and that the director did not have a valid basis for denying the petition.

Nevertheless, counsel contends that the petitioner established by a preponderance of the evidence that the beneficiary has been employed in a primarily managerial capacity. Counsel emphasizes that the director quoted only briefly from the various position descriptions provided and suggests that the director did not review the evidence in its entirety. Counsel provides excerpts from the petitioner's initial letter and the beneficiary's statement in response to the request for evidence in support of his assertion that the "majority of the Beneficiary's time is in fact spent on duties related to high levels of responsibility and not simple day-to-day operations." In addition, counsel acknowledges that the beneficiary may be involved in some marketing functions, but stresses that the petitioner need only establish that the beneficiary's duties are primarily managerial in nature.

Finally, counsel asserts that the director's conclusions that the beneficiary is "directly providing the services of the foreign organization" and that he is not supervising a subordinate staff of managerial, supervisory or professional personnel are unfounded based on the evidence submitted.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity with the foreign entity.

As a threshold issue, the AAO will address counsel's claim that the director should have first requested additional evidence prior to denying the instant petition based on this ground.

Title 8 C.F.R. § 103.2(b)(8)(ii), the revision of which went into effect on June 18, 2007, states as follows:

If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, [U.S. Citizenship and Immigration Services (USCIS)] in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by [USCIS].

Id.; see also 72 F.R. 19100 (April 17, 2007). As the instant petition was filed on October 28, 2008, the director was not obligated to request additional evidence if the petition and initial evidence failed to demonstrate eligibility for the benefit sought. Here, the director did in fact put the petitioner on notice that the initial evidence did not establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director allowed the petitioner 12 weeks to submit additional evidence regarding the beneficiary's job duties and the duties performed by the beneficiary's subordinate employees. The petitioner submitted some, but not all, of the requested evidence. Contrary to counsel's claims, the director was under no obligation to issue a second request for evidence with respect to the same issue. The second RFE was issued primarily to allow the petitioner an opportunity to establish that it had secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A), as it appears that the director previously overlooked the fact that the petitioner submitted no lease agreement or other evidence that the petitioner had secured physical premises. Again, the director, in her discretion, could have denied the petition based on the petitioner's failure to submit this required initial evidence, and was not obligated to issue either request for evidence. Ideally, all requests for additional documentation could have been addressed in a single RFE; however, there is no regulation prohibiting the issuance of two separate requests.

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 petitioner initially described the beneficiary's position with the foreign entity in only general terms, noting that the beneficiary "has exercised complete control over all restaurant policies" and delegated management duties to four subordinate managers. The petitioner further noted that the beneficiary was "charged with complete operational control," implemented policies, and "engaged in an array of oversight and

control responsibilities relating to essential company functions," such as purchasing, pricing and marketing decisions. While such duties generally convey the beneficiary's level of authority within the company, this description provides little insight into what specific managerial duties the beneficiary performs on a day-to-day basis, and no indication as to what constitutes his "array of oversight and control responsibilities." 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).

Accordingly, the director requested a detailed description of the beneficiary's duties while employed by the foreign entity, and a clear explanation as to how his time was allocated among specific duties. While the petitioner submitted a lengthier description of the beneficiary's duties in response, the description fell short of establishing what specific tasks the beneficiary primarily performs on a day-to-day basis. For example, the beneficiary stated that he oversees "quality control, marketing strategy, promotions and public relations," but he offered no further description of duties he performs in this regard. The beneficiary stated that he devotes 70 percent of his time to "analyzing the efficiencies and inefficiencies of the restaurant" and stated that his focus includes "productivity comparisons and evaluations, quality assurance, sales analysis, discussion with managers, creation of policies to address inefficiencies, and supervision of management's implementation of such policies." The beneficiary also indicated that this "vast majority" of his time includes his involvement in "an array of other oversight and control responsibilities," such as purchasing decisions. The petitioner failed to provide sufficient examples of the beneficiary's actual day-to-day job duties, such as the specific tasks he performs with respect to the quality assurance, marketing, promotions, public relations functions, or his "other oversight and control responsibilities."

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. While the AAO does not concur with the director's conclusion that the beneficiary is primarily engaged in providing the products or services of the foreign entity, the petitioner has not established with sufficient specificity what duties the beneficiary primarily performs, such that they could be classified as managerial or executive in nature. The AAO will not accept a vague job description and speculate as to what qualifying duties may be involved. A beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities.

The definitions of executive and managerial capacity each 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Thus, the fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity as defined by sections 101(a)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties fall

within the statutory definitions of managerial or executive capacity. The AAO does not doubt that the beneficiary exercises the requisite level of authority over the foreign entity as its owner and senior employee. However, due to the petitioner's failure to provide a sufficiently detailed description of the beneficiary's day-to-day duties, and a breakdown of how the beneficiary's time has been allocated among managerial and non-managerial tasks, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

The petitioner has submitted organizational charts indicating that the foreign entity has a three-tiered personnel structure and employs a staff of 36 employees in addition to the beneficiary. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Here, the petitioner indicates that the beneficiary qualifies as a personnel manager based on his supervision of four supervisory personnel, namely, a kitchen manager, an operations manager, and two floor managers. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

In the request for evidence, the director specifically requested that the petitioner provide job descriptions for all subordinate employees. Such information is critical in determining whether the beneficiary supervises professionals, managers or supervisors. The petitioner failed to submit the requested job descriptions for the beneficiary's subordinates. An employee will not be considered to be a manager or supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. 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)). Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. Therefore, the petitioner's claim that the beneficiary oversees four managers is not adequately supported. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, the AAO notes that one of the beneficiary's subordinates, the

operations manager, has no subordinate employees. Therefore, the petitioner has not established that the beneficiary's primarily supervises managerial or supervisory-level employees.

Furthermore, without the requested descriptions of the beneficiary's subordinates' duties, it cannot be determined that the beneficiary is relieved from performing administrative and operational tasks associated with the restaurant business. For example, the petitioner requires someone to performing marketing and promotion duties, purchase food, inventory and supplies, schedule staff, handle day-to-day bookkeeping and banking duties, and perform other administrative and clerical duties associated with operating the business. It is unclear who on the petitioner's staff is performing these functions and the AAO cannot assume that the kitchen, floor or operations managers perform such tasks, or that they fully relieve the beneficiary from performing the day-to-day operational and first-line supervisory tasks associated with their own departments.

Based on the lack of a sufficiently detailed position description for the beneficiary and his subordinates, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the nonimmigrant petition on October 28, 2008. The petitioner stated on Form I-129 that its address is [REDACTED] and that the beneficiary would be working at this same address. The petitioner stated in its letter dated October 20, 2008 that it has entered a contract to purchase the Mesa, Arizona-based company "Indoor Comfort Experts" (I.C.E.), contingent upon approval of the petition.

In support of the petition, the petitioner submitted an agreement dated August 26, 2008 between "AALAN Company, LLC" as seller and the beneficiary as buyer, indicating that the beneficiary agreed to purchase the business known as I.C.E. located at [REDACTED] for a price of \$550,000. The agreement indicates at paragraph 12 that "by close of escrow, buyer will have previously received or will have a reasonable opportunity to approve copies of the current lease for the premises now being occupied by the Company and its business operations." The same paragraph provides that "Seller shall obtain from the lessor under the foregoing real property lease and shall furnish to buyer at close of escrow the written consent of the lessor to buyer's assumption of the lease or as may be required, buyer shall procure a new lease or sublease agreement in accordance with the terms of the said lease."

The petitioner also submitted an amendment to the purchase contract, dated October 8, 2008, in which the buyer was changed to reflect the petitioner's company name and the seller was changed to "Indoor Comfort Experts, LLC." The date for closing of the transaction was also moved to November 10, 2008.

In a request for evidence issued on December 8, 2008, the director instructed the petitioner to submit, *inter alia*: (1) a complete copy of the U.S. company's lease signed and dated by both lessor and lessee; (2) a copy of the U.S. company's floor plan for all leased premises; (3) photographs of the leased premises; and (4) a letter from the owner or property management company of the leased premises confirming that the petitioner is actually occupying and maintaining the lease agreement.

In response to the director's request, the petitioner submitted a copy of a "commercial lease and deposit receipt" indicating that the company has leased the premises located at [REDACTED] in Mesa, Arizona for a three-year period commencing on December 1, 2008. The lease was signed by [REDACTED] as lessor on December 1, 2008, and was not signed by the petitioner.

The petitioner submitted a letter dated December 19, 2008 from [REDACTED] who states that he is the sole managing member of [REDACTED], the property owner of [REDACTED] in Mesa, Arizona.

[REDACTED] further states: "It is my intent to lease the property at this location to [the petitioner] for the operation of a heating, cooling and ventilation (HVAC) business upon receipt of the approval of [the beneficiary's] L-1 visa. The petitioner submitted evidence that [REDACTED] owns the premises and evidence that Indoor Comfort Experts LLC currently carries insurance for the property.

The director denied the petition, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the office as of the date of filing. The director noted that the lease agreement provided was not in effect at the time the petition was filed. The director further emphasized that, pursuant to the terms of the purchase contract submitted, the petitioner would not assume the lease of I.C.E. until the close of escrow, which is contingent upon the beneficiary receiving his L-1 visa.

On appeal, counsel for the petitioner states that the petitioner's purchase agreement is contingent solely upon the issuance of the beneficiary's L-1A visa and, accordingly, the lease agreement "stated a starting lease date of December 1, 2008 which was intended to provide enough time to properly file and receive approval of the Beneficiary's L-1A visa petition so that he could enter and start operating the business on the premises."

Counsel further states:

[T]he argument that no physical premises was secured prior to the filing of the petition is untrue as there are valid purchase and lease agreements that have already been entered into and secured. USCIS appears to believe that the lease start date of December 1, 2008 is indicative of subsequent developments that supposedly occurred after the original filing in October. This is incorrect as the purchase contract, escrow and lease agreements had all been prepared and agreed upon by [the petitioner], Indoor Comfort Experts, and Mark Allan Properties, LLC . . . prior to the filing of this petition.

Upon review, the petitioner has not established that it had secured sufficient physical premises to house the new office.

At the time of filing, the petitioner indicated on Form I-129 that the beneficiary's worksite would be located at [REDACTED] in Phoenix, Arizona. The purchase contract submitted at the time of filing indicates that the petitioner agreed to purchase a business known as I.C.E., located at [REDACTED] in Mesa, Arizona. The record contains no documentary evidence, such as a lease agreement, showing that the petitioner had secured premises at either of these addresses at the time the instant petition was filed on October 28, 2008.

In response to the director's request for evidence, the petitioner submitted a copy of an unexecuted lease agreement for premises located at [REDACTED], and a letter from the property owner

indicating his intent to lease this premises to the petitioning company contingent upon approval of the beneficiary's L-1 visa. Contrary to counsel's assertions on appeal, there is no evidence in the record indicating that the petitioner had secured these premises as of the date the petition was filed, given that the petitioner's initial evidence indicated that the petitioner would occupy premises at one of the two above-referenced addresses. 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).

While it appears that the business known as "I.C.E." has been occupying the premises at [REDACTED] in Mesa, Arizona since at least mid-August 2008, the petitioner has not explained why it did not provide this address at the time of filing, or why a different address is mentioned on the Form I-129 and the purchase contract. Counsel's assertion that the lease for these premises was prepared and signed prior to the filing of the petition is not supported by any evidence. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Based on the foregoing, the petitioner has not established that it had secured physical premises to house the new office as of the date the petition was filed. 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). Accordingly, the appeal will be dismissed.

The third and final issue addressed by the director is whether the petitioner established that the petitioner and the foreign entity have a qualifying relationship. 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(I).

The petitioner claims to have an affiliate relationship with the foreign entity based on common ownership and control by the beneficiary, who is claimed to be the sole owner of both companies. The petitioner submitted documentary evidence, including articles of organization for both entities, which identify the beneficiary as the sole member. The director denied the petition based solely on a determination that the petitioner failed to establish that the beneficiary made a capital contribution in the U.S. company.

On appeal, the petitioner provides further clarification and documentation evidencing that the beneficiary made an escrow deposit in the amount of \$10,000 on behalf of the petitioning company for the purchase of the business known as I.C.E. in the United States.

Upon review of the totality of the evidence, the petitioner has provided sufficient evidence to establish that the U.S. and foreign entities have a qualifying affiliate relationship. The director's determination with respect to this issue only will be withdrawn.

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

ORDER: The appeal is dismissed.