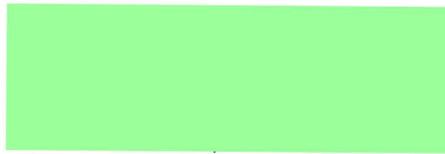




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 18 2013** Office: VERMONT 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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Texas corporation established in August 2012 stating that it will be engaged in the baking and convenience store industry. It claims to have been created through a joint venture by and between an [REDACTED] and the beneficiary, both of which are claimed managers or executives with the foreign employer [REDACTED] located in India. The petitioner, applying as a “new office” in the United States, seeks to employ the beneficiary as a Sales and Marketing Director for a period of three years.¹

The director denied the petition finding the record insufficient to establish that the petitioner would support the beneficiary’s managerial or executive role within one year of approval of the petition as required by the Act. The director additionally concluded that the petitioner had not shown the size of the U.S. investment necessary to commence doing business in the United States and to remunerate the beneficiary consistent with 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The director noted the petitioner’s failure to appropriately respond to the director’s Request for Evidence (RFE); including the petitioner not specifying whether the beneficiary qualifies as a manager or executive, providing insufficient information on the U.S. investment, and failing to produce a license to conduct baking operations.

On appeal, the petitioner contends that the director failed to acknowledge certain evidence provided in response to the director’s RFE, suggesting this was motivated by a pre-disposed desire to deny Indian L-1A applicants. The petitioner maintains that the beneficiary is established as an executive based on his title, place in the petitioner’s organization, and the investment in the petitioner. The petitioner notes the beneficiary’s duties related to meeting sanitation regulations and his ability to bind the petitioner. Further, the petitioner provides additional information on the foreign employer’s claimed investment in the petitioner.

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.

¹ The AAO notes that a petitioner applying as a “new office” in the United States, as in the present matter, may only be approved for one initial year consistent with 8 C.F.R. § 214.2(l)(7)(i)(A)(3).

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides 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 in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment 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 (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

- (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- (3) The organizational structure of the foreign entity.

II. The Issues on Appeal:

A. *Employment in the United States in a managerial or executive capacity*

As stated, the director denied the petition finding that the petitioner had failed to establish that the beneficiary would be employed in the United States primarily in a managerial or executive capacity within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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 "new office" provision was meant as an accommodation for newly established enterprises and provided for by U.S. Citizenship and Immigration Services (USCIS) regulation to allow 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.

However, 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. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). 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.*

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the petitioner will support the beneficiary in a managerial or executive capacity within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 petitioner's evidence

should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner provided the following general description of the beneficiary's position and duties:

[The] Sales & Marketing Director will serve as an Executive officer responsible for maintaining the relationship between the U.S. and the foreign parent company. He will be responsible for meeting the requirements of U.S. food regulations including food facility registration. Importers must follow U.S. import procedures as well as the requirements of Prior Notice.

Further, the petitioner provided the following list of duties for the beneficiary, including percentages of time spent on certain general categories of tasks:

50% of time is spent:

- Uses his discretionary authority to sign contractual agreements with vendors, suppliers, retailers, wholesale dealers and any other service providers he deems necessary for the operations of the business.
- Achieve revenue goals by servicing as a marketing consultant that identifies client's objectives and then sells products that deliver measurable success against the clients' success measure.
- Develop new advertising capabilities to increase client penetration which leads to incremental revenue growth.
- Build and manage relationships with multiple clients, brand marketing, field sales, consumer promotion and at all levels of the company.
- Analyze data to design efficient and effective solutions.
- Manage accounts including revenue forecasting and the managing of sales programs, budgets and accounts receivable.
- Implementation and execution of strategic plans and policies for the route sales representatives.
- Develops and administers sales goals and objectives.
- Development of annual budgets and strategic account plans for distributors and sales manager(s).
- Insures [sic] that the sales staff is kept informed on the conditions, activities and operations of the business and pertinent factors influencing them.
- Participates in all meetings with executive officers on the company.
- Proactively develops strategic planning input and options for analysis and decision by the executive officers.

- Oversees the productivity of the sales team and sets goals to exceed annual financial objectives including Sales and Profit goals.
- Exercise complete latitude and discretion in the decision process of hiring, promoting and dismissing all sales personnel.

30% of time is spent:

- Stay updated on all trends in the industry and marketing developments while gathering market intelligence in a timely matter. Following developments with respect to the competition and providing feedback to the Parent Company.

20% of time is spent: Managing Subordinates- recruit, train and motivate a leading Management team for the following duties:

- Develop and prospect for new business relationships and customers, while strengthening current relationships through on-going contact and customer service.
- Meet productivity standards and committed sales goals.
- Develop required team meetings for sales associates and team leaders.
- Organize and implement all marketing and sales events.
- Adhere to sales and marketing techniques while developing new ideas.
- Implement strong and effective communication skills when responding to customer complaints.
- Ensuring that sales team employees adhere to the company's policies and standards.

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 proposed activities in the course of his daily routine. For instance, no explanation is provided as to the type of agreements the beneficiary will execute; sales programs that will be initiated; strategic plans and policies that will be implemented; distributors that will be engaged; or marketing trends that will be monitored. 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Indeed, the beneficiary's duties bear little relation to the prospective focus on retail baking and convenience stores, and more closely resemble a duty description for an executive running a company with a large contingent of sales managers and representatives with a sophisticated marketing department. For instance, the beneficiary's duties reference training "sales associates and team leaders" despite the petitioner's hiring

plans not including the employment of a large cadre of sales staff beyond one "Route Sales Representative." Furthermore, the duties make no mention of the beneficiary supervising three other projected hires critical to the establishment of a baking business; specifically, the General Manager, Production Baker or Delivery Driver. In fact, the duties make no reference to any specific duties necessary for the establishment of a baking business or expansion into the convenience store business. Lastly, the petitioner further claims that the beneficiary will only perform managerial duties in the first year of operations, a questionable assertion, considering the petitioner only claims to have two other employees that both will act in managerial or executive roles thereby leaving no other employees to perform necessary day-to-day operational duties during the start-up period. 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. 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. 582, 591-92 (BIA 1988). In short, the job duties when compared to the petitioner's proposed business plans are not credible.

Thus, while several of the duties described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity in the description and their inconsistency with the record raises questions as to the beneficiary's actual proposed responsibilities. Overall, the position descriptions alone are insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. employer would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

In analyzing the totality of the record, the evidence presented does not support a finding that beneficiary will be performing primarily executive or managerial duties within one year due to insufficient evidence presented related to the petitioner's hiring and investment plans. As noted, the petitioner offers that it does not currently employ any non-managerial employees necessary to operate a wholesale baking business. Therefore, providing detailed evidence related to its hiring plans is critical to assessing the first year prospects of the business. The petitioner's proposed organizational chart notes that it intends to hire a Production Baker, a Delivery Driver, and a Route Sales Representative to perform day-to-day non-qualifying tasks necessary for a baking business. However, the petitioner provides no timeline for when it intends to hire these employees leaving doubt as to whether the petitioner will be sufficiently operational to support the beneficiary after one year. In fact, the petitioner's business plan mentions nothing regarding the addition of staff until the second year of operations. Insufficient evidence on the hiring of necessary support employees casts doubt on whether the beneficiary, and the claimed President and General Manager, will be primarily performing managerial duties after one year as offered. 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)). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Further, the AAO concurs with the finding of the director that the petitioner has not provided sufficient evidence of its investment plans in the petitioner. The director requested in the RFE that the petitioner submit evidence to establish the size of the U.S. investment and of the financial ability of the petitioner to remunerate the beneficiary consistent with 8 C.F.R. § 214.2(l)(3)(v)(C)(2), including bank statements of the petitioner or wire transfers from the foreign entity. In response, and on appeal, the petitioner offers a bank account statement for an [REDACTED] showing a balance of \$20,219.16 and claims this reflects an initial investment in the petitioner. In response to the director's RFE, the petitioner noted that the bank account statement was that of the claimed President of the petitioner, and 60% joint partner, referred to throughout the record as [REDACTED]. This discrepancy between the name of the claimed president of the petitioner and the offered bank account record is left unexplained. 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. 582, 591-92 (BIA 1988). Additionally, on appeal, the petitioner further claims that the foreign employer will be investing an additional \$20,000 upon approval of the petition. However, no supporting documentation is provided to determine the credibility of this statement. 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)). Lastly, the amounts of claimed investment are left with little relevance, as it is not explained on the record how these amounts will allow the petitioner to commence business immediately and successfully operate such that it will support the beneficiary's executive position within one year.

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

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

descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Although all the requirements of a business plan in a *Matter of Ho* are not definitively required to establish a credible business plan, the failure to provide the majority of the relevant information above casts serious doubt as to the viability of such a plan. Indeed, in the present matter, the petitioner has provided little of that suggested in the *Matter of Ho*, beyond unsupported financial projections, market statistics dating from 1999, and general statistics regarding population growth in the Dallas/Ft. Worth area. For instance, the petitioner does not describe relevant issues such as the baked goods it will manufacture, competing businesses in the region, sources of supply for cooking materials or equipment, or timetables for hiring. In fact, the joint venture agreement between the President of the petitioner and the beneficiary attached to the business plan notes that the parties are entering into the venture to open "beauty supply stores." Additionally, the petitioner's plans also include expansion into the convenience store market with little support or explanation of how this will be accomplished. In order for a business plan to be deemed credible, it must at least illicit a conclusion that the specific business venture has a reasonable chance of success. The petitioner must demonstrate with a preponderance of the evidence that the venture has a realistic expectation of success such that it will rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). However, the business plan submitted in the current matter and the record generally, leads to the conclusion that the petitioner will enter into the United States and pursue any business venture it deems the most expedient upon arrival, which is not sufficient to fulfill the "new office" requirements set forth in the Act. Again, 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)).

Lastly, on appeal, the petitioner asserts that the beneficiary is clearly established as an executive under the Act due to the beneficiary's title and his ability to bind the company. However, titles and the ability to sign for a company do not alone establish an executive consistent with the Act. 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 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-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 petitioner has failed to establish that the beneficiary will be employed in an executive capacity within the petitioner's first year of operations. The beneficiary's duties are inconsistent with the petitioner's proposed start-up of operations in the baking industry, casting doubt on whether the beneficiary will be

primarily focused on establishing goals and policies and directing the management of the organization. The petitioner has not detailed hiring plans that will lead to the employment of a complex organizational hierarchy, or provided a timetable for the employment of support staff necessary to allow for the beneficiary to primarily perform executive tasks. Further, the petitioner has not provided sufficient evidence of its investments, or a credible business plan, to allow a conclusion that the petitioner is likely to commence business immediately, succeed and rapidly expand as necessary to support the beneficiary in an executive role after one year.

In conclusion, the petitioner had failed to establish that the beneficiary would be employed in the United States primarily in a managerial or executive capacity within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C). As such, the appeal must be dismissed.

B. Qualifying relationship between the U.S and foreign employer

Beyond the decision of the director, the petitioner has also not established that a qualifying relationship exists between the petitioner and foreign employer.

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

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

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (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[.]

* * *

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

* * *

(J) *Branch* means an operating division or office of the same organization housed in a different location.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

* * *

(L) *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, or

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The 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 (Comm'r 1988); *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.

In the present matter, the petitioner was established in the State of Texas as a corporation in August 2012 through a claimed "joint venture" between the beneficiary and the President of the petitioner [REDACTED] both of whom are claimed managers or executives with the foreign employer. Further, the submitted joint venture agreement states that the Mr. [REDACTED] will hold a 60% interest in the petitioner and the beneficiary a 40% interest. However, no other documentation is provided to support a conclusion that the foreign employer and the petitioner are under common ownership or control; or that the petitioner is a subsidiary, branch or affiliate of the foreign employer. In fact, the record is silent as to who definitively owns the foreign employer, except statements that the foreign employer was founded by a [REDACTED] and that the foreign employer is owned by the beneficiary's family. However, a familial relationship does not constitute a qualifying relationship under the regulations. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family").

The petitioner must submit sufficient evidence to establish that the U.S. and the foreign employer are under common ownership or control. But, due to the insufficiency of the record, it cannot be determined who or what, specifically, owns and controls the foreign employer. Further, even if such a familial relationship were deemed sufficient, the petitioner states that it is majority controlled by Mr. [REDACTED] who has not been shown to have any connection to the beneficiary's family other than acting as an employee of the foreign employer. Therefore, the petitioner has not established with sufficient evidence that a qualifying relationship exists between the petitioner and the foreign employer. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

III. 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.