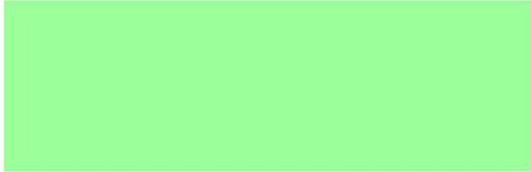




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 19 2013

Office: VERMONT SERVICE CENTER

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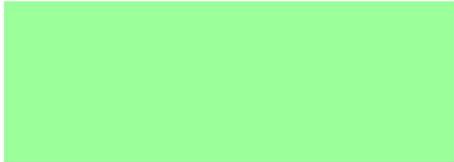
IN RE:

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking 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 Texas limited liability company, states that it operates a retail business. Specifically, it claims to own a controlling interest in [REDACTED] a Texas corporation doing business as [REDACTED]. It states that it is a subsidiary of [REDACTED] located in India. The beneficiary, the company's president and chief executive officer, was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend his status for two additional years.

The director denied the petition concluding that the petitioner failed to establish: that it will employ the beneficiary in a qualifying managerial or executive capacity; that the foreign entity employed the beneficiary in a managerial or executive capacity; that the U.S. and foreign entities have a qualifying relationship; and that the U.S. company maintains physical premises for the conduct of business. The director further found that inconsistencies in the submitted evidence cast doubt on the petitioner's claim that it actually owns and controls [REDACTED].

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size and nature of the petitioner's retail business in determining whether the beneficiary would be employed in a managerial or executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

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

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

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

II. THE ISSUES ON APPEAL

A. Employment Capacity in the United States

The first issue to be addressed is whether the petitioner established that it would employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 24, 2010. In a letter dated September 9, 2010, the petitioner described the beneficiary's duties as president and CEO as follows:

[The beneficiary] has overall executive responsibility for developing, organizing, and establishing the purchase, sale and marketing of merchandise for sale in the U.S. market. He is employed at the highest executive level and has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. His other duties include: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. retail market; (ii) hiring and training other managers and employees and is in charge of increasing the sales of the company; (ii) responsible for all our plan, expansion, banking, and budgeting;

(iii) marketing products to consumers according to [the foreign entity's] guidelines; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by [the foreign entity]; (vi) developing and implementing plans to ensure [the petitioner's] profitable operation; and (vii) negotiating prices and sales terms, developing pricing policies and advertising techniques.

As President and CEO, the Beneficiary spends 30% of his time on the management of the retail operations (meet with staff to implement policy, advise staff of new products of services, encourage team building, and obtain licenses related to the business); 15% of his time on administrative functions, including recruiting, hiring and training of staff; 15% of his time on planning, budgeting, banking, finance and accounting, review of financial statements, meeting bank officials, arranging loans, and providing prospectuses to banks; 40% of his time searching for and reviewing and analyzing potential new investments, analyzing zoning and legal issues, negotiating acquisitions and meeting with potential partners, co-investors, sellers, brokers. . . .

As the operational component of the enterprise, the petitioner stated that the U.S. company has acquired "majority shares" of [redacted] a company engaged in "marketing and retail distribution of gas, automotive and household products under the business name [redacted]. The petitioner indicated that it has "complete control over managerial and financial functions" of [redacted].

As evidence of its ownership of [redacted] the petitioner submitted: (1) a copy of [redacted] articles of incorporation dated February 19, 2002; (2) the minutes of a "reorganizational meeting" dated July 10, 2008 in which it was resolved that [redacted] would transfer his 50% ownership in the company to the petitioner; (3) a partially illegible "void" stock certificate for [redacted] indicating that [redacted] was issued 500 shares of stock on March 10, 2002, the reverse side of which indicates that the shares were transferred to [redacted] (the beneficiary); (4) a partially illegible stock certificate for [redacted] indicating that 500 shares were issued to [redacted] on March 10, 2002; and (5) a partially illegible stock certificate for [redacted] indicating that the petitioning company was issued 500 shares on July 10, 2008.

The petitioner stated on the Form I-129 that it has six employees and gross annual income of \$1.6 million. However, the petitioner submitted a business plan which indicated that these figures actually reflect the staffing level and income of [redacted]. The petitioner submitted an organizational chart for [redacted] which depicts the beneficiary as president and CEO and [redacted] as Vice President and General Manager. The chart also includes the positions of accountant, manager – retails, assistant manager, and two cashiers, although no additional employees were identified by name.

The petitioner provided job descriptions for all positions on the chart, and evidence of wages paid to six employees of [redacted] for the first two quarters of 2010. [redacted] Texas Employer's Quarterly Report for the second quarter of 2010 reflected a total of two full-time employees who earned

\$3,836 and \$6,000, respectively, and four part-time employees who earned wages between \$500 and \$1,050 during the quarter. The AAO notes that all of the state quarterly wage reports and IRS Forms 941, Employer's Quarterly Federal Tax Return, filed by [REDACTED] were signed by [REDACTED] in his capacity as "president."

The petitioner also submitted [REDACTED] IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2008 and 2009. The company's 2009 tax return, at Schedule K-1, Shareholder's Share of Income, Deductions, Credits, etc., identified [REDACTED] as the company's sole shareholder.

The petitioner submitted evidence of [REDACTED] operation of the business known as [REDACTED] located at [REDACTED] Texas. The sole document submitted for the U.S. petitioner was the beneficiary's IRS Form W-2, Wage and Tax Statement, indicating that he was paid \$36,000 in 2009. The petitioner did not submit any evidence of any business activities conducted by the U.S. company separate from [REDACTED] or otherwise provide evidence of the financial status of the company.

The director issued a request for additional evidence on March 10, 2011. The director advised the petitioner that "[t]he tax return and the financial documentation appears to supply contradictory information concerning the enterprise of the petitioner, the employer of the beneficiary, and the capacity in which the beneficiary has and will work." Further, the director noted that "the record does not delineate that the business is actually functioning, or has full-time employees who provide a product or service." The director requested that the petitioner more fully describe the scope of its business, noting that the petitioner failed to support its claim that it actually operates a retail business. The director instructed the petitioner to provide a description of its staff, including the number of employees, their job titles and duties, and their salaries or wages.

In response to the RFE, counsel explained that the petitioning company, [REDACTED] and [REDACTED] "share their hierarchical structure as per their relationship of ownership, which grants [REDACTED] rights to the operations of [REDACTED]." Counsel stated that the petitioner is "essentially operating as [REDACTED] by virtue of its acquisition of 50 percent of its shares, and that the beneficiary's "executive role within [REDACTED] therefore also rightly translates into the organizational structure of [REDACTED]

The petitioner submitted a slightly revised organizational chart for [REDACTED] which includes the additional position of bookkeeper, Texas Employer's Quarterly Reports for [REDACTED] for the third and fourth quarters of 2010, and copies of IRS Forms W-2, Wage and Tax Statement, issued by [REDACTED] in 2010, which indicate that the company paid total salaries and wages of \$52,703.50. Finally, the petitioner submitted copies of its IRS Forms 941 and Texas Employer's Quarterly Reports for 2009 and 2010, which confirm that the beneficiary was the company's sole employee.

The director denied the petition on October 13, 2011, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director emphasized that the evidence of record confirms that the beneficiary is the petitioner's sole employee, and fails to support the petitioner's claim that the U.S. company owns and controls [REDACTED]

Specifically, the director noted that "nothing shows how the beneficiary's endeavor for that business is legally connected to the petitioning entity." Accordingly, the director concluded that the petitioner had not grown to the point where it could support a managerial or executive position, or that the beneficiary would actually be performing the duties attributed to him on behalf of the petitioning company.

On appeal, counsel for the petitioner asserts that [REDACTED] is a US acquisition of [REDACTED] [REDACTED] noting that the petitioner's 50 percent ownership of [REDACTED] implies "an inherent ownership between the Parent company and its acquisition." In response to the director's finding that the beneficiary is the sole employee of the petitioning company, counsel asserts that the beneficiary is the president of both the petitioner and [REDACTED] and as such "will personally manage the overall organization, as well as several major essential components and functions of the organization." Specifically, counsel asserts that the beneficiary will supervise and control the work of [REDACTED] management, while also "managing the company's essential functions of business development, financial management and investment."

Counsel further states that the petitioner currently has seven employees and intends to invest in additional locations and hire seven additional employees within two years. Counsel concludes by stating that that it is "very clear" that the beneficiary "will supervise other professional and managerial employees, establishes goals and policies for the U.S. investment, and exercises wide latitude in discretionary decision-making."

Upon review, and for the reasons discussed herein, the petitioner has not established that it would employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

As stated above, this petition was filed to request an extension of a previously approved petition which involved a new office. As such, the petitioner is required to submit: evidence that it has been doing business for the previous year; a statement of duties performed by the beneficiary during the previous year and the duties he will perform under the extended petition; a statement describing the staffing of the company, including the number of employees, types of positions held and evidence of wages paid to employees; and evidence of the financial status of the United States operation. *See* 8 C.F.R. § 214.2(I)(14)(ii).

While the petitioner submitted evidence intended to satisfy these evidentiary requirements, the petitioner's evidence related almost exclusively to its claimed subsidiary, [REDACTED], rather than to the petitioning company, [REDACTED]. Therefore, as a preliminary matter, the AAO will address the director's finding that the petitioner failed to establish that it actually owns and controls [REDACTED].

The submitted evidence does show that [REDACTED] is in fact operating a retail grocery and tobacco store, but the petitioner has not fully or credibly documented its ownership of this claimed subsidiary company. Although the minutes of a "reorganizational meeting" allegedly held on July 10, 2008 indicate that one of the company's shareholders, [REDACTED] agreed to sell 50 percent of his stock to the petitioning company, the petitioner has not identified the purchase price or provided evidence of a payment to Mr. [REDACTED] in exchange for the issued stock to corroborate its claim that the acquisition actually occurred. 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)).

Furthermore, there are several additional deficiencies and inconsistencies in the record which raise questions regarding the validity of the claimed stock transfer. First, the petitioner and counsel have consistently indicated that the petitioning company acquired a 50 percent interest in [REDACTED] however, the voided stock certificate previously held by [REDACTED] indicates that he transferred his shares to the beneficiary, and not to the petitioner. 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). All three stock certificates in the record are partially illegible and none of the certificate numbers can be read to verify the petitioner's claims regarding the previous and current ownership of the company.

It is significant that [REDACTED] IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for both 2008 and 2009 undermine the petitioner's claims that it has acquired a 50 percent interest in the claimed subsidiary. The petitioner submitted an incomplete Form 1120S for 2008; however, the AAO notes that at item I, the company was asked to "Enter the number of shareholders who were shareholders during any part of the tax year." The petitioner claims that the company was owned by [REDACTED] from the time of its incorporation in 2002 through July 2008, when the petitioner allegedly acquired Mr. [REDACTED] interest. Therefore, the total number of shareholders reported on the Form 1120S for 2008 should have been three. The tax preparer stated that there were a total of two (2) shareholders during 2008. On the 2009 IRS Form 1120S, [REDACTED] reported that its sole shareholder was [REDACTED] which is obviously inconsistent with the petitioner's claim that it owns 50 percent of the company. Therefore, even if the petitioner had submitted sufficient credible evidence to support its claim that it acquired an ownership interest in [REDACTED] in 2008, the latest available information indicates that the claimed subsidiary has no current relationship with the petitioner.

Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. 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. *Id.* at 591.

In light of these discrepancies and omissions, the record as it stands is wholly insufficient to support the petitioner's claim that it has a controlling interest, or indeed any ownership interest, in [REDACTED] or that it is doing business through [REDACTED]. This failure of documentation therefore completely undermines the validity of counsel's claim that the beneficiary's "executive role within [REDACTED] therefore also rightly translates into the organizational structure of [REDACTED]

The record contains none of the required evidence at 8 C.F.R. § 214.2(l)(14)(ii) pertaining to the petitioning entity, [REDACTED]. The petitioner provided a Form W-2, Wage and Tax Statement, issued

to the beneficiary, but the record is devoid of any evidence that the company is otherwise staffed or that it is doing business as defined in the regulations. Despite the director's findings that the petitioning company does not appear to be staffed and operational in its own right, the petitioner has not supplemented the record on appeal, but rather continues to insist that the petitioner "essentially" does business as [REDACTED]. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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.* Here, the position description provided for the beneficiary is based on the unsubstantiated premise that he is the president of the petitioner and also the senior executive of [REDACTED]. Without conclusive evidence of a corporate relationship between the two companies, it follows that the record also fails to show that the staffing of [REDACTED] is in any way relevant to or demonstrative of the beneficiary's role or capacity within the named U.S. petitioner.

As the petitioner has failed to establish that it is actually operating independently from its claimed subsidiary or that it actually owns its claimed subsidiary, the position descriptions provided for the beneficiary are not credible. While the petitioner indicates that the beneficiary allocates 40 percent of his time searching for new investments and 15% of his time to the recruitment, hiring and training of staff, it has not established that the company has hired staff, made any investments or otherwise commenced operations in the United States as of the date of filing, and thus has not established that it has grown to the point where it can support a qualifying managerial or executive position.

As noted by the director, the evidence of record indicates that the beneficiary was the sole employee of the U.S. company at the time of filing. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The AAO notes that, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Furthermore, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the

petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not doing business and does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The AAO acknowledges the petitioner's and counsel's claim that the petitioner intends to invest in additional retail businesses and hire additional employees within the next two years. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner has not submitted evidence on appeal to overcome the director's adverse determination and therefore, the appeal will be dismissed.

B. Qualifying Relationship

The second issue to be addressed is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer, [REDACTED]. 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 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.

The petitioner claims to be a wholly-owned subsidiary of [REDACTED], a partnership established in India.

At the time of filing, the petitioner submitted a copy of its Certificate of Formation as evidence that it was established as a limited liability company in the State of Texas on March 13, 2008. This document was accompanied by a "Minutes of Reorganizational Meeting" dated March 13, 2008 indicating that the company resolved to issue "100% (1000) of its authorized stock to [REDACTED]

In the RFE issued on March 10, 2011, the director requested that the petitioner submit additional evidence to establish that the U.S. and foreign entities are still qualifying organizations. Specifically, the director requested: (1) a stock ledger for the U.S. entity which shows all of the stock transactions since its incorporation; and (2) copies of the articles of incorporation and all share certificates, stock ledgers or other evidence documenting the ownership and control of each company.

In response, the petitioner submitted an undated stock certificate for [REDACTED] which states that [REDACTED] is the owner of 1,000 shares of the common stock of [REDACTED]. The petitioner also submitted a stock ledger indicating that it issued 1,000 shares to the foreign entity on March 31, 2008.

The director determined that the petitioner failed to establish that it has a qualifying relationship with the foreign entity and further noted that the evidence submitted does not establish that the petitioner is doing business as a qualifying organization in the United States.

On appeal, counsel for the petitioner simply reiterates that the foreign entity wholly owns the petitioner and that the petitioner is doing business in the United States through [REDACTED]

Upon review, the petitioner has not established that the U.S. and foreign entities are qualifying organizations. First, the petitioner has not substantiated its claim that the foreign entity owns 100 percent of the U.S. company. Given that the petitioner, [REDACTED] is organized as a limited liability company rather than a stock corporation, the AAO cannot accept a stock certificate for [REDACTED] as evidence of the foreign entity's ownership of the company.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Here, the petitioner has not submitted membership certificates, an operating agreement, or any credible evidence of ownership for the petitioning limited liability company. 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 is a limited liability company and the petitioner has provided no explanation for its submission of stock certificates as proof of ownership.

Further, the AAO notes that the petitioner submitted copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first and third quarters of 2010 which list the company's name and contact information as follows: [REDACTED] Sole Member." The fact that this individual is identified as the company's sole member casts doubt on the petitioner's claim that the foreign entity wholly owns the company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, in light of the above described inconsistencies and deficiencies in the record with respect to the petitioner's ownership of [REDACTED] the AAO finds that the record as it stands fails to support the petitioner's claim of ownership in [REDACTED] as well as its claim that it is doing business through [REDACTED] or in any other capacity.

Another related issue addressed by the director is whether the petitioner is maintaining physical premises from which to conduct business. The "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). A petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

The petitioner stated on the Form I-129 that the beneficiary will be working at [REDACTED] in [REDACTED] Texas. In the request for evidence, the director asked that the petitioner submit evidence to establish that it has secured physical premises, including photographs of the interior and exterior of all of the premises secured. In reply, counsel stated that the petitioner operates "through [REDACTED]" which maintains office space located in the retail store that it operates at [REDACTED] Texas. In addition, the foreign entity submitted a letter dated April 23, 2011 which indicates that the petitioner is located at [REDACTED] Texas. The record contains no evidence that the petitioner has secured physical premises at the location stated on the Form I-129, or at this alternate location, and once again, fails to support a finding that the petitioner has any business operations separate from its alleged subsidiary, [REDACTED]. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As such, the petitioner has not established that it has secured and maintained physical premises from which to do business in the United States.

Accordingly, the AAO finds that the petitioner has not demonstrated that it has a qualifying relationship with the foreign entity or that it has been doing business as a qualifying organization in the United States. For these additional reasons, the appeal will be dismissed.

C. Foreign Employment in a Managerial or Executive Capacity

The final issue addressed by the director is whether the petitioner established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(iv). The director noted that the evidence provided of the foreign entity's "corporate structure, place of business, and financial documentation do not support that the beneficiary actually performed in a primarily managerial or executive position overseas."

In its letter dated September 9, 2010, the petitioner described the beneficiary's role as managing partner of the foreign entity as follows:

[H]e spent 30% of his time developing, implementing and consistently applying business-related policies to optimize the quality of the organization and employees; 15% negotiating client contracts and promoting sales of products and services; 15% recruiting, hiring, promotion, discipline and discharge of personnel of sales department; 10% developing and implementing marketing strategies using current market information . . . ; 10% in developing pricing strategies and responding to internal and external customer inquiry; and 20% in meeting with the appropriate officials to propose transactions, negotiating confidentiality and service agreements, coordinating the due diligence process with in-house counsel and outside auditors, and directing the preparation and completion of sales contracts and other related documents.

The petitioner further stated that the beneficiary "was heading Finance, sales and marketing functions by controlling and directing the work of other professional employees. Production Manager, Chief Accountant and Sales and Marketing Manager directly reported to the Managing Director." The petitioner indicated that these managers in turn supervised first-line managers.

In addition, the petitioner submitted an expert opinion letter from [REDACTED] Associate Professor of Management Science at the [REDACTED]. Mr. [REDACTED] recited a similar list of job duties pertaining to the beneficiary's foreign employment and concluded that such duties are in a managerial capacity according to the statutory definition at section 101(a)(44)(A) of the Act. Professor [REDACTED] described the foreign entity as "a large Indian garment distributor which manufactures, exports, markets and sells its products to individual and commercial clients on a wholesale scale."

In the RFE issued on March 10, 2011, the director requested evidence of the foreign entity's personnel structure, including the job titles and job duties of the beneficiary's subordinates, an organizational chart, and information regarding the amount of time the beneficiary allocated to executive duties versus non-executive functions. The director also requested additional information regarding the nature and scope of the business operated by the foreign entity, as well as photographs of the business.

In response, counsel resubmitted the position description provided in the petitioner's initial letter and referred to the opinion letter from Professor [REDACTED]. The petitioner also submitted an organizational chart depicting the beneficiary as managing partner, overseeing a marketing director, a chief accountant, and a director for production and manufacturing. The chart depicts a sales manager, an assistant sales manager, and a sales person reporting to the marketing director, while the director of production is depicted as supervising one quality controller and three unnamed contract employees identified as store officer, dispatch officer and designer. The chart depicts a total of seven employees and three contractors subordinate to the beneficiary. The petitioner provided brief descriptions for each position identified on the chart.

The petitioner provided photographs of a large retail clothing store which has a sign that bears a [REDACTED] logo. The record does not contain any evidence that the foreign entity is doing business as [REDACTED] despite the petitioner's submission of various invoices and purchase orders as evidence that the foreign entity is doing business. Further, the AAO notes that the position descriptions provided for the foreign entity's employees were vague and did not necessarily relate to the foreign entity's claimed business activities. For example, the submitted information indicated that the sales manager is responsible to "oversee operation of the bakery and sales," while only one of the foreign entity's employees was claimed to actually perform typical retail duties such as operating a cash register.

On appeal, counsel asserts that the beneficiary, during his tenure with the foreign entity, "managed from 10 to 20 employees and supervised different facets of the operation such as production, finance, marketing, and the like." Counsel further states that "several of these persons are also degree holders," and emphasizes that the foreign entity's board of directors "represents the highest level of management in the company." Finally, counsel emphasized that the beneficiary as a managing partner and director of the company had "several subordinate executives, each of whom has specific functional responsibilities."

Upon review, the petitioner has not established that the foreign entity employed the beneficiary in a primarily managerial or executive capacity.

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.*

Here, the petitioner submitted a vague description of the beneficiary's duties that failed to convey any understanding of the beneficiary's actual day-to-day duties within the context of the foreign entity's business operations. For example, the petitioner indicated that the beneficiary allocated half of his time to developing and implementing business-related policies, marketing strategies and pricing strategies, but it failed to describe any strategies or policies he created or to identify the specific tasks he performed within this broad area of responsibility. *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.).

The beneficiary's position description also includes potentially non-qualifying duties, such as "negotiating client contracts and promoting sales of products and services," responding to customer inquiries, meeting with the appropriate officials to propose transactions, negotiating confidentiality and service agreements," and directing the preparation and completion of sales contracts and other related documents." Without further explanation, these duties suggest that the beneficiary is directly involved in sales, promotional and customer service activities that do not fall within the statutory definitions of managerial and executive capacity.

Overall, the beneficiary's position description included a combination of overly generalized managerial functions and potentially non-qualifying duties that was insufficient to establish that the beneficiary performed primarily managerial or executive duties during his tenure with the foreign entity. The AAO

cannot accept an ambiguous position description and speculate as to the related managerial or executive duties the beneficiary performed.

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 organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

While the petitioner has submitted payroll records indicating that the company employs approximately 10 persons as of 2010 and beyond, it has not provided evidence of the staffing of the company during the beneficiary's period of employment abroad, prior to the beneficiary's last admission to the United States in May 2007. The company's current staffing levels are not relevant to a determination of whether the beneficiary was employed in a qualifying capacity during the three years preceding his admission to the United States as a nonimmigrant. 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)).

Nor has the petitioner provided consistent or credible descriptions of the duties performed by the foreign entity's employees. As noted above, the petitioner provided photographs of a large retail clothing store which allegedly reflects the operation of the business, yet it indicated that only one of its employees engages in any customer-oriented sales activities, such as operating a cash register. It claims to have five employees in its "production" department, but there is no clear evidence that the foreign entity produces its own products. Further, as noted above, the petitioner inexplicably indicated that the foreign entity's sales manager oversees a bakery. Finally, despite the petitioner's submission of photographs of a large retail store, the foreign entity has been described in the record as a major manufacturer and wholesale distributor of garments. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. 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. *Id.* at 591.

In sum, the petitioner has not provided a sufficient description of the beneficiary's duties, evidence of the foreign entity's organizational structure during the beneficiary's qualifying period of employment abroad, or credible information regarding the duties performed by its employees. As such, and upon review of the totality of the evidence, it has not met its burden to establish that the beneficiary was employed in a qualifying managerial or executive capacity abroad. 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 one of its owners.

With respect to Professor [REDACTED] letter, the 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. Furthermore, 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.

In this matter, the opinion letter submitted was based on a list of vague duties that, for the reasons discussed above, the AAO finds insufficient to establish the beneficiary's eligibility as a manager or executive. Further, Professor [REDACTED] did not indicate that he had any knowledge of the organizational structure of the foreign entity during the beneficiary's period of employment abroad. He also indicated his understanding that the foreign entity is a garment manufacturer and wholesale distributor, while the submitted photographs depict a company engaged in retail sales of apparel. Accordingly, as it is evident that Professor [REDACTED] letter was based on insufficient, incomplete and possibly inaccurate information, the AAO gives little evidentiary weight to the submitted opinion letter.

For the foregoing reasons, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

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.