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



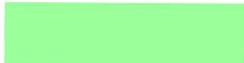
U.S. Citizenship
and Immigration
Services



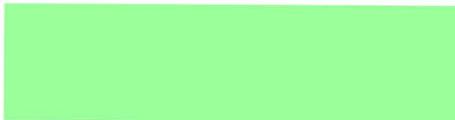
DATE: **MAY 17 2013**

Office: VERMONT SERVICE CENTER

FILE:



IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company established in 2009, is a travel agency and tour operator. It claims to be a subsidiary of [REDACTED] located in Sao Paulo, Brazil. The beneficiary was previously granted L-1A status for a period of two years, and the petitioner seeks to extend the beneficiary's employment as its general manager and chief executive officer (CEO) for an additional three years.¹

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States.

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 employed in a primarily 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.

¹ The petitioner requests to extend the beneficiary's status for an additional three years. However, pursuant to 8 C.F.R. § 214.2(l)(15)(ii), an extension of stay may only be authorized in increments of up to two years.

- (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.

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 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.

II. The Issues on Appeal

The primary issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker. On the Form I-129, the petitioner indicated that it had six employees at the time of filing, and a gross annual income of \$685,000 in 2011. On the form, the petitioner described itself as a “full travel agency that specializes in sells [sic] the

It does not only sell packages, tickets, rental car and reservations, it brings people to experience the culture.” In a letter accompanying the initial petition, the petitioner elaborated that it sells comprehensive customized travel packages, including air tickets, transfers, car rentals, attraction tickets, travel insurance, rental homes, guide services, mid-stay cleanings, and “everything that contributes to increase our average margin.”

The petitioner listed the beneficiary's job duties in the United States as the following:

1. Oversee daily operations, project planning, and special events, working closely with each manager and program coordinator;
2. Board Administration and Support – Supports operations and administration of Board by advising and informing Board members, interfacing between Board and staff, and supporting Board's evaluation of chief executive;
3. Together with the Sales Manager prepare the annual estimates of sales and detail the actions necessary to accomplish the goals;
4. Program, Product and Service Delivery – Oversees design, marketing, promotion, delivery and quality of programs, products and services;
5. Financial, Tax, Risk and Facilities Management – Recommends yearly budget for Board approval and prudently manages organization's resources within those budget guidelines according to current laws and regulations;
6. Human Resources Management – Effectively manages (recruiting, hiring, training, evaluation) the human resources of the organization according to authorized personnel policies and procedures that fully conform to current laws and regulations;
7. Community and Public Relations – Assures the organization and its mission, programs, products and services are consistently presented in strong, positive image to relevant stakeholders;
8. Strategic Alliances – Establishes Domestic and Overseas strategic alliances in the tourism industry, including identifying resource requirements, researching funding sources, approaching the major industry players.

The petitioner also described the beneficiary's duties as including the following: providing overall leadership, direction, management, and training; reviewing and managing the Business Plan; establishing a strong and steady customer network base; coordinating the proper use and allocation of financial, marketing, distribution, and human resources; creating, updating, and implementing the U.S. company's goals and policies; authority to enter into business agreements with clients/customers, vendors, rental service companies, hotels transportation companies and other entities; and directing and coordinating "activities of businesses concerned with pricing and sales."

The petitioner described the management team of the U.S. entity that would support the beneficiary as consisting of the following:

Operations Manager- [REDACTED] - Responsibilities include but are not limited to: Manage the inventory of lodging (hotels and vacation homes) constantly seeking new offers and ensuring the quality of current units; Development of administrative standards and procedures related to personnel and staff development; Supervision of staff; Serve as liaison between staff and board members; Coordinate with the General Manager and the board to oversee activities including grant applications, management of grants, special projects, fiscal management; Oversee the preparation of the annual report of activities as well as fiscal reports; Manage the Quality Control; Coordinate work on annual audits; Define priorities for all supervised staff; Inventory management of products and office supplies.

Marketing and Sales Manager – [REDACTED] - Responsibilities include but are not limited to: Together with the General Manager prepare the annual sales forecast and detail the actions necessary to accomplish the goals; Check weekly the sales performance taking necessary actions to achieve the goals; Coordinate all other marketing activities including establish[ing] the marketing budget with the executive director; prospect[ing] new markets and suppliers; develop[ing] marketing materials; advertising placement; develop[ing] direct mail plan; Publication and distribution of quarterly newsletter; Website maintenance; Measure effectiveness of marketing activities (program tracking).

Reservation Manager – To be hired – Responsibilities include but are not limited to: negotiate competitive rates and conditions from major tourist industry suppliers (Hotels, Property Managers, Rental Car Companies, Amusement Parks, Attractions, Transportations, Air Tickets, Travel Insurance etc.); Act a mediator between [the petitioner's] clients and suppliers to solve any conflict or stress; compensate clients for losses and damages; request reimbursement for non-compliance products/services.

The petitioner submitted its business plan which provided a personnel plan for fiscal years 2012 through 2016. For fiscal year 2012, the petitioner indicated that it plans to employ the following employees: a General Manager; an Operations Manager; a Sales and Marketing Manager; a Quality Control Supervisor; a Sales Assistant; an Internet and Telemarketing Supervisor; a Reservation Manager; a Travel Agent Supervisor; Information Technology Staff; and Cleaning Services.

The petitioner provided its organizational chart for 2010-2013 depicting the beneficiary at the top as General Manager/CEO, directly overseeing: an Information Technology Staff (Sub Contractor); the Marketing & Sales Manager [REDACTED] for Hotels and Vacation Homes; the Operational Manager [REDACTED] for Hotels and Vacation Homes; and the Reservation Manager (Summer 2012) for Accommodations, Cars, Attractions and Air Tickets. The Operational Manager is depicted as directly overseeing a Quality Control Supervisor ([REDACTED]) and an Owners Relations Supervisor (Summer 13). The Marketing & Sales Manager is depicted as directly overseeing two Internet and Telemarketing representatives [REDACTED] and a Travel Agents Supervisor (Fall 2012). The Reservation Manager is depicted as directly overseeing a GDS Operator (Winter 2013) and a Payments and Receipts Controller (Summer 2013).

The director issued a request for evidence ("RFE"), in which he instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's duties; (2) a list of all U.S. employees with complete position descriptions for all employees and a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; (3) complete copies of Forms 941, Employer's Quarterly Tax Returns, for the second, third, and fourth quarters of 2011 and the first quarter of 2012; (4) a copy of all Forms W-2 and 1099s issued by the U.S. entity in 2011; and (5) a copy of all Forms W-3 and 1096 issued by the U.S. entity in 2011.

In response to the director's RFE, the petitioner submitted complete position descriptions for its U.S. staff. The position descriptions for the beneficiary, the Operations Manager, and the Sales & Marketing Manager were the same as previously provided. The position description for the Internet and Telemarketing representatives, [REDACTED] listed the following duties:

1. Deliver prepared sales talks, reading from scripts that describe products or services, in order to persuade potential customers to purchase a product or service;
2. Explain products or services and prices, and answer questions from customers;
3. Adjust sales scripts to better target the needs and interests of specific individuals;
4. Obtain names and telephone numbers of potential customers from sources such as telephone directories, magazine reply cards, and lists purchased from other organizations;
5. Telephone or write letters to respond to correspondence from customers or to follow up initial sales contacts;
6. Maintain records of contacts, accounts, and orders;
7. Schedule appointments for sales representatives to meet with prospective customers or for customers to attend sales presentations;
8. Conduct client or market surveys in order to obtain information about potential customers.

The position description for the Quality Control Supervisor, [REDACTED] listed the following duties:

1. Maintain compliance with all the program regulations and the required reports and certifications from Florida Statutes and Department of Business Regulations;
2. Assist guests with situational issues and services referral processes;
3. Develop and maintain conditions for high occupancy level and rent revenues;
4. Show and inspect properties during check-in and check-out processes;
5. Apply surveys to measure the satisfaction level of each individual property;
6. Report noncompliance and request immediate corrections to guarantee guest satisfaction;
7. Manage cleanup crews about the quality standards desired for each property; and
8. Attend trainings, meetings and seminars for professional growth as required or assigned by Operational Manager.

The petitioner submitted its Forms 941, Employer's Quarterly Tax Returns, for the second, third, and fourth quarters of 2011 and the first quarter of 2012. The Form 941 for the second quarter of 2011 reflected that the petitioner employed one employee. The Forms 941 for the third and fourth quarters of 2011 reflected that the petitioner employed six employees. The Form 941 for the first quarter of 2012 reflected that the petitioner employed five employees. None of the submitted Forms 941 contained the page listing the names of the actual employees. The petitioner submitted its payroll records reflecting that, at the time of filing, it employed [REDACTED] beneficiary.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director found that the petitioner's description of the beneficiary's job duties was conclusory and merely a recital of the regulations, general, and unsupported by the evidence in the record. The director also found that the record was unclear who was actually providing the goods and services of the United States operation to its customers/clients; the director observed that, based on the incomes and position descriptions of the U.S. employees, it appeared that the petitioner employed part-time and/or non-professional employees. The director concluded that the beneficiary likely has performed and will perform or help perform non-qualifying duties of the U.S. entity.

² The petitioner's payroll records indicate that [REDACTED] was employed in June 2012.

On appeal, counsel asserts that the beneficiary is employed in a primarily managerial or executive capacity. Counsel asserts that, at the time of filing, the petitioner employed six employees, namely the beneficiary, the Operational Manager [REDACTED] the Marketing & Sales Manager [REDACTED] the Quality Control Supervisor [REDACTED] and two Internet and Telemarketing representatives [REDACTED]

Counsel asserts that the beneficiary's supervision over the company's two managerial positions (Operational Manager and Marketing & Sales Manager) is sufficient to establish that the beneficiary is a supervisor of other supervisory employees. In addition, counsel asserts that the previously submitted description of the beneficiary's job duties was not general or merely a recital of regulations, and re-submits the same description and breakdown of the beneficiary's duties. Finally, counsel points out and corrects several errors of fact that the director committed, and asserts that these errors "tainted the Director's perception of the duties that the beneficiary performs."

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a 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.* 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 and the U.S. 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 petitioner's evidence should demonstrate that it will employ the beneficiary in a primarily managerial or executive capacity.

In the instant matter, counsel and the petitioner have repeatedly described the beneficiary's job duties in broad and vague terms, such as "[o]versee daily operations, project planning, and special events," "[s]upports operations and administration of Board," "[o]versees design, marketing, promotion, delivery and quality of programs, products and services," and "[e]ffectively manages (recruiting, hiring, training, evaluation) the human resources of the organization." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide sufficient detail or explanation of the beneficiary's activities in the course of his daily routine. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves will reveal the true nature of the employment. *Id.*

Although the director specifically instructed the petitioner to submit a comprehensive description of the beneficiary's duties in the United States, the petitioner responded by reiterating the same description of the beneficiary's job duties as previously provided, which the director already deemed to be insufficient. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R.

§§ 103.2(b)(8) and (12). 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).

Critically, the AAO considers the nature of the petitioner's business with the petitioner's actual staffing at the time of filing. The petitioner claims to be a travel agency that sells comprehensive customized travel packages, including air tickets, transfers, car rentals, attraction tickets, travel insurance, rental homes, guide services, and mid-stay cleanings. However, the petitioner failed to establish which of its actual employees are actually providing the necessary services related to sales, reservations, and ticketing. At the time of filing, the petitioner employed a General Manager, an Operations Manager, a Sales and Marketing Manager, a Quality Control Supervisor, and two Internet and Telemarketing representatives. None of the position descriptions for the six U.S. employees listed above included any duties related to closing and executing the travel package sales, such as finalizing the sale with the customer and accepting payment; making the necessary reservations with the airlines, rental car companies, attractions, insurance companies, rental homes and hotels, guide services, and cleaning services (as applicable); and preparing and delivering the final travel packages to the client.³ In particular, the petitioner claimed that the two Internet and Telemarketing representatives schedule appointments for "sales representatives to meet with prospective customers," but the petitioner claimed to employ no actual sales representatives.

The petitioner indicated that it plans to hire a Reservation Manager in summer of 2012, which the petitioner depicted on the organizational chart as being responsible for "accommodations, cars, attractions and air tickets." The petitioner also indicated that it plans to hire several other positions within 2012, such as a Travel Agents Supervisor, an Owners Relations Supervisor, GDS Operators, and a Payments and Receipts Controller.⁴ However, the AAO cannot take these anticipated employees into consideration. 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).

Not only did the petitioner fail to identify which of its employees performs the necessary operational tasks and services of the U.S. entity, but almost all of the employees have been or will be given managerial titles notwithstanding the lack of any subordinate employees to manage. For example, the positions of the Quality Control Supervisor, Owners Relationship Supervisor, and Travel Agents Supervisor are all depicted as having no subordinate employees.⁵ Inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. Overall, the petitioner's claimed staffing and organizational structure is not entirely credible.

³ The job descriptions for the Internet and Telemarketing representatives indicate that they are involved in the initial sales process, such as delivering prepared sales talks, reading from scripts, describing products or services, and obtaining names and telephone numbers of potential customers from sources such as telephone directories, magazine reply cards, and lists purchased from other organizations.

⁴ The petitioner did not clarify what "GDS" stands for, nor provide any position descriptions for the Owners Relations Supervisor, GDS Operators, Payments and Receipts Controller, and Travel Agents Supervisor.

⁵ In a document listing personal references for the beneficiary, [REDACTED] is listed as a reference with the professional title "Travel Agent."

A critical analysis of the beneficiary's job duties in the United States indicates that he will be performing some non-qualifying duties in the United States. For example, the petitioner indicates that the beneficiary has the authority to enter into business agreements with clients/customers, vendors, rental service companies, hotels transportation companies and other entities. The petitioner also indicates that the beneficiary will direct and coordinate the activities of businesses concerned with pricing and sales. From these descriptions, it appears that the beneficiary will be directly involved in contacting and negotiating with clients, customers, vendors, and service providers with regards to pricing and sales. These particular duties, given the petitioner's lack of a credible organizational structure and any employees who execute the sales and reservation functions, brings into question whether the beneficiary is primarily performing duties that are managerial or executive in nature. See sections 101(a)(44)(A) and (B) of the Act.

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its general manager and CEO. However, 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 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). Overall, the vague job description provided for the beneficiary, considered in light of the nature of the petitioner's business and its organizational structure, prohibits a determination as to whether the petitioner will employ the beneficiary in a primarily managerial or executive position. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the beneficiary's overseas employer. 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 petitioner claims to be a subsidiary of the beneficiary's foreign employer, [REDACTED] located in Sao Paulo, Brazil. The petitioner claims it is 51% owned by the foreign entity, and 49% owned by [REDACTED]

In support of the petition, the petitioner submitted its "Detail by Entity Name" from the Florida Department of State Division of Corporations showing that it has two manager/members: the beneficiary and [REDACTED]. Consistent with its officially registered organization as a limited liability company with two members, the petitioner filed its 2009, 2010, and 2011 federal tax returns as a partnership with two members on Form 1065, U.S. Return of Partnership Income. The beneficiary also declared partnership income on his 2011 federal tax return, specifying that he derived partnership income from the petitioner. Further, the petitioner submitted its Management Operating Agreement consistently and specifically listing its two members as the beneficiary and [REDACTED]. In particular, page 12 of the Management Operating Agreement states:

This LLC is managed by its 2 members. The names and addresses of each of its current 2 members as of July 21th, 2009 are listed below. Both [the beneficiary], the general manager, and [REDACTED] have managerial authority of the LLC and is empowered to transact business on its behalf.

At the bottom of page 12 of the Management Operating Agreement appear the names, addresses, and signatures of the beneficiary and [REDACTED], dated July 21, 2009.

However, the same Management Operating Agreement reflects that, on or before July 21, 2009, the foreign entity paid capital provisions of an unspecified amount with an unspecified fair market value amounting to a 51% membership interest, while the beneficiary provided no capital provisions amounting to a 0% membership interest. The Management Operating Agreement further indicates that [REDACTED] paid capital provisions of an unspecified amount with an unspecified fair market value amounting to the remaining 49% membership interest. This purported ownership structure, i.e., that the foreign entity owns 51% while the beneficiary owns 0%, is not credible because it contradicts the rest of the provisions in the Management Operating Agreement as well as the other documentation in the record. Notably, the Management Operating Agreement does not mention the foreign entity in any provisions other than the capital provisions.

The petitioner submitted a copy of its membership certificate number 1, dated July 21, 2010, purportedly issued to the foreign entity for 510 shares representing 51% of the shares of the company. The petitioner failed to explain why the certificate was issued one year after the foreign entity purportedly paid its capital provisions. Overall, the membership certificate is not credible, considering the date of issuance and the weight of the contrary evidence. Based on the above, the petitioner failed to establish that it is a subsidiary of the foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(I) (defining a subsidiary as 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); 8 C.F.R. § 214.2(l)(1)(ii)(K) (defining a parent as a firm, corporation, or other legal entity which has subsidiaries).

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). 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.*

Assuming *arguendo* that the beneficiary owns 51% interest in the petitioner, the record still fails to establish that the petitioner can qualify as an affiliate of the foreign entity. The petitioner submitted evidence establishing that the beneficiary owns 50% of the foreign entity. However, the petitioner submitted no evidence establishing the beneficiary's control over the foreign entity. Absent evidence establishing that the beneficiary exercises control over the foreign entity, the record fails to establish that the petitioner and the foreign entity share a qualifying relationship as affiliates. See 8 C.F.R. § 214.2(l)(1)(ii)(L)(I) (defining an affiliate, in part, as one of two subsidiaries both of which are owned and controlled by the same parent or individual).

Control may be *de jure* by reason of ownership of 51% of outstanding stocks of the other entity, or it may be *de facto* by reason of control of voting shares through partial ownership and by possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm'r 1982). In order to establish *de facto* control of both entities by an individual, the petitioner must provide agreements relating to the control of voting rights such

as through proxy agreements or other legal mechanisms.⁶ *Id.* The petitioner provided no such agreements relating to the control of the foreign entity.

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.

⁶ A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. See *Black's Law Dictionary* 1241 (7th Ed. 1999).