

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

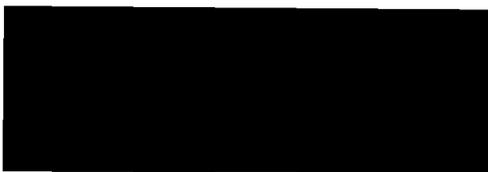
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

D7



File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 17 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. After the petitioner filed suit challenging the decision, the director certified the decision to the Administrative Appeals Office (AAO) for review. *Cost Saver Mgmt. LLC v. Napolitano*, No. CV-10-02105-JST-CW (C.D.Cal. filed Mar. 23, 2010). After considering the director's findings and the petitioner's brief on certification, the AAO issued a notice dated July 1, 2010 informing the petitioner of its intent to affirm the director's decision to deny the petition. The AAO provided the petitioner with a copy of an overseas "site visit" verification report, which the director had relied upon as a basis for the decision, and allowed the petitioner additional time to submit a rebuttal. The AAO has received and considered the petitioner's response. The AAO will affirm the director's decision.

The petitioner is a limited liability company organized under the laws of the State of California that intends to provide operational and personnel management services to a chain of three supermarkets in the Los Angeles, California metropolitan area. The petitioner claims to be an affiliate of the beneficiary's overseas employer, [REDACTED] a company located in [REDACTED] that provides building, civil engineering, architectural, and consulting services. In the petition, the overseas employer claimed to have 45 employees and a net profit of \$445,432 as of March 31, 2009. The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of "manager" to open a new office in the United States 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 director reviewed the conclusions that were cited as grounds for the petitioner's two prior denials and ultimately determined that the most recently filed Form I-129 should also be denied.<sup>1</sup> In addition, the director also cited an "Field Site Visit Report" from the U.S. Embassy in [REDACTED] that was based on an unannounced "site visit" of the affiliated overseas company that was conducted by a USCIS officer. The director determined that the petitioner failed to provide sufficient and credible evidence to establish that: 1) the petitioner has a qualifying relationship with the beneficiary's alleged foreign employer; or 2) the beneficiary was employed abroad in an executive or managerial capacity.

In response to the director's notice of certification, counsel for the petitioner submits a brief addressing the issues raised in the director's two prior denials and disputing the validity of the field site visit report that served as the basis for finding that the beneficiary was not employed abroad in a qualifying managerial or executive capacity.

With regard to counsel's attempt to overcome the grounds cited in two prior denials, the AAO notes that the proper manner for addressing such grounds would have been an appeal or motion in response to either or both of the director's decisions. *See generally* 8 C.F.R. §§ 103.3 and 103.5. Although the director's current decision includes an overview of the circumstances that resulted in denials of the previously filed Forms

---

<sup>1</sup> The record shows that the petitioner filed two prior Form I-129 petitions. The petitioner filed the first Form I-129 [REDACTED] on August 26, 2009. That petition was denied on October 14, 2009. Shortly thereafter, the petitioner filed a second Form I-129 [REDACTED] on October 22, 2009. That petition was denied on November 19, 2009. The record shows that the petitioner did not file an appeal or motion in response to either denial.

I-129, the AAO cannot enter a decision, either to withdraw or to affirm an adverse decision, when the petitioner has not filed an appeal seeking the AAO's review of either matter. Therefore, the AAO will limit its review to the current record of proceeding and consider only those issues that were certified to the AAO for review pursuant to 8 C.F.R. § 103.4(a).

### **I. The Law**

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, 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 involved 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 (I)(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.

## II. Field Site Visit Report

The record shows that on January 11, 2010, two USCIS immigration officers from the U.S. Embassy in [REDACTED] visited the site of the beneficiary's claimed foreign employer and interviewed the beneficiary. The USCIS officers issued a report to memorialize the observations and findings that were generated by the interview and field site visit.

In the April 19, 2010 decision, the director focused on several anomalies. First, she noted that although the petitioner claimed that the beneficiary was the Chief Executive Officer (CEO) of the foreign company, the report listed the beneficiary as a "director" of the foreign entity. The director further pointed out that the foreign company was unable to provide any documents demonstrating the beneficiary's signatory authority as the CEO of the company. The director also noted the beneficiary's inability to describe his daily job duties and, when asked how much time he allocates to managerial and executive duties, the beneficiary stated that he does not manage employees or office operations, but rather that his daily activities involve "construction and property management." When asked about the types of key decisions he makes, the beneficiary provided an example of an instance when he went to the office of another company seeking payment owed to [REDACTED] the claimed foreign employer. The beneficiary also stated that his job includes visiting construction sites.

The immigration officers asked the beneficiary a number of questions about the personnel that work for [REDACTED]. In response, the beneficiary stated that the company has "44-45 employees" who are dispatched to various construction sites. However, in response to a request for production of documents regarding the company's personnel, the beneficiary stated that employees are paid in cash. The beneficiary produced a "staff wage register" that listed "28-35" employees. The register further indicated that most of the employees are common laborers, some of whom were not listed by their full names, and that they are paid 4,000 IR (\$86.00 USD) per month.

The director pointed out a discrepancy between a Form I-129 supporting document, which lists seven managerial positions directly subordinate to the beneficiary, and the beneficiary's statements during the site visit, during which he stated that he does not manage any employees and further indicated that very few staff work at [REDACTED] offices. The director also pointed out that the beneficiary was unable to identify the foreign entity's account manager, who was listed among the beneficiary's subordinates.

The record shows that on December 23, 2009, the director issued a notice of intent to deny (NOID) asking for additional supporting documentation. That notice was issued well in advance of the January 11, 2010 field site visit. Accordingly, on January 13, 2010, the director issued an addendum to the NOID to incorporate the adverse information contained in the field site visit report and offer the petitioner the opportunity to rebut.

In response, counsel submitted a statement dated February 12, 2010 disputing the denials of the petitioner's previously filed Forms I-129 and the intended denial of the third Form I-129, which is the subject of the current proceeding. Counsel's statement included objections to the field site visit and report, asserting that the report contained "incomplete, inaccurate and materially misleading" information. Counsel focused heavily on the beneficiary's lack of command of the English language, implying that certain factors were misconstrued as inconsistencies as a result of the alleged language barrier between the beneficiary and the immigration officers who came to interview him.

The petitioner provided the following documents, *inter alia*, as part of its response to the NOID addendum:

1. The beneficiary's four-page declaration dated February 11, 2010 containing statements made under the penalty of perjury stating that the beneficiary has been working for [REDACTED] in the position of "Director-cum-CEO" since October 4, 2007. The beneficiary disputed findings that were issued in the field site investigation report, claiming that questions were asked in "an unfamiliar foreign accent," which led the beneficiary to misunderstand the questions being asked. (Exhibit 4, NOID response.)
2. A declaration made under the penalty of perjury, dated February 10, 2010, from [REDACTED] who claimed to hold the position of management consultant for [REDACTED]. [REDACTED] provided his personal account of the circumstances surrounding the field site visit, offering his own interpretation of the beneficiary's responses. [REDACTED] believed that the alleged language barrier between the beneficiary and the immigration officers was the main cause for confusion and claimed that he was hired by the beneficiary and remains a direct subordinate of the beneficiary. (Exhibit 5, NOID response.)
3. A declaration made under the penalty of perjury, dated February 11, 2010, from [REDACTED] who identified himself as an advocate and managing partner at a law firm in New Delhi, India. [REDACTED] provided his professional opinion based on his review of [REDACTED] documents, stating that the beneficiary 1) has been a director and chief executive officer of [REDACTED] since October 4, 2007; 2) has hiring, firing, and promoting

authority over the company's employees; and 3) has been overseeing, managing, and directing the management of the company since October 4, 2007. [REDACTED] further attested to the beneficiary's lack of ease in speaking English, despite his "basic understanding" of the language. (Exhibit 6, NOID response.)

4. Three documents memorializing the beneficiary's position abroad, including a letter dated October 4, 2007, appointing the beneficiary as "Director-cum-Chief Executive Officer" of the foreign entity, a notarized agreement dated October 4, 2007 agreeing to the beneficiary's appointment, and an extract from a minutes of meeting with a resolution made on October 4, 2007 to appoint the beneficiary to the new position. (Exhibits 6A, 6B, and 6D, respectively, NOID response.) It is noted that the latter document contains the date "8<sup>th</sup> day of February, 2010" at the lower right-hand side of the document with no explanation as to the significance of the more recent date.
5. Documents signed by the beneficiary establishing his hiring and firing authority over company employees. The documents include two appointment letters dated December 28, 2009 and April 15, 2008 addressed to [REDACTED], respectively, and one employment termination letter dated October 15, 2008 for [REDACTED]

After conducting a comprehensive review of the report and the petitioner's submissions in response thereto, the director determined that the petitioner failed to overcome the adverse findings cited in the NOID and the addendum. The director denied the petition in a decision dated April 19, 2010.

In response to the director's decision, counsel challenges the director's reliance on the field site visit report, asserting that the visit was not prearranged and was made without prior notice to counsel. In his more recent statement, submitted in response to the AAO's July 1, 2010 notice of derogatory information, counsel elaborates on his objections to the unannounced field site visit. Counsel asks the AAO to reject the site visit report as untrustworthy, unreliable and inadmissible.

#### *A. Due Process*

First, counsel claims that the unannounced visit from immigration officers from the U.S. Embassy in India violated the beneficiary's due process rights. Among various complaints, counsel asserts that the beneficiary was deprived due process because the officers interviewed the beneficiary without the presence of counsel and further conducted the site visit in English instead of Hindi.

Although the brief is ambiguous, counsel appears to refer to the Due Process Clause of the Fifth Amendment of the United States Constitution, which guarantees minimal requirements of notice and hearing when action by the federal government might deprive one of a significant life, liberty, or property interest. However, counsel also cites to at least one regulation in support of a regulatory challenge to the unannounced site visit. For the sake of completeness, the AAO will assume that the petitioner raises both regulatory and constitutional challenges to the site visit.

With respect to a constitutional due process challenge, the AAO has no authority to entertain constitutional challenges to a USCIS action. *Cf. Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002) (collecting cases). The AAO notes, however, that counsel has not explained how an alien, who has not been admitted to the United States, merits due process protection under the United States Constitution. Aside from citizens, the only individuals who warrant constitutional protections are those aliens who have been lawfully admitted to the United States. *See U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Objecting to the unannounced site visit on a procedural or regulatory basis, counsel also cites the regulation at 8 C.F.R. § 103.2(b)(9) as requiring USCIS to notify a petitioner of an interview by mailing an interview notice. The provision cited, however, specifically refers only to requests for the appearance of applicants and petitioners who are "residing in the United States at the time of filing an application or petition." *Id.* Thus, the provision does not apply in the present matter, since: first, the field site visit is not a request for appearance; and second, the beneficiary was residing abroad at the time the Form I-129 was filed.

Even if such due process protections were available to aliens overseas, the petitioner has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioning company or the beneficiary. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge).

The petitioner's chief complaint is that the director denied the nonimmigrant visa petition after conducting an unannounced site visit in India. The AAO notes that USCIS consistently denied two prior petitions that were filed well in advance of the site visit, and issued the initial NOID prior to receiving the site visit report from India. It appears likely that the present petition would have been denied even if the site visit had never occurred. Further, even if the petition had been approved, this approval would not guarantee admission to the United States. The approval of a visa petition vests no rights in the beneficiary, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to entry as a nonimmigrant alien. Sec. 214(c)(1) of the Act, 8 U.S.C. § 1184; *see also Matter of Patel*, 19 I&N Dec. 774, 780-1 (BIA 1988). If USCIS had approved the petition, the beneficiary would have been required to seek and obtain the visa at a U.S. consulate and then apply for admission at a port of entry, where an immigration officer would have determined if he is admissible. Thus, status as a nonimmigrant alien is not automatic upon approval of the petition. Even if due process rights applied in this matter, the petitioner has fallen far short of showing substantial prejudice.

USCIS considers the procedural due process rights of an employer or an alien beneficiary to be of crucial importance. However, counsel's reasoning would have serious ramifications for the overseas visa issuance process making the petition process tantamount to a criminal proceeding. In the present case, the contact between the USCIS officer and the alien beneficiary strictly related to his eligibility for an L-1A nonimmigrant visa based on a voluntarily submitted petition. The site check was not related to a criminal investigation, the alien beneficiary's participation in the visit was entirely voluntary, and the alien beneficiary was not taken into custody. Accordingly, the overseas "field site visit" contact between a USCIS officer and the beneficiary of a pending visa petition is more akin to the contact between an immigration officer and an alien seeking entry to the United States in primary or secondary inspection at a designated port of entry. In such cases, the alien does not have the right to representation. *See* 8 C.F.R. § 292.5(b).

Instead of a criminal proceeding, the field site visit was an administrative inquiry relating to the petitioner's burden of proof. As in all visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. A site visit may lead to the discovery of adverse information, as in the present case, but it is just as likely to confirm the petitioner's eligibility and lead to an approval.

While there are no due process privileges available to an alien overseas, the AAO notes that the beneficiary's participation in the site visit was entirely voluntary. The beneficiary, as a representative of the petitioner, had the right to assert that the site visit was "unfair" and either refuse or terminate the visit. However, if the petitioner is to meet its burden of proof, the petitioner must provide any requested information that is material to L-1A visa eligibility. If the petitioner were to refuse the site visit, the petitioner might prevent the director from reaching a conclusion as to the petitioner's eligibility. Under these circumstances, the petitioner would have failed to sustain its burden of proof. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

*B. Prohibited Contact with a Represented Party*

Second, counsel contends that the field site visit somehow violated Model Rule 4.2 of the American Bar Association (ABA) Model Rules of Professional Conduct. This assertion is equally unconvincing, as the section cited by counsel refers to an attorney being prohibited from directly contacting a party he or she knows to be represented by counsel. According to the ABA, the model rules create limits to client-lawyer relationships and impose certain duties upon the attorney with respect to his or her client. Counsel acknowledges that the contact was made by immigration officers, but speculates that USCIS attorneys may have been involved in ordering the site visit. Upon careful review, the record of proceeding fails to disclose any participation by USCIS attorneys in the site visit.

As applied in the present matter, it would appear that counsel considers the beneficiary of the Form I-129 to be the represented party.<sup>2</sup> However, counsel has not explained how the model rule would apply when: 1) the

---

<sup>2</sup> Upon review, neither the beneficiary nor the petitioner signed the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. Instead, the form is signed by [REDACTED] as both the petitioner and as the attorney. Although [REDACTED] indicates that he signed for the petitioner "per power of attorney for petitioner and [REDACTED]" the petitioner did not submit a power of attorney but rather a document titled "Signature Authorization." The signature authorization document does not purport to designate counsel as an agent or attorney-in-fact, but rather states that counsel may sign "on behalf of Company Representative(s) the immigration case documentation to be filed by Company with Government Agency." USCIS will not recognize the appearance of an attorney in visa petition proceedings unless the attorney properly files the required Form G-28. To be considered properly filed, both the regulations at 8 C.F.R. § 292.4(a) and the form instructions specifically require the petitioner to sign the Form G-28.

As will be discussed further in the conclusion of this decision, even if the attorney had submitted a "power of attorney," the use of such a document is highly questionable in instances where an official form, such as the I-129, is required to be signed under penalty of perjury. The probative force of a declaration subscribed under penalty of perjury is derived from the actual signature of the declarant. Without the declarant's signature,

contact took place outside of the United States; 2) the beneficiary and the foreign employer were contacted by immigration officers rather than an attorney; and 3) the contact was an administrative inquiry regarding a visa petition that was filed by a foreign business organization.

The facts of the present case are plainly distinguishable from the petitioner's allegations and speculation of improper attorney contacts. While the ABA Model Rules are due serious consideration and weight in matters related to attorney ethics, the model rules are not applicable to this case.

Although counsel maintains the beneficiary's right to have an attorney present at the time of the field site visit, he did not point to any legal authority in support of this assertion, such as a statute, regulatory provision, or precedent case law. While 8 C.F.R. § 292.5(b) recognizes that an alien has the right to legal representation during an "examination," this regulation does not mandate that USCIS inform him of such a right either before or during the examination. Instead, DHS is only required to advise an alien that he has a right to legal representation upon his arrest and placement in formal proceedings under section 238 or 240 of the Act. *See* 8 C.F.R. § 287.3(c).

Additionally, the AAO also concludes that an administrative inquiry such as a "field site visit" would not be considered an "examination" under 8 C.F.R. § 292.5(b). The term "examination" is not defined by statute or regulation, but the use of the term in the Act implies that it is a formal adjudication of an applicant or petitioner's eligibility. *See, e.g.,* sec. 335(b) of the Act (setting standards for conducting examinations upon applications for naturalization). A "field site visit," on the other hand, is an informal administrative inquiry and not a formal adjudication.

### *C. Authority to Conduct Site Visits and APA Concerns*

Throughout the briefing in this case, counsel directly and indirectly attempts to cast doubt on the authority of USCIS to conduct site visits. For example, counsel readily admits in his most recent submission that the Form I-129 instructions authorize site visits which are incorporated by reference into the applicable regulations via 8 C.F.R. § 103.2(a)(1), but asserts that the form instructions violate the public notice and comment requirements of the Administrative Procedure Act (APA).

As revised, the instructions to the Form I-129 (rev. June 12, 2009), at page 23, notify the petitioner of "USCIS Compliance Review and Monitoring." The instructions state:

The Department of Homeland Security has the right to verify any information you submit to establish eligibility for the immigration benefit you are seeking *at any time*. Our legal right to verify this information is in 8 U.S.C. 1103, 1155, 1184, and 8 CFR parts 103, 204, 205, and 214. To ensure compliance with applicable laws and authorities, USCIS may verify information before or after your case has been decided.

---

such a declaration is completely robbed of any evidentiary force. *See Blumberg v. Gates*, No. CV 00-05607, 2003 [REDACTED] C.D.Cal.).

Agency verification methods may include, but are not limited to: review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic submission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews. Information obtained through verification will be used to assess your compliance with the laws and to determine your eligibility for the benefit sought.

Subject to the restrictions under 8 CFR part 103.2(b)(16), you will be provided an opportunity to address any adverse or derogatory information, that may result from a USCIS compliance review, verification, or site visit . . . .

(Emphasis in original.)

The form instructions also require the petitioner to sign the form under penalty of perjury, attesting that all evidence submitted with the record is true and correct.

The AAO notes that the USCIS authority to conduct "site visits" does not rest on the form instructions alone. The Secretary of Homeland Security maintains broad authority to administer and enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens. Sec. 103(a)(1) of the Act, 8 U.S.C. § 1103. Among the authorities delegated to USCIS, the Secretary delegated the authority to conduct interviews, investigate alleged civil violations of the immigration laws, and to station officers overseas. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). Additionally, with respect to overseas "site visits," the Homeland Security Act of 2002 authorizes the Secretary to assign Homeland Security personnel to diplomatic and consular posts to conduct investigations and review applications, "either on the initiative of the employee of the Department or upon request by a consular officer or other person charged with adjudicating such applications." *See* section 428(e)(6) of the Homeland Security Act of 2002, PL 107-296 (Nov. 25, 2002).

Finally, USCIS regulations give the agency specific authority to take testimony and conduct investigations: "The USCIS may require the taking of testimony, and may direct any necessary investigation." 8 C.F.R. § 103.2(b)(7). The former Immigration and Naturalization Service (INS) initially published this regulation as a proposed rule, with request for public comment, on December 2, 1991. 56 Fed. Reg. 61201, 1991 WL 251729 (Dec. 2, 1991). The INS published the final rule on January 11, 1994. 59 Fed. Reg. 1455, 1994 WL 5197 (Jan. 11, 1994). The 1994 Federal Register notice reflects no public comments or objections to the INS, now USCIS, authority to take testimony and conduct investigations.

The AAO concludes that there is ample authority for USCIS to investigate and verify eligibility for immigration benefits, including the use of site visits.

While counsel contends that 8 C.F.R. § 103.2(a)(1) violates the APA, the AAO is not the proper forum for a determination as to the legality of a federal regulation. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003). Accordingly, the AAO has no authority to address counsel's claim.

*D. Objections to the Form of the Site Visit Report*

Finally, counsel makes numerous objections to the form and content of the site visit report. Counsel notes that the report is not a verbatim transcript of the visit, but instead is composed of "characterizations" of the discussions. Counsel also asserts that the immigration officers did not place the interviewees under oath. Counsel also alleges that the report omits portions of the visit and that the parties to the office visit did not understand each other. Additionally, counsel asserts that the immigration officers were not familiar with the L-1 visa category and came to erroneous legal conclusions. Finally, counsel asserts that the officers made "slandorous and false suggestions" regarding the beneficiary's previous visit to the United States, alleging that he engaged in unauthorized employment.

Citing to *Matter of S-S-*, 21 I&N Dec. 121 (BIA 1995) and *Matter of Arias*, 19 I&N Dec. 568 (1988), counsel asserts that the report should be rejected in its entirety because it is "conclusory, speculative, equivocal, and . . . irrelevant."

While counsel for the petitioner argues that the site visit evidence obtained by USCIS officers during the unannounced visit should be suppressed, he does not address, with any specificity, what evidence in particular he has sought to suppress. Instead, he seeks to throw the entire report out. The AAO does not find that the petitioner has provided a sufficient basis to conclude that the evidence presented by USCIS should be excluded. Instead, the AAO observes that the report contains enough detail and summarizes a sufficient number of material points to allow the director and the AAO to consider the report as part of the adjudication.

Upon review, the report is not conclusory, speculative, or equivocal. As will be discussed in the merits, once the petitioner is put on notice of inconsistencies in the record, the petitioner must resolve those inconsistencies 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).

*E. Conclusion*

There is a considerable and widely recognized need for resources that would allow immigration officers to verify overseas companies that are seeking to transfer employees by way of the L-1 visa. In January 2006, the Department of Homeland Security's Office of the Inspector General (OIG) released a report entitled "Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program." Richard Skinner, DHS Inspector Gen., OIG-06-22 (Jan. 2006). Among a number of L-1 visa program vulnerabilities, the OIG report noted that the transfer of L-1 workers requires that the petitioning firm is doing business abroad, but "[i]t can be a very difficult task for an adjudicator to verify that a business exists abroad." *Id.* at 15. The report recommended that DHS establish procedures to obtain overseas verification of pending H and L petitions.

Like the OIG, the AAO concludes that it is essential to the integrity of the L visa classification for DHS to have the ability to confirm information submitted with a visa petition, especially when it relates to the actual existence or eligibility of an overseas business. In the present case, a USCIS immigration officer at the

California Service Center requested the overseas site visit after noting inconsistencies in the documents submitted in support of the L-1 new office visa petition. The director noted some of these inconsistencies in the initial NOID, dated December 23, 2009.

Beyond the inconsistencies noted in the NOID, the record contains additional irregularities that the AAO deems to be significant. These irregularities would reasonably lead the director to request an overseas site visit.

Specifically, the record contains photographs of the purported overseas employer's building and interior offices that reveal significant discrepancies. At the time of the petition's filing, the petitioner submitted a letter brief from counsel and 48 evidentiary exhibits. The 12-page letter is on letterhead from the law firm of [REDACTED] dated December 14, 2009, and is signed by [REDACTED] as a Certified Specialist in Immigration and Nationality Law, according to the State Bar of California Board of Legal Specialization (Paparelli Letter).

Among the description of the many exhibits, [REDACTED] notes that Exhibit 15 is comprised of: "Color copies of photographs of [REDACTED] showing company signage, logos, internal office, external buildings and construction sites (submitted with initial petition)." See Paparelli Letter, page 10.

Upon review of Exhibit 15, the color copies of the photographs contain unique characteristics that lead the AAO to conclude that the photographs have been *digitally manipulated or altered to create an appearance of "company signage."* The first two photographs in Exhibit 15 illustrate the outside of a white, four-story building with an awning on the first floor and balconies on the upper three floors. The photographs were taken from the perspective of the corner, so that the viewer can see the front and side of the building. There are two men standing in front of the building, but their position shifts between the two photographs, indicating that these are two distinct photographs taken in series. On the third floor, on both sides of the building, there are two yellow rectangular signs with the words "[REDACTED]" in dark red text.

Upon close examination, it is apparent that the photographs were digitally altered to insert the "company signage" as described in the [REDACTED]. First, the font of the "[REDACTED]" text is artificially slanted away from the surface plane of the signs instead of running parallel to the edge of the signs. Second, the background of the signs is an unnaturally uniform yellow color, with no shading or texture, that appears to have been digitally created rather than captured in a photograph. Finally, the AAO notes that in the first photograph, there is a telephone or electrical line that crosses over the front of the signage. In the second photo, however, the line disappears at the left-hand edge of the sign and then reappears at the right-hand edge of the sign. It is clear that the author of this manipulated photo failed to reinsert the telephone or electrical line after altering the photo to insert the company signage.<sup>3</sup> Because of the

---

<sup>3</sup> The AAO notes that additional photographs contained in Exhibit 15, as well as Exhibit 14, appear to have been digitally manipulated. The third photograph in Exhibit 15, for example, represents an interior office with a man seated at an apparent reception desk. There is a framed picture of high rise buildings on the wall

difficulty in describing these documents, the AAO has attached a copy of the two photographs as an appendix to this decision. *See attached, Appendix A.*

Discrepancies of this nature would have reasonably caused the director to question the existence of the overseas company and the beneficiary's employment experience with that entity.

In summary, there is no legal obligation on the part of USCIS to provide advance notice of an overseas field site visit either to the alien or to an attorney representing that alien. Furthermore, even if the site visit could be considered an "examination" with the corresponding right to legal representation, the regulations do not mandate that USCIS inform the petitioner or beneficiary that he or she has such a right either before or during the examination.

Pursuant to 8 C.F.R. § 103.2(b)(16), the petitioner in the present matter has been given ample opportunity to provide documentary evidence to refute the adverse findings made in the report in question. In light of the considerable deficiencies that cast serious doubt on the validity of the claims being presented in the present matter, only independent objective evidence would suffice to overcome the adverse findings. As properly pointed out by the director in the denial, any attempt to explain or reconcile the inconsistencies without evidence will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-92.

Furthermore, a comprehensive analysis of the petitioner's submissions indicates that even if the field site report were not used as a basis for adverse findings, the record contains numerous deficiencies and inconsistencies that put the petitioner's credibility in question and strongly indicate that the petitioner is ineligible for the immigration benefit sought.

**III. Eligibility**

Turning to the merits of the petitioner's claimed eligibility for an L-1 visa, there are two primary issues raised by the director: 1) the petitioner failed to prove that the beneficiary was employed abroad in an executive or managerial capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's alleged foreign employer. Upon review, the AAO will affirm both of the director's findings.

---

behind the desk, with the words [REDACTED] at the bottom in a red font. Again, this framed picture appears to have been digitally altered or manipulated, since the text does not line up with the plane of the picture frame and the edge of the original artwork appears to be visible at the lower right hand corner under the superimposed picture. Exhibit 15 concludes with photographs of the beneficiary at a desk in a vacant office, apparently representing his day-to-day work space within the overseas company.

While the AAO could continue to note discrepancies of this nature for the record, the AAO will refrain from doing so. Instead, the AAO will simply note that the director may reasonably request the original documents and refer the matter for further criminal or administrative investigation. *See* 8 C.F.R. § 103.2(b)(5).

*A. Managerial and Executive Duties*

The first issue to be addressed is whether the beneficiary was employed abroad in a qualifying managerial or executive capacity for at least one out of three years prior to the filing of the instant petition.

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 whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Instead, the petitioner appears to claim both, relying on partial sections of the two statutory definitions.

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. 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)(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)(ii)(B)(3).

The statutory definition of the term "executive capacity," on the other hand, 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 managerial 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-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.*

*(i) Petitioner's description of the job duties*

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).

A December 11, 2009 letter submitted in support of the petition identifies the beneficiary's employment abroad as Chief Executive Officer (CEO) of Shree Ram Buildwel Pvt. Ltd. and asserts that the position "clearly involves extensive executive/managerial responsibilities." The letter states that the beneficiary is directly charged with the oversight and management of seven (7) executive and managerial level employees, including two Directors, one Senior General Manager for Projects, one General Manager for Projects, one Purchasing Manager, one Accounts Manager, and one Management Consultant. The letter lists all seven employees by name, job title, educational background, and area of responsibility.

The letter continues to state that the beneficiary is charged with the following responsibilities: Management of Client Development and Strategic Planning (approximately 30% of his time); Client Relations Management (approximately 15% of his time); Finance Management (approximately 15% of his time); Management of Employees (approximately 25% of his time); Supervision of Construction Sites (approximately 5% of his time); and Other Miscellaneous Oversight Activities (approximately 10% of his time). The AAO notes that

for the initial three responsibilities, the letter consistently describes the beneficiary as "directing subordinate managers" who in turn are responsible for the day-to-day functions.<sup>4</sup>

The AAO also acknowledges the petitioner's initial submission of supporting documentation, including the foreign entity's organizational chart depicting the beneficiary at the top of its organizational hierarchy (Exhibits 3 and 10), the beneficiary's payroll record for the 2008-09 fiscal year (Exhibit 5), documents appointing the beneficiary to the position of CEO (Exhibits 4 and 6), and the foreign entity's payroll documents from October 2007 through October 2009.

As noted by the director in her decision, a petitioner must clearly and specifically describe the beneficiary's employment capacity, indicate whether such duties are either in an executive or managerial capacity, and submit evidence to substantiate the claim. *See* 8 C.F.R. § 214.2(l)(3)(ii), (iv) and (v)(B). 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).

While the petitioner submitted a letter to describe the managerial and executive nature of the beneficiary's position, the December 11, 2009 letter was signed by the petitioner's immigration counsel and not by the actual petitioner. Although the letter is submitted on Cost Saver Management letterhead, and possesses a signature block for the beneficiary as "Owner and Manager," the letter is signed by counsel, "per power of attorney." notes that the signature is based on a "power of attorney" but the petition is not accompanied by a valid power of attorney; there is no indication that is authorized to act as attorney-in-fact or agent. Instead, the petitioner submitted a "Signature Authorization" document that simply states that counsel may sign "on behalf of Company Representative(s) the immigration case documentation to be filed by Company with Government Agency." There is no indication that the petitioner wrote the description of the duties. Instead, the letter appears to have been written by the petitioner's immigration counsel.<sup>5</sup>

The fact that the letter describing the critical duties of the beneficiary is not signed by the petitioner raises doubt as to whether the beneficiary or petitioner had knowledge of its contents; thus, its evidentiary weight is severely limited. Rather than treating the document as a letter from the petitioner, the AAO will treat the document as an assertion of counsel. 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).

---

<sup>4</sup> Because the complete job description is included in the record of proceeding, and fully quoted in the director's decision, the AAO will not recite the description in full.

<sup>5</sup> There is one document at Exhibit 13 that is signed by a director of that lists the beneficiary's duties. While this document mirrors the letter signed by counsel, the letter provides no detail at all regarding the beneficiary's duties. Instead, the letter simply lists the six categories and attributes percentages. This document falls far short of describing the beneficiary's duties with any specificity.

Turning to the actual contents of the letter, and counsel's arguments on certification, the petitioner asserts that the beneficiary should be considered both a manager and an executive based on the description contained in the December 11, 2009 letter. Assuming *arguendo* that the letter was drafted and signed by the petitioner, the AAO concludes that the letter does not describe with sufficient specificity the actual duties of the beneficiary.

For example, the description attributes the greatest percentage of the beneficiary's time – 30 percent – to the duty of "Management of Client Development and Strategic Planning." The description of this job duty states that the beneficiary directs subordinate managers in the "development and expansion of business activities for Shree Ram." The letter states that these activities include:

- The identification of target markets, contracting parties or agencies and demographic segments of the market,
- The development of strategies and policies to expand business development and the evaluation of potential clients brought to the CEO for final review and approval, and
- The development, review, analysis and approval of reports of sales, marketing and business development activities in order to evaluate and revise current practices and strategies, as necessary, to promote the continued growth of Shree Ram;

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 job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108.

Based on the nonspecific description of the beneficiary's responsibilities, the AAO cannot determine what composes the beneficiary's "primary" duties on a daily basis. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On the basis of this finding, the instant petition cannot be approved.

*(ii) Inconsistencies*

Furthermore, the AAO cannot conclude that the beneficiary is either a manager or executive because of unresolved inconsistencies in the record of proceeding.

In the January 13, 2010 Addendum to the NOID, and the ultimate certified decision, the director relied heavily on the Field Site Visit report to conclude that the beneficiary was not primarily employed in a managerial or executive capacity. Among numerous observations, the director noted that the site visit revealed that the beneficiary is not serving in the capacity of CEO but instead as a "Director." While in the beneficiary's purported office, the immigration officers asked the beneficiary to produce four or five

documents which had his signature on it in his capacity as CEO. The director noted that the beneficiary was unable to provide any documents with his signature at the time of the request. The beneficiary was asked what five major types of decisions he made on a day-to-day basis. The director noted that the beneficiary stated that on the previous day, he had gone to another company's office and asked the company to pay a bill. He also stated that he goes to construction sites. The immigration officers asked the beneficiary how many employees he supervised. The director noted that the beneficiary responded: "None." The immigration officers further asked whether the beneficiary's subordinate employees are "professional." The beneficiary responded that he does not manage employees. The immigration officers asked the beneficiary to identify the Account Manager, one of the employees purportedly supervised by the beneficiary, but the beneficiary was unable to do so.

As previously discussed, in response to both the Addendum and the director's ultimate certified decision, the petitioner has primarily attacked the Field Site Visit on procedural and due process grounds. The AAO concludes that the Field Site Visit was appropriate and valid.

The petitioner also submitted additional evidence to rebut the Field Site Visit. The petitioner submitted a sworn statement from the beneficiary, who confirms that he answered some of the questions in the negative, but states that the "negatively-perceived information results from honest misunderstandings based on my limited ability to speak English and my inability to understand the fully the accented statements that [the immigration officer] orally communicated to me." The petitioner also submitted additional sworn statements from an employee who was present at the site visit and an attorney who represents the overseas employer. Finally, the petitioner submitted numerous corporate documents, *inter alia*: 1) an April 15, 2008 appointment letter for a Purchase Manager, signed by the beneficiary as "Director Cum C.E.O."; and 2) an October 15, 2008 letter terminating the employment of [REDACTED] again signed by the beneficiary as "Director Cum C.E.O." (See NOID Response Exhibit 6L.)

However, the AAO has reviewed these documents as well as the additional evidence submitted in response to the NOID and NOID addendum and finds that there are considerable anomalies that further undermine the petitioner's credibility and, consequently, the validity of the petitioner's claims regarding the beneficiary's employment with the foreign entity.

The first anomaly concerns counsel's repeated references to the language barrier between the immigration officers who conducted the field site visit interview and the beneficiary. Counsel has repeatedly attempted to explain the adverse findings noted in the field report by claiming that the beneficiary has poor command of the English language and was therefore unable to understand the questions asked by the interviewers or to provide meaningful responses to the officers' queries. However, the evidence in the record of proceeding shows that the foreign entity's corporate documents are all in the English language. While some allowance must be made for the claim that the beneficiary is not proficient in orally communicating in the English language, the fact that the company transacts business in English casts doubt on the claimed language problems. The evidence of record effectively undermines the petitioner's credibility and further justifies the director's reluctance to give evidentiary weight to *ex post facto*, third-party declarations that were submitted in rebuttal to the site visit information.

A second inconsistency becomes apparent when reviewing letters that were submitted in the response to the NOID (Exhibit 6L) in an attempt to establish the beneficiary's hiring and firing authority in his position with the foreign entity. The letter dated April 15, 2008 purportedly offers employment to one [REDACTED] in the position of purchase manager. When this information is verified with the foreign entity's payroll documents going back as far as October 2007 (Exhibit 12, from initially submitted support documents), it is apparent that [REDACTED] was listed as the foreign entity's purchase manager many months prior to the date the alleged offer of employment was extended. There is no explanation for this inconsistency.

Additionally, the AAO notes the letter dated October 15, 2008, purportedly terminating the employment of [REDACTED] creates an additional inconsistency. When this information is verified with the same payroll documents (Exhibit 12), [REDACTED] name does not appear on any of the payroll documents predating the termination letter, thus indicating that either [REDACTED] was never employed by the foreign entity or that the payroll documents submitted in support of the petition are not accurate. In fact, according to these payroll documents, not a single employee was hired or fired during a full two-year time span.

Third, the AAO notes that all of the corporate documents submitted in response to the director's NOID are stamped with the following inscription whenever the beneficiary's signature appears: "For [REDACTED] [REDACTED] Director Cum CEO." A careful review of the initial petition does not reveal a single instance of the "Director cum CEO" stamp among the corporate documents submitted with the initial evidence. Instead, documents are either signed without a stamp or they are signed by the various directors under a stamp of "For [REDACTED] [SIGNATURE] Director." It is a striking anomaly that the "Director cum CEO" stamp would appear in the record only after the Site Visit and the director's Supplemental NOID raised the inconsistency regarding the beneficiary's title.

Finally, as previously discussed, careful review of Exhibit 15 strongly indicates that the photographs depicting the outside of the foreign employer's premises have been digitally altered to include two adjoining signs displaying the entity's business name. *See supra*, pp. 12-13. The apparent manipulation and the incongruent nature of these pictures gives the AAO cause to question the veracity of the applicant's evidence of an existing legitimate business premises for the foreign entity.

Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Allowing for the initial Addendum to the NOID, the certified denial, and the AAO's notice of derogatory evidence, the petitioner had three opportunities to submit evidence to clarify the inconsistencies raised by the Field Site Visit. The evidence submitted to rebut the inconsistencies simply raises additional inconsistencies, clouding the petition in new and more grave doubts.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. *See Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner has not submitted competent objective evidence to clarify exactly where the truth lies with respect to the beneficiary's claimed overseas duties. Therefore, on the basis of this finding, the instant petition cannot be approved.

*B. Qualifying Relationship*

The second issue to be addressed is whether the petitioner has established that it has a qualifying relationship with Shree Ram Buildwel, the beneficiary's claimed employer in India.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

*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 (l)(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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

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

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

*Branch* means an operation division or office of the same organization housed in a different location.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

*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 regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

*Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

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

In the present matter, the petitioner's alleged qualifying relationship is premised on the claim that the beneficiary is majority owner of the foreign entity where he is currently employed and the petitioning entity that seeks to employ him in the United States. More specifically, in the petitioner's initial support letter dated December 11, 2009, the petitioner indicated that the beneficiary maintains a 100% ownership interest in the U.S. entity and a 90% ownership interest in the foreign entity where the beneficiary is currently employed.

In a separate statement dated December 14, 2009, counsel reflected on USCIS's prior adverse findings regarding the petitioner's qualifying relationship with the foreign entity, and asserted that the regulations do not require the submission of evidence establishing the purchase of stock. Counsel's assertion, however, is without merit, as the regulation at 8 C.F.R. § 103.2(b)(8) does not restrict the director's authority to request additional evidence or information in any matter where eligibility has not been established. The regulation at 8 C.F.R. § 214.2(l)(3)(viii) goes a step further, expressly stating that the director may, in his or her discretion, request any additional evidence or information that he or she deems necessary to adjudicate the petition. To the extent that stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity, the director may reasonably inquire into the means by which stock ownership was acquired to determine the existence of a qualifying relationship between the petitioner and the named foreign employer.

In support of its claim regarding the alleged qualifying relationship between the beneficiary's U.S. and foreign employers, the petitioner provided the foreign entity's certificate of incorporation dated June 5, 2000 followed by a memorandum of association naming the same entity. Information regarding the foreign entity's capital distribution was contained in a separate, undated document identifying the beneficiary as owner of [REDACTED] shares, [REDACTED] as owner of 1,000 shares, and [REDACTED] shares for a total distribution of [REDACTED].

With regard to the U.S. entity's ownership, the petitioner provided the following documentation:

1. A photocopy of a wire transfer dated October 20, 2009 showing the beneficiary as the originator of the [REDACTED] fund transfer. The document indicates that the funds were being sent "towards maintenance of offices abroad" and is accompanied by the receiving bank's report identifying the petitioner as the recipient of funds that originated from the beneficiary.

2. A promissory note dated October 20, 2009. The note identifies the beneficiary as the payee to whom the petitioner, identified as the maker of the note, owes ██████████ the principal amount, plus annual interest in the amount of ██████████.
3. Declaration of ██████████ dated November 10, 2009, in which ██████████ identified herself as general counsel representing the petitioner and in such capacity stated that the beneficiary purchased 100 shares of the petitioner's stock in exchange for \$█████████ and contributed an additional sum of \$█████████ as a loan to the company. ██████████ referred to the promissory note in No. 2 above as evidence of the loan from the beneficiary to the petitioner.
4. The petitioner's articles of organization filed on June 12, 2009 accompanied by the petitioner's operating agreement made on the same date. Exhibit A, which is annexed to the operating agreement, indicates that the beneficiary purchased 100 of the petitioner's "economic units" and made a capital contribution of ██████████ in exchange therefore.
5. Membership certificate dated June 12, 2009 identifying the beneficiary as a member of the petitioning entity accompanied by a membership certificate transfer ledger that shows certificate no. 1 transferring 100 shares to the beneficiary on June 12, 2009.
6. The petitioner's Notice of Transaction Pursuant to Corporations Code Section 25102(f), filed on September 4, 2009, showing that the petitioner issued ownership interest in exchange for ██████████ on June 12, 2009.

Counsel further stated that the foreign wire transfer described in No. 1 above was sufficient to establish the beneficiary's purchase of the petitioner's stock. Counsel reasoned that since a new corporation typically sells stock to fund its start-up costs, it should be assumed that the money the beneficiary initially supplied to maintain the petitioner's U.S. operation was synonymous to the purchase of the petitioner's stock.

On December 23, 2009, the director issued a NOID notifying the petitioner that additional evidence was required to establish the existence of a qualifying relationship between the beneficiary's foreign and U.S. employers. The director made references to two prior Forms I-129 that were previously filed by the same petitioner and pointed to the petitioner's prior statements indicating that a U.S. bank account had not been opened as of September 29, 2009 and that instead, the beneficiary's initial contribution of \$█████████ was made on May 29, 2009 in the form of a retainer fee. The director repeated the petitioner's reference to "banking restrictions" that allegedly prevented the petitioner from opening a U.S. bank account due to fact that the beneficiary was not physically present in the United States. The director found the petitioner's statements to be lacking in credibility in light of service records that show the beneficiary's entries into the United States on April 4, 2009 and on November 15, 2009. The director also noted the petitioner's failure to provide evidence of the banking regulation that purportedly restricted the petitioner's ability to open a U.S. bank account. Lastly, the director observed that the Notice of Transaction Pursuant to Corporations was filed several months after the beneficiary's purported share purchase and further concluded that the October 20, 2009 fund transfer was not evidence that established the beneficiary's payment for stock.

Although the petitioner responded to the director's notice, no further documentary evidence was submitted with regard to the beneficiary's claimed majority ownership of his foreign and U.S. employers.<sup>6</sup>

Accordingly, in the April 19, 2010 denial notice, the director issued a finding based on the previously submitted documents, concluding that the petitioner failed to provide adequate documentation establishing the beneficiary as owner of its stock and that as a result, USCIS could not conclude that the U.S. and foreign entities have a qualifying relationship. The director reviewed all of the previously submitted documents and pointed out that no documentation was submitted to establish the contemporaneous purchase of stock at the time that the membership units were issued. The director further noted that third party attestations are insufficient to establish that the beneficiary paid for an ownership interest that is shown as having been issued on June 12, 2009.

In response to the director's notice of certification, counsel reiterates the petitioner's claim regarding the beneficiary's purported ownership interest and refers to the May 17, 2010 declaration of [REDACTED] corporate counsel representing the petitioner. Counsel relies heavily on [REDACTED] declaration, pointing out that [REDACTED] has personal knowledge of facts concerning the petitioner's ownership. With regard to the petitioner's inability to open a bank account, [REDACTED] explained that opening a bank account requires an employer identification number (EIN), which can be obtained once the filer provides a social security number. Since the filer in the present matter was the beneficiary, who did not have a social security number, the petitioner was unable to obtain an EIN. However, [REDACTED] follows up with further statements explaining that the issue was resolved when an officer and agent of the petitioning entity applied for and received an EIN on the petitioner's behalf. It is unclear why the same resolution was not applied earlier to enable the petitioner to receive funds that the beneficiary allegedly paid for the purchase of its stock.

Additionally, [REDACTED] statement fails to resolve the inherent factual inconsistency that exists between the petitioner's claim that the beneficiary has been 100% owner of the petitioning entity since stock was issued on June 12, 2009 and the fact that payment for that stock was not received contemporaneously with the stock issuance. Moreover, if, as [REDACTED] explains, the petitioner did not have a bank account at the time of the stock issuance and was therefore unable to collect the beneficiary's monetary contribution in exchange for stock ownership, then it would appear that the claim made on the Notice of Transaction Pursuant to Corporations was misleading, as it clearly showed June 12, 2009 as the date of the sales transaction. *See*

---

<sup>6</sup> The AAO acknowledges that the petitioner also submitted advisory letters from [REDACTED]

[REDACTED] provided testimonial and opinion evidence regarding the beneficiary's wire transfers, capital contribution, and corporate start up, among other issues. While the AAO does not give these letters great weight, given the conflicting evidence in this case, the AAO has carefully considered the content of the letters. Although the AAO acknowledges counsel's submission of a January 26, 2010 letter from the American Immigration Lawyers Association (AILA) addressing the beneficiary's majority ownership of an entity and its effect on the employer-employee relationship between the petitioner and the beneficiary, the director did not cite this issue as a basis for denial. As such, the AAO need not address the AILA letter in the current proceeding.

*Matter of Ho*, 19 I&N Dec. at 591-92. As previously stated in this discussion, third party attestations, including the attestation of [REDACTED], are insufficient to overcome the director's adverse findings.

Counsel also contends that USCIS has overlooked evidence that the petitioner has submitted in its attempt to resolve the deficiencies that were pointed out in the director's prior denials of the petitioner's previously filed Forms I-129. Counsel's assertion, however, is unpersuasive. While the AAO acknowledges that the petitioner has attempted to take steps to remedy certain evidentiary deficiencies, these remedial steps consist primarily of third party attestations and other actions that further support a conclusion that the beneficiary did not pay for the shares he was issued by the petitioning entity at the time of the issuance.

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 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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 stated earlier, stock certificates alone are not sufficient evidence of a qualifying relationship. Therefore, the director was right to question the petitioner about the means by which the beneficiary acquired stock ownership. In the present matter, none of the documentation submitted by the petitioner establishes that the beneficiary supplied the funds that were then used to purchase his ownership interest in the U.S. petitioner. As properly noted in the director's denial, in order to resolve the deficiencies regarding the beneficiary's claimed ownership of the petitioning entity, the petitioner must submit evidence that is "contemporaneous with the event to be proved," i.e., the actual exchange of funds for the issued ownership interest. Here, the record lacks evidence to establish that such an exchange took place. The petitioner cannot transfer the necessary funds at a later date and ask USCIS to retroactively apply that act to the earlier stock issuance. There is simply no way of establishing that a subsequent transfer of funds is related to the earlier act of issuing ownership shares. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

As the petitioner has failed to provide evidence to establish that the beneficiary paid for his claimed ownership in the U.S. entity, the AAO cannot conclude that the beneficiary's U.S. and foreign employers share common ownership, a factor that is necessary in order to establish the existence of a qualifying relationship. Therefore, on the basis of this finding, the instant petition cannot be approved.

#### **IV. Signature Issues and Misrepresentation**

In general, the AAO notes that while a few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits, anytime a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's

assertions. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). As stated in the director's decision, doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. *See, e.g., Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner's submission of inconsistent and questionable documents causes the AAO to question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. at 591.

Thus, while the findings from the field site visit certainly contribute to the AAO's decision in the present matter, the inconsistent evidence alone gives USCIS sufficient basis to deny the petition without relying on the site visit report. The AAO bases this conclusion on its own independent and *de novo* review, pursuant to a comprehensive examination of the petitioner's submissions.

In such a situation, where the petitioner has been given notice of serious discrepancies and an opportunity to offer a rebuttal, the AAO would normally find that the petitioner knowingly submitted documents containing false statements in an effort to mislead USCIS and the AAO on elements that are material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States. *See* 18 U.S.C. §§ 1001, 1546.

However, in the present case, the AAO is barred from making a finding of fraud or material misrepresentation against the petitioner because the petitioner never signed the Form I-129 petition, certifying under penalty of perjury that the petition, and all evidence submitted with it, is true and correct.

As previously noted, the petitioner has signed neither the Form I-129, Petition for Nonimmigrant Worker, nor the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. Instead, as previously discussed, the forms have been signed by [REDACTED] as counsel, purportedly on behalf of the petitioner and the beneficiary.<sup>7</sup> Although the signature of [REDACTED] indicates that he signed the forms "per power of attorney for petitioner and [REDACTED]" the petitioner did not submit a power of attorney document. Instead, the petitioner submitted a form titled "Signature Authorization" that authorizes the attorney to sign "immigration case documentation to be filed by [the petitioner] with Government Agency." The document does not purport to be a power of attorney, granting [REDACTED] the authority to act as agent

---

<sup>7</sup> The AAO has historically rejected appeals when the case is premised on a visa petition that was improperly filed without the signature of the petitioner. *See e.g., In re [REDACTED]*, not selected for publication, 2008 WL 4052418 (AAO June 3, 2008); *In re [REDACTED]*, not selected for publication, 2005 WL 2211502 (AAO Feb. 23, 2005). The AAO notes that the director apparently considered the petition properly filed, albeit erroneously, and adjudicated the merits. The AAO will not reject this matter because we take jurisdiction by certification, rather than appeal, pursuant to 8 C.F.R. § 103.4(a).

or attorney-in-fact for the petitioner. Nor does the form authorize [REDACTED] to certify under penalty of perjury, on behalf of the petitioner, that all information and documentation submitted with the petition are true and correct.

The governing regulation at 8 C.F.R. § 103.2(a)(2) states that a petitioner must sign his or her petition to certify under penalty of perjury that the petition, and all evidence submitted with it, is true and correct. Citing to 28 U.S.C. § 1746, the instructions to the Form I-129 visa petition also require the petitioner to sign the petition, certifying under penalty of perjury that all information and documentation submitted with the form are true and correct. Finally, the Form I-129, at Part 6 "Signature," states:

I certify, under penalty of perjury under the law of the United States of America, that this petition and the evidence submitted with it is all true and correct. If filing this on behalf of an organization, I certify that I am empowered to do so by that organization. If this petition is to extend a prior petition, I certify that the proposed employment is under the same terms and conditions as stated in the prior approved petition. I authorize the release of any information from my records, or from the petitioning organization's records that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit being sought.

Accordingly, the regulations, the form instructions, and the Form I-129 itself all require a signature that meets the requirements of the "Unsworn declarations under penalty of perjury" provision at 28 U.S.C. § 1746:

*Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same . . . , such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:*

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

*(Signature)*".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

*(Signature)*".

(Emphasis added.)

Even if a form is signed "on behalf of" another individual based a power of attorney or a signature authorization document, the use of such a document would be highly questionable where an official form is required to be signed under penalty of perjury pursuant to 28 U.S.C. § 1746. The probative force of a declaration subscribed under penalty of perjury is derived from the actual signature of the declarant. Without the declarant's signature, a declaration is completely robbed of any evidentiary force. *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D.Cal.); *cf. Summers v. U.S. Dept. of Justice* 999 F.2d 570, 573 (D.C. Cir. 1993) (discussing identity as among the most important "matters" disclosed in any statement made under penalty of perjury pursuant to 28 U.S.C. § 1746).

Therefore, the petitioner must certify under penalty of perjury that the petition and supporting documents are true and correct. To find otherwise would have serious negative consequences for the Department of Homeland Security and the administration of the nation's immigration laws. By regulation, every visa petition is filed after a responsible party attests under penalty of perjury that the facts are true and correct. 8 C.F.R. § 103.2(a)(2). If USCIS were to absolve individuals of responsibility for the content of their petition, then ineligible petitioners would readily benefit from the approval whenever USCIS fails to identify fraud or material misrepresentations. As in the present case, once USCIS did identify potential fraud or material misrepresentations, these same individuals could avoid the negative consequences of the fraud or misrepresentation because they avoided attesting that the petition and supporting documents are true and correct. The Department of Homeland Security cannot effectively administer the nation's immigration laws unless the petitioner's attestation requirement is given serious and consequential weight in immigration proceedings.

In the present case, the petitioner has not certified under penalty of perjury that the petition, and the evidence submitted with it, is all true and correct. Because the petitioner never certified the evidence as "true and correct," the AAO cannot find that the petitioner or beneficiary "willfully" made a false representation to an authorized official of the United States government.

This fundamental flaw in the proceeding bars both the director and the AAO from entering an administrative finding of fraud or material misrepresentation against the petitioner.<sup>8</sup> See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1961) (finding that a charge of "willful misrepresentation" cannot be sustained when the record is confused about whether the applicant was aware of what was contained in his visa application); see also *United States v. O'Connor*, 158 F.Supp. 2d 697, 710 (E.D. Va. 2001) (noting that criminal immigration fraud requires proof that, among other elements, the false statement was made under oath); see generally Memorandum from Lori Scialabba, Donald Neufeld, and Pearl Chang, USCIS, *Section 212 (a)(6) of the*

---

<sup>8</sup> The AAO notes that, regardless of any "signature authorization" document, counsel signed the Forms G-28 and I-129 at Part 6 under penalty of perjury. While the AAO does not allege any malfeasance on the part of the attorney in this matter, we note prior examples where attorneys have been convicted of various criminal charges, including money laundering and immigration fraud, after signing immigration forms on behalf of an alien or employer. See *United States v. O'Connor*, 158 F.Supp.2d 697, 710 (E.D. Va. 2001); *United States v. Kooritzky*, Case No. 1:02CR00502 (E.D. Va. December 11, 2002).

*Immigration and Nationality Act, Illegal Entrants and Immigration Violators* (March 3, 2009) (discussing the term "willfully").

However, the inverse of this flaw is also duly noted. Because the petitioner has never certified that the petition and the evidence are all "true and correct," neither the director nor the AAO may give the submitted evidence any probative weight.

Accordingly, on this additional basis, the petition must be denied.

#### **V. Conclusion**

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. Here, that burden has not been met. Accordingly, the director's decision denying the petition will be affirmed.

**ORDER:** The decision of the director dated April 19, 2010 is hereby affirmed.

## APPENDIX A



