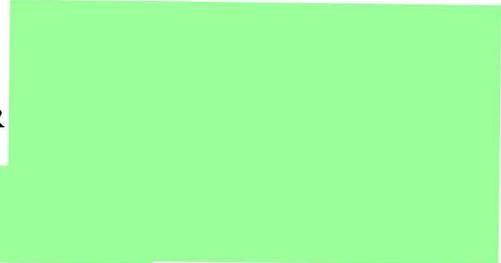




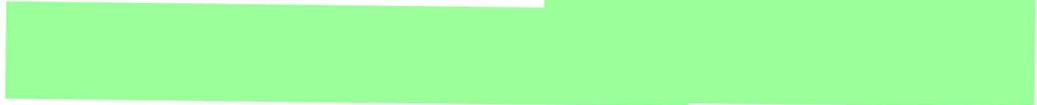
U.S. Citizenship  
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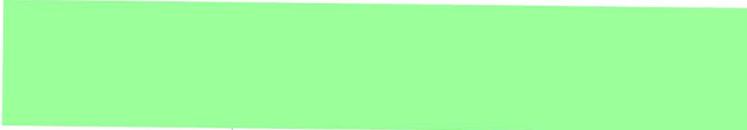
DATE: **JUN 24 2013** Office: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:

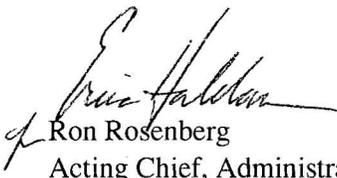


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen 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 request 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 that any motion must 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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to classify 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, a California corporation established in June 2009, states that it is a telecommunications company. The petitioner claims to be an affiliate of [REDACTED] located in [REDACTED]. The petitioner seeks to employ the beneficiary as the CEO of its new office in the United States.

The director denied the petition on five independent and alternative grounds, concluding that the petitioner failed to establish: (1) that it had secured sufficient physical premises to house the new operations as of the date of filing the petition; (2) the size of the United States investment and the financial ability of the ability of the company to commence doing business in the United States; (3) that the foreign entity has employed the beneficiary in a qualifying managerial or executive capacity; (4) that it will employ the beneficiary in a qualifying managerial or executive capacity within one year of approval of the petition; and (5) that there is a qualifying relationship between the foreign company and the petitioner.

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 beneficiary is eligible for the requested status and briefly addresses each of the stated grounds for denial. 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)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

## II. Issues on Appeal

### A. Physical Premises

The first issue to be addressed is whether the petitioner established that it has secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 10, 2009, and therefore must establish that it satisfied the requirements at 8 C.F.R. § 214.2(l)(3)(v)(A) as of this date. 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. 1978).

On the Form I-129, the petitioner indicated its address as [REDACTED]

[REDACTED] The petitioner submitted a partial copy of the rental agreement for premises located at this address, which clearly states:

**Use of Premises:** Lessee agrees to use the premises solely as private residence for occupancy by no more than 1 named adults and 0 children and no other person or persons without the consent of Lessor. Lessee agrees to maintain the premises in clean and sanitary condition at all times, to commit no waste, not to engage in unlawful or immoral act therein (Selling drugs, allowing others to sell drugs or any illegal use will result in eviction) and to observe all applicable laws, rules . . . .

The director issued a request for evidence ("RFE") on August 18, 2009. The director advised the petitioner that the lease agreement submitted appeared to be the beneficiary's rented apartment and instructed the petitioner to submit evidence that the petitioner is authorized by the appropriate authority to conduct business from a residential area.

In response to the RFE, the petitioner submitted a second partial copy of the same rental agreement, also missing pages two and three, for a private residence. The rental agreement does not explicitly authorize the petitioner to conduct a business out of the beneficiary's private residence.

The director denied the petition on October 9, 2009 based, in part, on the petitioner's failure to submit a commercial lease agreement, or any explanation as to how it would conduct business from a residential apartment.

On appeal, counsel for the petitioner states the following:

The Petitioner can establish that it had secured sufficient physical premises to house the new operators [*sic*].

While it is true that when Petition [*sic*] was incorporated a residential address was being used as its office of incorporation nevertheless [*sic*] when Petitioner started normal functioning of its business it acquired business premises as required.

The petitioner submits a copy of a Commercial Lease Agreement between [REDACTED] and the petitioner for an "office suite" located at [REDACTED]. The lease was to begin on August 1, 2009 through August 1, 2010. The last page of the lease agreement appears to be signed only by the landlord and not the tenant.

Upon review, the AAO concurs with the director's determination that the petitioner failed to submit evidence that it had secured sufficient physical premises to house the new office prior to filing the petition. Although the petitioner's commercial office lease is dated and was set to commence nine days prior to the filing of the

petition, the petitioner failed to submit this lease at the time of filing and instead indicated the beneficiary's residential address on the petition as the petitioner's mailing address and as the beneficiary's intended work location.

Furthermore, when the director issued the RFE, the petitioner was advised that the beneficiary's private residential rental agreement would not suffice as evidence that the petitioner had acquired sufficient physical premises to house the new office. The petitioner failed to submit the commercial lease agreement in response to the request for evidence, nor did it submit any evidence demonstrating that it could conduct its business from the beneficiary's private residence. 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).

The AAO acknowledges that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective, leaving USCIS great flexibility in adjudicating this legal requirement. There may be cases in which a residential premises or home office would satisfy the regulatory requirements. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a residential dwelling, if required, evidence that the landlord has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling or portion of a residential dwelling will meet the company's needs. Finally, photographs and floor plans of the premises may assist in determining that the premises secured are sufficient to accommodate the petitioner's business operations. The petitioner submitted none of this evidence and the director properly concluded that the partial copy of the beneficiary's residential lease was insufficient to establish that the petitioner had acquired sufficient physical premises in accordance with 8 C.F.R. § 214.2(l)(3)(v)(A).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Further, the AAO notes that the petitioner provides no explanation as to why it did not include the commercial lease agreement with its initial evidence or submit it in response to the RFE when the lease was ostensibly signed prior to the date of filing. 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).

For the foregoing reasons, the petitioner has not established that it had secured sufficient physical premises to house the new office as of the date the petition was filed. Accordingly, the appeal will be dismissed.

## II. Financial Ability to Commence Business Operations in the United States

The second issue to be addressed is whether the petitioner submitted evidence to satisfy the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(v)(C)(2), which requires the petitioner to provide information regarding 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.

The petitioner's initial evidence included bank statements from a Wells Fargo account in the beneficiary's name. All of the bank statements submitted, from May 29, 2009 to August 5, 2009, appear to be for the beneficiary's personal bank account. The bank statements reflect one wire transfer for \$8,000 on June 2, 2009 from [REDACTED] however, the origin of these funds is unknown.

In response to the RFE, the petitioner submitted the same copies of the beneficiary's bank account statements along with copies of the foreign company's bank accounts from [REDACTED]. The foreign company's bank account statements do not reference any wire transfers to the U.S. company or to the beneficiary directly. The petitioner's letters also did not make any reference to the foreign company's investment in the U.S. company.

The petitioner's business plan, submitted in response to the RFE, states the following:

Total start-up expense (including legal costs, logo design, stationary and related expenses) comes to \$10,000. Start-up assets required include \$5,000 in short-term assets (office furniture, etc.) and \$5,000 in initial cash to handle the first few months of operations as sales and accounts receivable play through the cash flow.

However, the petitioner failed to indicate the amount of investment or provide any evidence that investments have been made in the U.S. company in order for it to commence doing business. Accordingly, the director denied the petition.

On appeal, counsel for the petitioner states the following:

The second issue raised by USCIS was whether the foreign entity was able to remunerate the beneficiary and to commence doing business in the United States. The foreign entity has submitted and [sic] Internal Reporting extract from its overseas operations showing the moneys [sic] spent on licensing and technical support from 2006 to 2009 amounting to a total of \$37,160. An agreement in licensing and technical support between the foreign entity and its European counterparts amounts to \$21,000.

A bank statement from [REDACTED] shows a balance of \$26,136. Petitioner has already secured local licensing [to] carry out its business which is expected to be lucrative[.] Petitioner's website [www.voiceipnet.us](http://www.voiceipnet.us) and its brochures demonstrate

that Petitioner has established a large network of access numbers serving its clientele in the US. The technical support is presently being handled by the foreign entity in Armenia. However, as business develops it will be necessary to hire local personnel. Presently, managerial functions are being performed by beneficiary. With business development, his annual salary will be secured. Projections for this look positive.

In the RFE, the director specifically instructed the petitioner to specify the amount of investment actually committed to the U.S. company and explain how the company would be able to commence doing business. The director requested copies of the petitioner's bank statements and requested a detailed description for all start-up costs, including receipts for expenses already accrued, such as evidence of lease payments, equipment purchases, etc. The petitioner did not adequately address these requests in its response to the RFE and now attempts to do so on appeal. Again, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaiqbena*, 19 I&N Dec. 533 (BIA 1988).

Regardless, the documents submitted on appeal are not sufficient to establish that the petitioner has satisfied the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The record does not adequately establish the size of the U.S. investment or establish that the petitioner will be able to commence business 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the appeal will be dismissed.

### C. Employment Abroad in Managerial or Executive Capacity

The third issue to be addressed is whether the petitioner established that the beneficiary has been employed by the foreign company in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

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.

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign company on January 1, 2004. Where asked to describe the beneficiary's duties for the past three years, the petitioner stated, "alien has been the manager of a telecommunications company. Handled overseas contracts, domestic vendors, provided telephone communication lines with other companies."

The petitioner's initial evidence included the following statement about the beneficiary's employment abroad:

[The foreign company] in Armenia has three departments: sales, accounting, telecommunications and a Regional Director [is] responsible for all these operations. Beneficiary has worked as the regional director overseeing these departments as well as contracting with server companies in USA, UK and Canada. His transfer to the USA will be to set up the telecommunication operations between the two companies.

In the request for evidence, the director instructed the petitioner to submit: (1) copies of the foreign company's payroll records pertaining to the beneficiary for the year preceding the filing of the petition; (2) the foreign entity's detailed organizational chart identifying the total number of employees and clearly identifying the names, job titles, job duties, educational level and salaries of employees who report to the beneficiary; and (3) a more detailed description of the beneficiary's job duties abroad, including the percentage of time he allocates to each specific duty listed.

In response to the RFE, the petitioner submitted a letter stating the following about the beneficiary's employment abroad:

[The beneficiary] is a founding director of our company for the past four years. His responsibilities are that of a managing director as follows: Managing all employees of the company 80% of his time[,], 20% entering negotiations[,], and public relations 20%.

We hope the above will be given sufficient to demonstrates [sic] his role in the company.

The petitioner did not submit any additional details about the beneficiary's duties abroad. The AAO notes that the percentages above add up to 120%.

The petitioner submitted an undated, handwritten organizational chart for the U.S. and foreign companies. According to the organizational chart, the foreign company has two "founder/directors," the beneficiary and [REDACTED] and four departments: accounting, sales, technical support, and customer service. The U.S. company also has four proposed departments: accounting, sales and marketing, customer service, and technical support. The chart indicates that the U.S. and foreign companies share the technical support and customer service departments located at the foreign company. The organizational chart does not specify any other names for positions within the foreign or U.S. companies, nor does it indicate that there are any personnel from the foreign company dedicated to completing work for the U.S. company. The organizational chart also does not provide the requested information on the job titles, job descriptions, educational requirements, and salaries of the beneficiary's subordinate employees abroad.

The director denied the petition based on the petitioner's failure to establish that the beneficiary has been employed by the foreign company in a qualifying managerial or executive capacity. The director found the minimal evidence insufficient to establish that the beneficiary supervises the work of supervisory, professional or managerial employees, or that he manages an essential function within the foreign company.

On appeal, counsel for the petitioner states the following:

Beneficiary[s] past employment in managerial capacity was demonstrated in a sketch. Nevertheless[,], beneficiary is submitting his educational credentials and a letter of employment. A list of the foreign entity's employees on payroll is also being submitted. A detailed description [sic] of the beneficiary's duties and a business plan prepared by the foreign company and a letter confirming this is being submitted.

The "sketch" referenced by counsel is the same handwritten organizational chart described above. The petitioner submits an un-translated document that appears to be a diploma for the beneficiary stating that he is qualified as "lawyer" and what appears to be a listing of courses he completed. The petitioner also submits a copy of the same letter previously submitted in response to the RFE (quoted above) referencing the beneficiary's duties abroad. Although counsel stated that a detailed description of the beneficiary's duties and a list of the foreign company's employees are being submitted, the petitioner failed to submit such information.

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

The petitioner has failed to submit any meaningful description of the beneficiary's job duties as founder/director of the foreign company. Instead, the petitioner sought to rely on his job title in lieu of providing the requested detailed description of his duties. 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).

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the AAO does not doubt that the beneficiary exercised some discretion over the foreign entity's day-to-day operations and possesses the requisite level of authority with respect to discretionary decision-making, the petitioner has failed to show that the beneficiary's actual duties were primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

Beyond the required description of the beneficiary's job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company'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 company'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 director requested a detailed organizational chart illustrating the staffing hierarchy within the company, and also requested job duties, educational level, and job titles for all employees. While the petitioner submitted an organizational chart for the foreign and U.S. companies in response to the RFE, the chart depicts only two named employees, including the beneficiary, and several departments. The organizational chart does not, however, indicate the number of employees, if any, who report to the persons identified in the chart, the number and types of employees working in each department, or the hierarchical structure of the company. 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).

Absent a detailed description of the beneficiary's actual duties and a consistent account of the foreign company's staffing levels, the AAO cannot conclude that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

#### **D. U.S. Employment in a Managerial or Executive Capacity**

The fourth issue to be addressed is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the petition.

On the Form I-129, the petitioner stated that the beneficiary would be employed as CEO of the new office. Where asked to describe his proposed duties in the United States, the petitioner stated, "alien will set up office with computers, contract with telecommunications companies and provide service to countries such as Armenia and Russia." The petitioner indicated that the U.S. company would be engaged in a telecommunications business.

The petitioner's initial evidence included the following statement about the beneficiary's proposed employment in the United States:

Duties will be primarily executive or managerial. Beneficiary will perform a high level of responsibilities. He will not be involved with the day to day functions of telecommunication operators. He will be directing the management of the organization. He will be responsible for hiring qualified personnel, entering negotiations, signing contracts, buying equipment. He will have authority over day to day operations of the company.

The petitioner submitted no additional information regarding the beneficiary's proposed duties, the proposed nature of the office, the scope of the entity, its proposed organizational structure, or its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(I).

Accordingly, in the request for evidence, the director instructed the petitioner to submit: (1) an original letter from the foreign entity that explains the need for the new office, indicates the proposed number of employees and types of positions they will hold, identifies the size of the investment in the U.S. entity, and explains how the proposed business venture will support a managerial or executive position within one year; (2) copies of current and original business plans that have been prepared for the U.S. entity, including specific details as to the business to be conducted and one, three and five-plan projections for business expenses, sales, gross income and profits or losses; and (3) a detailed proposed organizational chart for the U.S. company indicating its proposed staffing levels and managerial hierarchy.

In response to the RFE, the petitioner submitted a letter stating the following about the beneficiary's proposed duties at the U.S. company:

Our Board has authorized [the beneficiary] to take all steps to open an associated company in the United States.

[The beneficiary] in the US will be responsible as the manager of the international telephonic communications department, because his managerial and technical knowledge will be essential to the growth of the US company operation.

- (a) Please note that he will jump start the business of telephonic communications in the US, enter negotiations on behalf of the company engage marketers and be active in all aspects of the US Company.
- (b) Alien has the managerial knowledge and can recommend policies and objectives to the President of the US Company for evaluations as a manager of the international communications department, because his task will be to manage the department and will be active in the overall management of the company.

The business plan submitted does not address the beneficiary's proposed duties at the U.S. company. The organizational chart discussed above does not identify the managerial hierarchy of the U.S. company as requested. The petitioner does not discuss proposed staffing for the U.S. company other than stating that the technical support and customer service departments will be shared by the U.S. and foreign companies.

The director denied the petition, concluding that the petitioner failed to meet its burden of establishing that the beneficiary will be employed as a manager or executive within one year of approval of the petition.

On appeal, counsel for the petitioner simply states that "managerial functions are being performed by the beneficiary," and that the beneficiary will hire local personnel as the business develops. The petitioner submits a copy of the same letter submitted in response to the RFE and educational credentials for the beneficiary.

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the petition.

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

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed.

Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the start up of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

Here, the petitioner has indicated that the beneficiary's job title will be "CEO" and his role will be to "open an associated company in the United States." No additional information has been provided to assist USCIS in determining the beneficiary's actual proposed duties or level of authority within the new U.S. office. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore the director specifically requested that the petitioner provide a detailed job description for the beneficiary at the U.S. company, a business plan for the new office, and a proposed organizational chart. In response, the petitioner provided only a vague statement about the beneficiary's proposed position in the U.S. company, failed to list any job duties for the beneficiary, failed to provide a detailed organizational chart for the U.S. company, and failed to provide a detailed business plan for the U.S. company showing a staffing plan and other proposals for the U.S. company. Again, 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). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO cannot find that the beneficiary will be employed in a managerial or executive capacity based solely on his job title and the unsupported claims of the petitioner regarding the beneficiary's proposed position in the United States.

Additionally, as noted above, the petitioner has not established that it had secured physical premises at the time the petition was filed, much less obtained all licenses required to begin doing business. Again, the

evidence submitted in support of a new office petition should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner has not met its burden to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. Accordingly, the appeal will be dismissed.

**E. Qualifying Relationship**

The fifth and final issue to be addressed is whether the petitioner has established that the United States and foreign entities are qualifying organizations. 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.

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

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

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H):

*Doing business* means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner stated on the Form I-129 that it is an affiliate of [REDACTED] Armenia. The petitioner did not reply where asked to explain the company stock ownership and managerial control of each company.

With respect to the U.S. company, the petitioner submitted its California Articles of Incorporation indicating that the company is authorized to issue one-hundred (100) shares of stock. It is unclear what documents were submitted as evidence of ownership of the foreign entity. The petitioner submitted: (1) a translated document titled "Certificate, Legal Entity of Partitioned Compartment, Accountancy of Company" that simply lists "Armenian Representative" and no names for ownership of the company; (2) a second translated document titled "Insert, Legal Entity of Partitioned Compartment, Accountancy of Company," that lists the beneficiary as CEO of the company; and (3) additional un-translated documents. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, documents that are not translated are not probative and will not be accorded any weight in this proceeding.

In the request for evidence, the director requested the following documentation to demonstrate the existence of a qualifying relationship between the U.S. and foreign entities: (1) a copy of the foreign company's annual report that lists all affiliates, subsidiaries, and branch offices, and percentage of ownership; (2) a copy of the minutes of the meeting for the foreign company that lists the stock shareholders and the number and percentage of shares owned; (3) a detailed list of all owners of the foreign company and what percentages they own; (4) the U.S. company's articles of incorporation, copies of all stock certificates issued, and the company's stock ledger; and (5) evidence to establish that the foreign entity has, in fact, paid for the U.S. entity, including copies of original wire transfers, cancelled checks, deposit receipts, etc.

In response to the RFE, the petitioner submitted a stock certificate dated November 28, 2005 indicating that the beneficiary owns "70 shares numbered 71 to 100" of the foreign company, and another stock certificate dated November 28, 2005 indicating that [REDACTED] owns the other "70 shares numbered 1 to 70" of the foreign company. The AAO notes that the beneficiary's stock certificate states that he owns shares 71 to

100, which is only 30 shares, not 70 as noted on the foreign entity's stock certificate. 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).

With respect to the U.S. company, the petitioner submitted: (1) a stock transfer ledger which indicates that the beneficiary is the owner of 51 shares; and (2) other documentation which states that the beneficiary agreed to purchase 100 shares of the company and would pay \$10,000.00 for these shares, including an "Annual Summary of Transactions," and the minutes of the company's organizational meeting. The petitioner submitted no additional evidence to establish the ownership of the U.S. company. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. 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).

The director denied the petition, noting the petitioner's failure to submit the requested documents in response to the RFE. The director determined that the petitioner failed to submit any evidence that the foreign and the U.S. companies are owned and controlled by the same individual or controlled by the same group of individuals, each individual owning and controlling approximately the same share of proportion of each company.

On appeal, counsel for the petitioner states the following:

Petitioner is an affiliate of the foreign entity. Copies of stock certificates and evidence of notification to the State of California about its stock issuance is submitted herein.

Beneficiary's share ownership of 100 shares for \$10,000 is in the value of the expenses advanced by beneficiary on behalf of Petitioner as demonstrated earlier.

Evidence of ownership of the foreign entity showing its control relationship is also submitted.

The only documentation in reference to this issue submitted on appeal by the petitioner, is a blank stock certificate for the U.S. company. The certificate has not been completed, signed, or dated.

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 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 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.

While it appears that the petitioner claims an affiliate relationship between the U.S. and foreign companies based on the beneficiary's common interests in each company, the petitioner has failed to submit probative

documentary evidence of the ownership or control of either company. Here, the foreign company is owned and controlled by [REDACTED] whose stock certificate clearly demonstrates that she owns 70 shares of the foreign company. Although the other stock certificate submitted for the foreign company states that the beneficiary also owns 70 shares, it also clearly states that he owns shares 71 to 100, or only 30 shares. Regardless, if both individuals owned 70 shares, control over the foreign company must be established in order to determine whether a qualifying relationship exists. Additionally, the evidence of ownership and control submitted for the U.S. company is unclear as the documents do not provide a consistent description of the company's ownership. 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.

The evidence on record does not support the petitioner's claim that it has an affiliate relationship with the beneficiary's foreign employer. As such, the petitioner has not met its burden to establish that the U.S. and foreign entities have a qualifying relationship. Accordingly, 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.