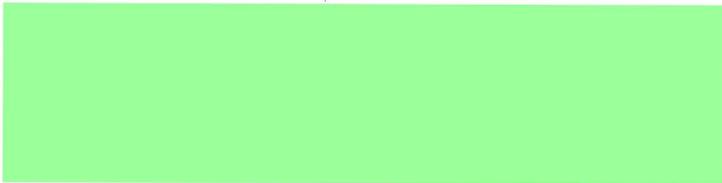


(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **JAN 17 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:

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 director subsequently granted the petitioner's motion to reconsider and affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks 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 New York corporation established on March 7, 2011. It intends to engage in the business of "insurance, commercial and industrial research." The petitioner claims to be a subsidiary of [REDACTED] based in Italy. The petitioner seeks to employ the beneficiary as Executive Manager of its new office location.¹

On August 3, 2011, the director denied the petition, finding the petitioner failed to establish: (1) that it will employ the beneficiary in a primarily managerial or executive capacity within one year; and (2) that the foreign entity employed the beneficiary in a managerial or executive capacity for one continuous year in the three years preceding the filing of the petition. The director granted the petitioner's motion to reconsider and, after requesting additional evidence, withdrew her finding that the beneficiary was not employed abroad in a qualifying capacity for one year within the three years preceding the filing of the petition. However, the director found that the petitioner did not overcome the finding that the beneficiary would not be employed in a qualifying managerial or executive capacity within one year. Therefore, the director affirmed the denial of the petition on April 6, 2012.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner contends it has demonstrated the beneficiary will be performing high-level duties that qualify him as a manager or executive, and that he will have sufficient subordinate personnel to relieve him of non-qualifying tasks.

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 petitioner requested a five-year period of approval. However, pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

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.

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.

II. The Issues on Appeal

A. Managerial or Executive Capacity

The director denied the instant petition based on a finding that the petitioner failed to show it will employ the beneficiary in a primarily managerial or executive capacity within one year.

When examining the managerial or executive 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 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.* In addition, the definitions of executive and managerial capacity each have two parts. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in the definitions. Second, the petitioner must prove the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

On its Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's proposed duties as follows:

PLAN, DIRECT AND COORDINATE THE OPERATIONS OF THE COMPANY.
DUTIES AND RESPONSIBILITIES INCLUDE FORMILATING [*sic*] POLICIES,
MANAGING DAILY OPERATIONS; PLANNING THE USE OF MATERIALS; AND
HUMAN RESOURCES.
ESTABLISHING THE CONNECTION BETWEEN THE ITALIAN COMPANY AND
THE COMPANY BASED IN THE UNITED STATES OF AMERICA, LINK
TOGETHER THE NEW CONTACTS CREATED BY THE BENEFICIARY BEFORE,
COMBINE AND OPEN NEW CHANNEL OF TRUST IN LEGAL, COMMERCIAL,
AND INSUARANCE [*sic*] MATTERS BETWEEN TWO COMPANIES.

In response to a Request for Evidence (RFE) issued by the director on April 27, 2011, the petitioner submitted a more detailed job description for the beneficiary's proposed position of Executive Manager. It lists the Executive Manager's responsibilities as:

1. To adhere to financial guidelines e.g. expenditure' company's overheads.
2. To maintain and constantly review client service standards.
3. To discipline and guide all members of staff to create a productive working atmosphere for the benefit of both staff and clients.
4. To encourage and motivate all staff to maximum potential, both technically and professionally for their individual benefit future growth of the company.
5. To plan future staff requirements to maintain staff levels and fluctuations in trade throughout the year.
6. o [*sic*] action all directives whether verbal or written within the time specified through the correct channels e.g. staff grievances and complaint procedures.
7. To follow the guidelines on controlling and accounting for stock, ensuring that paperwork is completed accurately.
8. To do banking monthly. At the end of the month once the Takings Sheet has balanced, total cash available to be banked should be amount given on the Takings Sheet, less the amount retained in the float.

9. To be responsible for controlling petty cash expenditure and ensuring that receipts are obtained for expenses.

Although specifically requested in the RFE, the petitioner did not indicate the percentage of the beneficiary's time to be allocated to each duty. The petitioner similarly failed to indicate which duties it considers managerial or executive. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Five of the eight aforementioned duties refer to supervision of employees. 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). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner has not clearly or consistently indicated the number and types of employees to be hired during the first year of operations, and therefore has not established that the beneficiary will primarily be engaged in supervising and controlling the work of a subordinate staff of supervisory, professional or managerial employees within the required timeframe.

An undated and unsigned letter submitted with the Form I-129 states: "At the moment the new company will be run by [the beneficiary], who has underlined the need for new personnel in American territory as soon as possible."

In response to the RFE, the petitioner submitted an organizational chart showing the beneficiary as Executive Manager with two named employees beneath him: a customer assistance employee in the "sales department" and an accounting employee in the "administration department." Although requested, the petitioner did not provide a list of job duties for these employees, or the percentage of time they will dedicate to each duty. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In a business plan also submitted in response to the RFE, the petitioner indicated that it will hire "approximately 5 salespeople" in the coming year, but did not provide any further detail regarding these positions, nor does it mention the accounting or customer assistance positions that the petitioner appears to claim were already staffed. Regarding salary, the petitioner stated that payments to staff will be based largely on commissions and/or a percentage of revenue; however, the submitted business plan does not include information regarding the company's financial objectives, projected revenues, or anticipated commission

expenses. The petitioner indicated only that future employees will assist with day-to-day operations and thereby relieve the beneficiary from performing non-managerial tasks. However, 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On motion, counsel for the petitioner stated that the business plan contemplates hiring five employees, and noted, contrary to what is stated in the business plan, that "[t]wo employees will be working in the Administration Department (Legal Consultancy and Banking), and two will be in charge of the Sales Department (Marketing)" while the fifth employee would "dedicate his/her time to real estate and insurance research." Counsel emphasized that there was no need for the petitioner to establish that the beneficiary's subordinates are professionals. On motion, the petitioner made no reference to the previously named customer assistance and accounting employees, or to the petitioner's previously-stated intention to hire five sales employees. As with its earlier submissions, the petitioner failed to provide any information regarding the anticipated job duties of the subordinate staff or information regarding the salaries to be paid.

On November 21, 2011, after an initial review of the petitioner's motion, the director requested: (1) an organizational chart depicting where the proposed five sales person positions will fit into the organization; and (2) evidence of the highest educational level achieved by the head of the sales department. In response, the petitioner submitted a new proposed organizational chart which places a "director" position at the top of the hierarchy, with the executive manager reporting directly to the director position. The chart includes: a research department with no proposed positions depicted, an administration department consisting of "general accounting" and "consulting" positions; and a sales department including a "customer assistance" position and five sales brokers. Although no employees were named on the chart, the petitioner provided copies of two certificates issued to [REDACTED] in July 2011. This individual was identified as a "customer assistance" employee on a previous organization chart.

On appeal, counsel relies upon the same organizational chart submitted in response to the latest RFE and asserts that it "clearly shows that the Beneficiary will be in charge of a Customer Assistance department which will relieve him of the tedious clerical jobs, freeing him to act as a manager." In addition, counsel asserts that the company has a Consulting department responsible for "cooperation with the clients and performing administrative tasks on a daily basis." Counsel's assertions are not persuasive, as the petitioner has never explained the duties to be performed by any proposed subordinate employees, nor submitted a business plan that supports the claim that the company will hire five or more employees during the first year of operations. 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)).

A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology*

International, 19 I&N Dec. 593, 604 (Comm'r 1988). While the petitioner has made various claims regarding the number and types of employees to be hired, the petitioner does not allege that the beneficiary will oversee professionals or supervisors. It concedes that employees in sales do not generally require advanced bachelor's degree or specialized training in order to enter the field. The petitioner provided certificates in real estate training for one claimed employee, but specifically states that it will not require such qualifications of future employees. The petitioner also stated it plans to hire an accountant. It does not allege that this position is professional or that it will supervise other individuals. However, even if the AAO considers the accountant a professional, the petitioner must still show that the beneficiary will spend his time primarily supervising this professional and completing other managerial tasks. The petitioner has failed to provide sufficient evidence that this will occur within one year.

Other than supervising employees, the beneficiary's job duties involve finance and accounting functions such as adhering to financial guidelines, performing monthly banking, and controlling petty cash expenditures. However, given that one of the anticipated subordinate employees is an accountant, it is unclear why the beneficiary would need to perform these tasks. The petitioner failed to provide a list of job duties for its accountant. However, the existence of a position dedicated solely to accounting cannot be reconciled with the Executive Manager's finance and accounting functions without some further explanation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In this case, the petitioner has failed to do so.

Lastly, the majority of the beneficiary's duties are described in extremely vague terms. The list provided includes duties such as adhering to financial guidelines, maintaining and reviewing client service standards, and encouraging and motivating staff. It is unclear what these duties mean in concrete terms and how the petitioner intends the beneficiary to perform them within the context of the proposed business. Without further detail, it is therefore impossible to determine whether any of such duties are managerial or executive in nature. 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). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. 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. See 8 C.F.R. § 204.5(j)(5). In the instant case, the petitioner fails to articulate an essential function which the beneficiary will manage.

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 AAO does not question the beneficiary's authority to make important decisions for the petitioner. However, the petitioner must demonstrate that the beneficiary will be employed *primarily* in an executive capacity within one year. As previously noted, the petitioner did not identify which duties it considers executive or what percentage of the beneficiary's time will be devoted to executive duties. In addition, the responsibilities listed lack the meaning and clarity necessary to conclude that the beneficiary will primarily spend his time dealing with executive matters. Finally, due to the inconsistencies and deficiencies catalogued above with respect to the petitioner's proposed organizational structure, the record does not establish that the petitioner would employ staff to relieve the beneficiary from performing non-qualifying duties within one year, such that he would be free to allocate the majority of his time to the broad goals and policies of the organization.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Here, based on the petitioner's failure to provide an adequate description of the beneficiary's duties, its failure to provide a consistent and corroborated explanation of its proposed organizational structure and hiring plans for the first year of operations, and the lack of any financial objectives or projections in the company's business plan, the petitioner has not established that the company will support a managerial or executive position within one year. Accordingly, the appeal will be dismissed.

B. Beyond the Decision of the Director

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). In addition to the grounds identified in the director's denial, the instant petition also fails to meet the following requirements:

1. *Manager or Executive Abroad*

In order to qualify for an intracompany transferee visa, the beneficiary must have at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition. 8 C.F.R. § 214.2(l)(3)(iii). The AAO notes that the director initially denied the petition, in part, based on a finding that the beneficiary did not meet this requirement. While the director subsequently withdrew this ground for denial on motion, the record reflects that the director's original determination was correct.

The petitioner filed the instant petition on April 18, 2011. It must therefore demonstrate that the beneficiary worked for the foreign entity in a primarily managerial or executive capacity for one year between April 19, 2008 and April 18, 2011. According to the petitioner, the beneficiary attended school in the United States from October 1, 2007 to July 1, 2010. The beneficiary's transcript from the [REDACTED] lists a commencement date of October 1, 2007 and a completion date of July 1, 2010. It lists the beneficiary's location as New York, NY. The beneficiary's expired passport has a five-year M-1 classification visa issued to him in September 2007 for attendance at [REDACTED] in New York.

The petitioner also submitted a Form I-20 Certificate of Eligibility for Nonimmigrant (M-1) Student Status approved on January 9, 2011 that confers on him authorization to remain in the United States to study at [REDACTED] from February 1, 2011 to February 1, 2012. The beneficiary was last admitted to the United States in M-1 status on January 9, 2011 and the petitioner requested that he be granted a change of nonimmigrant status from M-1 to L-1A.

Although the petitioner claims the beneficiary was working full-time while attending school, the regulations require that the beneficiary have worked *abroad* for at least one year out of the previous three. The petitioner appears to concede the beneficiary's presence in the United States for the majority of the three years preceding the filing of the instant petition.² The petitioner therefore fails to show that the beneficiary worked abroad for at least one year out of the previous three.

² The evidence in the record shows that the petitioner left and reentered the United States multiple times during this period. However, the record supports a conclusion that the beneficiary's primary residence during that time was in New York City.

In its response to the director's Request for Evidence (RFE), the petitioner asserts: "Attending school in the United States will generally extend the three year time period, if it can be determined that the beneficiary's school tuition was paid by the foreign business entity and the beneficiary received wages from the foreign entity for the educational period." The petitioner appears to misunderstand this statement's relevancy as it pertains to the beneficiary's own situation. The regulations state that "[p]eriods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad *but such periods shall not be counted toward fulfillment of that requirement.*" 8 C.F.R. § 214.2(l)(1)(ii)(A) (emphasis added). Attending school in the United States may in certain circumstances extend the three year time period so that a petitioner may count time worked abroad that occurred more than three years ago toward the necessary one year. Time spent physically in the United States may *not*, however, count toward the necessary one year of employment abroad. This principle is well-supported in the regulations and case law. *See Karmali v. INS*, 707 F.2d 408 (9th Cir. 1983); *Matter of Kloeti*, 18 I&N Dec. 295 (RC 1981); 8 C.F.R. §§ 214.2(l)(1)(ii)(A) & (3)(iii).

The petitioner included a letter from the president of the foreign entity stating that it has employed the beneficiary since December 28, 2007. The petitioner's school transcript lists his commencement date as October 1, 2007, meaning the beneficiary was already in the United States when he started working for the foreign entity. Ostensibly, this means the beneficiary has been residing in the United States throughout most of his period of employment with the foreign entity. The petitioner does not allege that the beneficiary spent any time working abroad prior to April 18, 2011. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Even if the beneficiary returned to Italy upon completing his first course of study in July 2010, and worked for the foreign entity during that time period, he returned to the United States in January 2011. The beneficiary has not spent one year outside of the United States since his claimed start date with the foreign entity and therefore cannot establish that he has the requisite one year of qualifying experience abroad.

For these reasons, the petitioner has failed to establish that the beneficiary worked abroad in a managerial or executive capacity for one out of the three years preceding the filing of his petition. The petition must be denied for this additional reason.

2. *Qualifying Relationship*

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same (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 Int'l*, 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 Int'l*, 19 I&N Dec. at 595.

The petitioner alleges on its Form I-129 that it is a subsidiary of the Italian company, and states that both companies are "100% Italian owned."

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.

8 C.F.R. § 214.2(l)(1)(ii)(K).

Although the petitioner provided articles of incorporation and a computer print-out confirming the petitioner's New York State corporate registration, it failed to provide sufficient evidence regarding its ownership and control. In response to the director's RFE, the petitioner claimed a qualifying relationship in that the foreign entity has 50% ownership and control of the "joint venture." The petitioner submitted several copies of a "joint venture agreement." The copy dated March 1, 2011 purportedly creates the joint venture [REDACTED] between the petitioner and the overseas entity and states that each has a 50% interest in the joint venture.

On the whole, the petitioner's reliance on this "joint venture agreement" is misguided: the qualifying relationship must be between the petitioner and the foreign company. Neither the petitioner nor the foreign entity is claimed to be the joint venture. This makes ownership of the joint venture known as [REDACTED] irrelevant for purposes of establishing a qualifying subsidiary relationship between the petitioner and the beneficiary's claimed foreign employer.

In any case, the veracity of the joint venture agreement is questionable. While the joint venture agreement was signed on March 1, 2011, the petitioner's certificate of incorporation is dated March 4, 2011 and was not filed with the State of New York until March 7, 2011. This means that the petitioner was not yet an entity at the time the joint venture agreement was signed. Furthermore, although the joint venture agreement states that all joint venture names will be registered with the State of New York, a search of the New York's online corporate name database reveals no results for [REDACTED]. 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 (BIA 1988).

In other documents submitted by the petitioner, it claims the name of the joint venture is not [REDACTED] the exact name of the petitioner.³ The petitioner does not provide any document purporting to amend the name of the venture. In proceeding documents, the petitioner continues to use the same name for both the joint venture and the petitioner, which allows it to easily conflate the two. 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).

On appeal, the petitioner submits a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2011. According to information provided at Schedule K, the company is wholly-owned by one Italian shareholder. The petitioner did not include any additional statements or schedules and the tax return does not identify the identity of its sole shareholder. 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 fact that the company reports a single shareholder further undermines any claim that the petitioner itself is a "joint venture."

Due to the lack of evidence regarding ownership and control of the petitioner, it has failed to establish a qualifying relationship with the beneficiary's claimed foreign employer. For this additional reason, the petition will be denied.

3. *Sufficient Physical Premises*

As a "new office," the petitioner must establish that it has secured sufficient physical premises to house the new operation. Because evidence of physical premises is required initial evidence for a "new office" petition, the petitioner must establish that sufficient physical premises have been secured as of the date the petition was filed. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

On the Form I-129, the petitioner listed its address as [REDACTED]. However, when asked for evidence regarding its physical premises, the petitioner replied that it leased an office at [REDACTED]. It submitted a purported sub-lease for this space, but the sub-lease is neither signed nor dated. As a result, there is no evidence that the petitioner had obtained the premises at the time of filing. The record as presently constituted contains no lease or other evidence related to the location claimed at the time of filing. 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.

³ The first line of the "joint venture business plan" states, for example: [REDACTED]

⁴ The petitioner also lists this location as the beneficiary's home address.

158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In addition, the petitioner provides no explanation for its conflicting statements regarding its physical premises. 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 lack of evidence, the petitioner has failed to establish that it had obtained sufficient physical premises by the time of filing. For this additional reason, the petition will be denied.

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. Accordingly, the appeal must be dismissed.

ORDER: The appeal is dismissed.