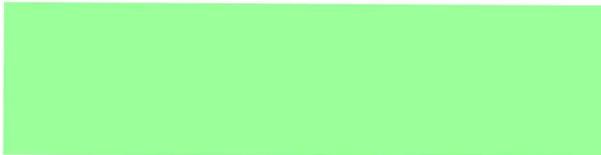


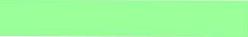
(b)(6)

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



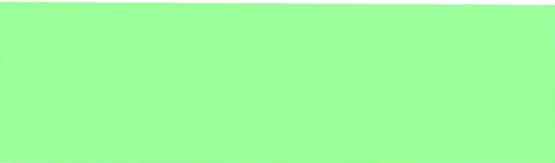
U.S. Citizenship  
and Immigration  
Services



DATE: **JUN 11 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner subsequently filed an appeal, which the director rejected as being untimely filed. The petitioner then filed a motion to reopen the matter, which was dismissed by the director. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider the director's previous decision. The AAO will grant the motion, withdraw the director's decision to reject, and enter a decision on the appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment 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, a Louisiana corporation established in 2009, states that it is engaged in the retail gas/convenience store business. It claims to be wholly owned subsidiary of [REDACTED] in India. The beneficiary was previously granted status as an L-1A status in order to operate a new office in the United States. The petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition, in part, finding the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive position. Further, the director determined that the petitioner had failed to establish a qualifying relationship exists between the U.S. and foreign entities.

The petitioner appealed the director's decision, which the director rejected the appeal as untimely filed.<sup>1</sup> The director dismissed the motion, finding that the petitioner had not stated any new facts or asserted sufficient reasons to reopen the matter. The matter is now before the AAO.

On motion, counsel asserts that the director's rejection of the petitioner's appeal for being untimely was in error, and asserts that the appeal was received on October 24, 2011, 32 days after the director's decision. The AAO finds counsel's assertion that the appeal was rejected in error convincing. The record includes Federal Express documentation indicating that the appeal was mailed overnight to the Vermont Service Center on Friday October 21, 2011 for receipt by Monday October 24, 2011. A United States Citizenship and Immigration (USCIS) receipt stamp on the Federal Express shipping invoice confirms receipt on October 24, 2011. As such, the appeal was received by the Vermont Service Center in a timely fashion. Further, the director should not have issued a decision on the appeal, but forwarded the appeal to the AAO for adjudication since he was not taking favorable action on the appeal. *See* 8 CFR 103.3(a)(2)(iv). In other words, not only did the director erroneously calculate the date of receipt, but the director did not have jurisdiction to issue a rejection with respect to the petitioner's appeal, but should have forwarded the appeal to the AAO to issue a full appellate decision. As such, the AAO will grant the petitioner's motion, withdraw the director's decision to reject, and enter a decision on the appeal..

---

<sup>1</sup> The petitioner filed two motions to reopen the director's decision to reject the appeal ([REDACTED]) and [REDACTED]

## 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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with 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 Issues on Appeal:**

### **A. Employment with the petitioner in a managerial or executive capacity:**

The first issue to be addressed is whether the petitioner established that the beneficiary was, and would be, primarily employed in a managerial or executive capacity as defined by the Act. Upon review of the petition and the evidence, and for the reasons discussed herein, the AAO affirms the director's finding that the petitioner did not establish that the beneficiary was and would be employed in a primarily executive or managerial 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.

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). In support of the I-129 Petition for a Nonimmigrant Worker, the petitioner submitted the following job description for the beneficiary:

At the [petitioner], [the beneficiary] will hold the position of President and CEO. In that capacity, [the beneficiary] will have overall executive responsibility for developing, organizing, and establishing the purchase, sale, and marketing of merchandise for sale in the U.S. market. His other duties will include: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. retail market; (ii) negotiating and supervising the drafting of purchase agreements; (iii) marketing products to consumers according to [the foreign employer's] guidelines; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing and implementing plans to ensure [the petitioner's] profitable operation; and (vi) negotiating prices and sales terms, developing policies and advertising techniques.

The petitioner further broke down the beneficiary's duties into the following general categories by percentage of time spent on each: (1) management decisions- 40%; (2) company representation- 15%; (3) financial decisions; 10%; (4) supervision of day-to-day company functions- 10%; (5) business negotiations- 15%; and, (6) organizational development of the company- 10%.

In a request for additional evidence (RFE), the director requested that the petitioner provide additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity, including a more comprehensive description of the beneficiary's duties. In response, the petitioner provided the following explanation of the beneficiary's duties:

[The beneficiary] will have overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, supervising all financial aspects of the company and developing policies and objectives for the Company. Specific job duties include: (i) Negotiating and supervising the drafting of purchase agreements; (ii) Developing trade and consumer market strategies; (iii) hiring appropriate personnel and leasing equipment and retail distribution facilities; (iv) Overseeing the legal and financial due diligence process and resolving any related issues; and (v) Developing and implementing plans to ensure [the petitioner's] profitable operation.

The petitioner failed to provide additional details regarding the beneficiary's daily job duties, and merely restated the previous duties submitted with the original petition in a slightly revised fashion. 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).

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 provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his daily duties. For instance, the petitioner did not provide specifics, examples, or supporting documentation regarding purchase agreements negotiated; marketing or advertising strategies developed and/or implemented; or plans implemented to increase profitable operation, to give the referenced job duties more credibility or probative value. Indeed, there is little in the duties to distinguish them from the duties of any executive or manager with any company, and it is not possible to discern from the duty description, due to the lack of specifics, the industry within which the beneficiary will operate. Further, the duties, and the record generally, are largely repetitive of the statutory language. As such, the total lack of specificity or examples in the provided U.S. duties casts doubt on their credibility. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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)). 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.).

Certain discrepancies are apparent within the duties when compared to the record generally. For instance, a major duty of the beneficiary is listed as building a management team; however, the petitioner alternatively asserts on the record that a management team is already in place. Additionally, the petitioner prominently references the development and implementation of marketing and advertising plans, but the petitioner's U.S. Income Tax Returns for an S Corporation (Form 1120S) for the years 2009, 2010 and 2011 note that the petitioner spent nothing on advertising during any of these years. Further, counsel's support letters questionably refer to the beneficiary as "she" and confusingly intermingle the beneficiary's U.S. and foreign duties casting further doubt on their authenticity and suggesting that the provided duties and support language are boilerplate. 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).

The petitioner offers an expert opinion of [REDACTED] a professor at the [REDACTED] which asserts that the beneficiary's position qualifies as that of an executive or manager consistent with the Act. USCIS may, in its discretion, use as advisory opinions statements submitted as

expert testimony. See *Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795. In the current instance, the AAO gives little weight to the provided expert opinion, as it simply reiterates the language of counsel's brief, which as discussed, provides vague duties that are repetitive of the statutory language. Again, 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. at 1108.

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

Various material discrepancies on the record cast serious doubt on whether the petitioner has a group of managers and supervisors to whom he delegates non-qualifying day-to-day operational duties as asserted. The petitioner states that it operates a gas station/convenience store called the [REDACTED] located in [REDACTED] Louisiana, which operates 12 hours per day, 7 days a week (or 84 hours per week). The petitioner indicates that it employs six managers, including the beneficiary, out of seven total employees. Only one of the current employees, the Cashier/Stocker, is shown to be exclusively tasked with daily operational duties necessary to operate the convenience store. Although the Retail Manager and Assistant Manager are also shown to perform certain duties necessary to operate the convenience store, such as maintaining inventory, and hiring, firing and training employees, these managers are only shown to have one subordinate employee tasked with the operation of the store, 84 hours per week. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Further, the petitioner's wage documentation does not support the submitted organizational chart, casting further doubt on the actual duties being performed by the beneficiary and his claimed subordinates. For instance, the organizational chart submitted on appeal early in the 4<sup>th</sup> quarter of 2012 lists the following employees: (1) [REDACTED] President; (2) [REDACTED] Vice President; (3) [REDACTED] Sales Manager; (4) [REDACTED] Retail Manager; (4) [REDACTED] Accountant; (5) [REDACTED] Assistant Manager; and (6) [REDACTED] Cashier/Stocker. However, the most recent Louisiana quarterly payroll documentation submitted from the 3<sup>rd</sup> quarter of 2012 does not account for payments made to Mr. [REDACTED] the Vice President or the lone Cashier/Stocker for the store, Mr. [REDACTED]. As such, the only claimed non-managerial subordinate for the petitioner is not established as being employed in supporting wage documentation, casting further doubt on the duties actually performed by the beneficiary and his claimed managers. Indeed, the lack of non-managerial employees in the organization suggests that the beneficiary's claimed managerial subordinates are not performing managerial duties as asserted. Further, the aforementioned wage documentation from the 3<sup>rd</sup> quarter of 2012 includes two employees. [REDACTED]

and [REDACTED] who are not included on the petitioner's most recent organizational chart. In sum, the credibility of the petitioner's organizational chart is in serious question due to the above referenced inconsistencies on the record, thereby casting doubt on the assertion that the beneficiary delegates all operational duties to subordinate managers. 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. 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).

The regulations also require that a petitioner provide evidence of the financial status of the United States operation in order to confirm that the petitioner is capable of supporting the beneficiary's executive or managerial role. See 8 C.F.R. § 214.2(l)(14)(ii)(E). However, discrepancies with respect to the petitioner's stated revenue cast doubt on whether the petitioner is developing as planned and whether it is providing credible information as to its current financial status. For instance, the petitioner's business plan and a "profit & loss statement" submitted in support of the petition state that the petitioner earned \$2.473 million in 2009. But, a corresponding IRS Form 1120S U.S. Income Tax Return for an S Corporation submitted for 2009 notes that the petitioner only grossed \$1,007,776 in 2009. Later submitted IRS Form 1120S returns for 2010 and 2011 support the previously mentioned lower revenue level, as they reflect that the petitioner generated \$1,331,997 and \$1,309,211 in each respective year. But, the petitioner's business plan references that the petitioner projected over \$3 million in revenue in 2010, over \$4 million in 2011, and \$5 million in 2012. Further, bank records submitted from 2011 reflect negative or low balances, supporting a conclusion that the petitioner has insufficient capital to expand. Granted, expansion need not be necessarily established to allow a beneficiary to qualify as a manager or executive consistent with the Act and regulations. However, the petitioner has stated that a major duty of the beneficiary is directing investment in the United States, but has provided supporting documentation that the petitioner has little capital to support further investment in the U.S. market.

Counsel asserts that the beneficiary acts as a personnel manager as defined by law, stating that he supervises other subordinate managers and supervisors who run the daily operations of the company. 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 term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The petitioner has not credibly established that the beneficiary has managers, supervisors, and professionals to whom he delegates day-to-day operational duties. As previously noted, there are many discrepancies on the record regarding the petitioner's claimed operations and organizational structure. As such, the petitioner has not sufficiently established that his claimed managers and supervisors actually perform managerial duties as asserted. For instance, the petitioner maintains that the beneficiary has four subordinate managerial employees, or [REDACTED] (Vice President); [REDACTED] (Sales Manager); [REDACTED] (Retail Manager); and [REDACTED] (Accountant). However, Mr. [REDACTED] is not included on the petitioner's most recently submitted State of Louisiana quarterly wage reports. Further, Ms. [REDACTED] is listed as only earning \$500 per quarter throughout 2012 on State of Louisiana quarterly wage reports, casting doubt on whether she is actually acting in a managerial role as asserted. Indeed, the aforementioned four managers are only shown to have two subordinate employees, or the Assistant Manager and one Cashier/Stocker, the latter of which who is also not included on State of Louisiana quarterly wage reports in 2012. Additionally, the duties of the Sales Manager and Retail Manager both prominently list that they hire, train and oversee employees, but they have not been shown to have sufficient subordinates to allow them to perform these duties thereby casting doubt on whether they are managerial or supervisory subordinates as offered.

Counsel also contends that two of the beneficiary's subordinates are established as professionals and submits degree information for Mr. [REDACTED] (Vice President) and Ms. [REDACTED] (Accountant) in order to establish this assertion. But, establishing that a subordinate has a baccalaureate level degree is not alone sufficient to establish that a beneficiary's subordinate is a professional as defined by law. The position must be established as being that of an advanced type in a given field gained by a prolonged course of specialized instruction where baccalaureate level degree is considered a minimum for entry into the field. The petitioner has not credibility supported this assertion with evidence. In fact, the supporting evidence provided as to Mr. [REDACTED] education notes that he received an engineering degree in Electrical Communications, a field wholly unrelated to acting as a Vice President of company owning and operating a convenience store. As such, it is not sufficiently demonstrated that the Vice President position requires a specific type of baccalaureate level degree. Also, no degree information is provided for Ms. [REDACTED] the stated accountant, to establish that she is a professional as defined by the Act. Indeed, she is only shown to earn \$500 per quarter in submitted wage documentation, casting doubt on whether she is acting in a professional role. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In sum, the totality of the circumstances does not establish that the petitioner employs managerial, supervisory or professional subordinates as asserted; therefore, the beneficiary has not been established as a personnel manager as defined by the Act.

On appeal, counsel also alternatively asserts that the beneficiary qualifies as an executive consistent with the Act and regulations. 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 not submitted sufficient evidence to establish that the beneficiary primarily acts as an executive. Indeed, counsel has done little other than reiterate the language of the statute in an attempt to advance the beneficiary as an executive and offers a claimed expert opinion that does the same. As noted previously, the beneficiary's provided duties are not credible as they are insufficiently vague and boilerplate. Also, the petitioner has also not established, due to various discrepancies, that the beneficiary has sufficient operational employees to allow the beneficiary to exclusively focus on establishing goals and policies for the company and directing management. As noted, a beneficiary must be shown as more than an executive in name only, and being head of an organization alone is not sufficient. The beneficiary must be established as being at the head of a complex organizational hierarchy, within which, they set goals and policies and direct management. In the current matter, and for the aforementioned reasons, the petitioner has not met this burden.

In conclusion, the petitioner has submitted insufficient and inconsistent evidence to establish that the beneficiary has been and would be employed in a primarily executive or managerial capacity.

### **B. Qualifying Relationship**

As noted, the director found in his original decision that the petitioner had not established that a qualifying relationship existed between the petitioner and the foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i).

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.

\* \* \*

(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.

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 asserts that it is owned equally between a Mr. [REDACTED] and the foreign employer, each owning 500 of the petitioner's outstanding 1,000 shares. The petitioner submits minutes of an organizational meeting of the petitioner dated October 1, 2009, and supporting share certificates, whereby former shareholder Mr. [REDACTED] transferred his 500 shares to the foreign employer. The petitioner contends that it is a subsidiary of the foreign employer pursuant to the foreign employer's 50% ownership interest in the petitioner. As noted above, to establish a parent subsidiary relationship, the parent must show that it owns more than half of the claimed subsidiary or otherwise present evidence that establishes that the parent controls the entity. See 8 C.F.R. § 214.2(l)(1)(ii)(K). Although counsel has stated various times on the record that the foreign employer controls the petitioner, no supporting evidence has been presented to support this conclusion. Without documentary evidence to

support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Indeed, the petitioner submits evidence that supports a conclusion that it is equally controlled between the aforementioned Mr. [REDACTED] and the foreign employer and that neither has been shown to exert definitive control over the organization through veto power or other such control. Further, even if the entities were considered as affiliates, they still do not qualify since they are not offered as being controlled by the same parent or individual or by the same group of individuals. In fact, the petitioner and foreign employer are both jointly owned and controlled by completely different owners. To illustrate, the foreign employer is shown as being controlled jointly by the beneficiary and a [REDACTED] neither of whom hold any ownership interest in the petitioner.

Further, the petitioner's existence as an S-corporation partly owned by a foreign corporation casts material doubt on the petitioner's provided ownership. The petitioner submitted copies of U.S. Income Tax Returns for an S Corporation (Form 1120S) for the years 2009, 2010 and 2011. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code, § 1361(b)(1999)*. A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, material doubt is cast on the foreign employer's claimed ownership in the petitioner and this conflicting information has not been resolved. 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).

As such, the petitioner has not established that it and the foreign employer are under common ownership and control, and therefore, they are not shown to have a qualifying relationship as required by the Act. For this reason, the petition must remain denied.

### III. Conclusion

The motion is granted, but the underlying decision of the director on the merits is affirmed and the petition remains denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The decision of the director is affirmed. The petition remains denied.