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



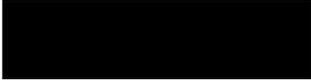
**U.S. Citizenship  
and Immigration  
Services**



D7

DATE: **SEP 08 2011**

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 \$630. 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 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 extend the beneficiary's employment as a 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, states that it operates a furniture and Indonesian product wholesale and retail business. It claims to be an affiliate of [REDACTED], located in Bali, Indonesia. The beneficiary was previously granted L-1A status for a period of one year, from March 2008 to March 2009, to open a new office in the United States, and the petitioner now seeks to extend her status so that she may continue to serve in the position of president.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record establishes that all of the beneficiary's job duties are primarily executive in nature and do not involve the day-to-day functions of the company. Counsel suggests that the director incorrectly assumed that the beneficiary's duties were too broad and nonspecific and the lack of subordinate staff does not negate the beneficiary's role as an executive. Counsel solely submits a brief in support of the appeal.

#### 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

## II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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.

#### Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 26, 2009. The petitioner indicated on the Form I-129 that it is operating a furniture and Indonesian product wholesale and retail business with two employees and gross annual income of \$170,914. The petitioner stated that the beneficiary performs the following duties:

1. Plans, develops, and establishes policies and objectives of business organization;
2. Develops organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives.
3. Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions.
4. Directs and coordinates formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.
5. Plans and develops industrial, labor, and public relations policies designed to improve company's image and relations with customers and employees, and public.
6. Evaluates performance of employees for compliance with established policies and objectives of domestic company and contributions in attaining objectives.

The petitioner did not submit any additional information describing the duties of the beneficiary on a day-to-day basis.

The director issued a request for additional evidence ("RFE") on March 20, 2009 instructing the petitioner to submit, inter alia, the following: (1) indicate the total number of employees at U.S. location where the beneficiary will be employed; (2) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees she supervises by name and job title; and (3) a more detailed

description of the beneficiary's duties indicating the percentage of time spent performing each of the listed duties.

In response to the RFE, Counsel submitted a brief stating that the beneficiary is the only employee of the domestic company, which is why an organizational chart was not submitted, and listed the same duties for the beneficiary referenced above with the exception of number six. Counsel then went on to state:

Additionally, [b]eneficiary will be responsible for showcasing Foreign Company's Products here in the U.S. including but not limited to eventually setting up a permanent showroom to showcase said products, traveling to trade shows to showcase said products, as well as enter into enforceable agreements to sell said products.

Moreover, [b]eneficiary will be responsible for any and all marketing decisions here in the U.S. pursuant to an approved budgetary outlay from Foreign Company. Beneficiary will all [sic] be responsible for approving marketing campaigns and materials.

In the same brief, Counsel submitted the following listing of the "typical and specific day-to-day description of beneficiary" but failed to submit the percentage of time spent performing each of the listed duties:

Beneficiary follows up with sales leads from previous showcases or from previous sales days at the showroom. This includes phone calls, emails, and faxes to potential customers, both private and commercial. This also includes [b]eneficiary's personal visits to customers['] places of business.

With respect to those leads that turn into sales, [b]eneficiary execute[s] pro forma invoices for such products with corresponding purchase orders to Foreign Company.

Beneficiary reports to Foreign Company almost every evening at around 6 p.m.

The rest of the day is typically spent providing customer service, feedback, on the rare occasion, minor repairs and after-sale service.

The director denied the petition on July 2, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition.

In support of the appeal, Counsel submits a brief in which he asserts that all of the beneficiary's duties are "primarily" executive in nature and do not involve the day-to-day functions of the company. Counsel further asserts that "regardless of the lack of full time or part time employees, [the b]eneficiary does engage the services of independent contractors throughout the almost twelve months of her duties as an Executive LIA for Petitioner. Petitioner began doing business with two employees, however, due to the recent economic downturn, those employees had to be let go. Beneficiary was forced to run the company without full-time, in-house employees, at least for the time being. However, currently, [b]eneficiary is hoping that the recent uptick in sales in the United States, Mexico, Canada and South America will justify the hiring of additional employees."

Discussion

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner indicates that it plans to hire employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, or is otherwise not sufficiently operational, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the start up of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. See generally, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the

business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

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 in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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 show that the beneficiary primarily performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. While the AAO does not doubt that the beneficiary exercises discretionary authority over the U.S. company as its sole employee, the petitioner has not submitted a consistent or credible breakdown of how the beneficiary will allocate her time among specific responsibilities. At the time of filing, the petitioner characterized the beneficiary's role as president. The petitioner indicated that the beneficiary's duties include "showcasing [the] Foreign Company's Products in the U.S., traveling to trade shows to showcase said products, as well as enter into enforceable agreements to sell said products." While these tasks are undoubtedly necessary in order to establish the U.S. operations, the petitioner has not indicated how such duties qualify as either managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner describes the beneficiary's day-to day duties as "follow[ing] up with sales leads [...] include[ing] phone calls, emails, and faxes [as well as] personal visits to customers," "execute pro forma invoices with corresponding purchase orders," and "provid[e] customer service, feedback, [and] on the rare occasion, minor repairs and after-sale service." Since the beneficiary actually performs the work of a salesperson, she is performing a task necessary to provide a service or product and these duties will not be considered managerial or executive in nature. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of

the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

The record shows that the beneficiary was the petitioner's sole employee at the time the petition was filed. Counsel emphasized that, at the time of filing the petition, the beneficiary had not yet been in L1A status for one full year and thus the lack of subordinate staff should not be considered in the decision on the extension petition. Counsel further asserts that the beneficiary hopes to hire additional employees in the future. The AAO notes that Counsel made a contradictory statement in the brief initially submitted with the petition stating, "[d]omestic company has now been in business for more than one year. After one year, it reported gross income of \$170,914 with net income of \$23,319. Clearly, the advances of a company that has only been in business for a little over one year shows a distinct upward trend." Additionally, the extension petition was filed merely five days prior to the completion of the beneficiary's full year in L1A status. The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner indicates that it will hire additional employees in the future; however, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). Additionally, although counsel states on appeal that the "[b]eneficiary does engage the services of independent contractors," the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive

duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

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). 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).

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The beneficiary in this matter, has not been shown to be primarily engaged in establishing goals and policies for the U.S. company or overseeing its management given the company's preliminary stage of development. The AAO concurs with the director's determination that the petitioner has not grown to the point where the beneficiary is primarily engaged in managerial or executive duties. Accordingly, the appeal will be dismissed.

### III. Qualifying Relationship

Beyond the decision of the director, the minimal documentation of the foreign company's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). When considering the totality of the evidence presented, the petitioner has not sufficiently demonstrated that it is an affiliate of the foreign company.

In response to the RFE, Counsel submitted a brief stating the following:

Domestic company is not a public corporation with any form of stock certificates of ownership. However, domestic company is owned wholly by [REDACTED]. Domestic company was set up simply as a U.S. presence for a very well established foreign business entity. Beneficiary is charged with the responsibility of developing domestic company into a viable US presence for foreign company. As mentioned above, domestic company is wholly owned by foreign company and therefore a detailed list of owners is not applicable in this case.

Additionally, the petitioner submitted copies of its 2007 and 2008 Federal Income Tax Returns (Fed Return) and Arizona Partnership Income Tax Returns (AZ Return). The 2007 Form 1065 Fed Return, Schedule B asks the following question at number six: "Does this partnership have any foreign partners?" The petitioner selected the answer indicating "no." There were two Schedule K-1 submitted with the 2007 Fed Return, one for the beneficiary stating that she owns 50% of the petitioning company, and one for a second domestic partner stating that she owns the remaining 50% of the petitioning company. The 2007 Form 165 AZ Return, Schedule E (Information on Partners) and Schedule K-1 both list the beneficiary and the same domestic partner as each owning 50% of the petitioning company. The 2008 Form 1065 Fed Return, Schedule B asks the same question as above at number sixteen. Again, the petitioner selected the answer indicating "no." There were also two Schedule K-1 submitted with the 2008 Fed Return indicating the same as the previous year. The 2008 Form 165 AZ Return, Schedules E and K-1 also matched the information submitted in the previous year.

In this case, the record contains insufficient evidence to establish that the foreign company is in any way affiliated to the petitioner. It appears that the petitioner purchases goods from the foreign company to sell in the U.S., but that alone does not make them affiliates pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L). The inconsistencies between counsel's assertions and the evidence in the record raise serious doubts regarding the claim that the petitioner is an affiliate of the foreign company. 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). Due to the inconsistencies and deficiencies detailed above, the petitioner has not met its burden to establish that the petitioner is an affiliate of the foreign company. For this additional reason, the petition cannot be approved.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

#### IV. Conclusion

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.