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



U.S. Citizenship
and Immigration
Services

DATE: **MAY 28 2014**

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", written over a circular stamp or mark.

Ron Rosenberg
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 appeal will be dismissed.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking to qualify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a New York corporation, established in September 2012, engaged in the import and export business. The petitioner states that it is an affiliate of [REDACTED] Ltd. located in China. The petitioner seeks to employ the beneficiary as the vice president of a "new office" in the United States for a period of three years.¹

The director denied the petition, finding that the petitioner failed to establish that it has secured sufficient premises to house the proposed new office. Further, the director concluded that the petitioner has not demonstrated that it would support the beneficiary in a qualifying managerial or executive capacity within one year.

On appeal, counsel contends that the petitioner has submitted two leases on the record that demonstrate that it has secured sufficient premises to house the new office. Additionally, counsel states that submitted evidence of investment in the petitioner, and its proposed hiring plans, establish that it will support the beneficiary in a qualifying capacity within one year.

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.

¹ A beneficiary coming to the United States to be employed in a new office may only be approved for only one year. 8 C.F.R. § 214.2(l)(7)(i)(A)(1)(3).

- (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. The Issues on Appeal

A. Managerial or Executive Capacity (United States)

The first issue to be addressed is whether the petitioner has established that it will employ the beneficiary in a qualifying managerial or executive capacity within one year of approval of the 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.

A. Facts

In the Form I-129 Petition for a Nonimmigrant Worker, the petitioner stated that it was opening a new office in the United States that would engage in the import and export business. The petitioner projected its gross annual income to be \$100,000 in the first year and indicated that it currently had one employee. The petitioner noted that the beneficiary would act in the capacity of vice president and explained her duties in the petition as follows: “[The] [b]eneficiary will be responsible for the North America’s business development, attending various trade shows, seeking import and export business opportunities for the company and helping the company to establish its foundation in America and employing more local workers in the future.”

The petitioner further stated that the beneficiary “will be responsible for directing the overall daily operations of the business, establishing the highest level of quality of merchandise and services to be provided to its customers and ensuring they are satisfied with the value that the business will sell and

promote.” The petitioner explained that the beneficiary would “utilize her business experience and management skills to ensure the company’s growth and expansion.” The petitioner also submitted a copy of a Chinese money wire form, dated June 13, 2013, indicating that the foreign entity wired \$3,258 to the petitioner. Additionally, the petitioner also submitted a two-year lease agreement with a [REDACTED] dated May 1, 2013, for an apartment of unspecified size and use in Flushing, New York.

The director issued a request for evidence (RFE), stating that the evidence submitted by the petitioner with respect to its proposed new operation in the United States was insufficient to demonstrate that it would support the beneficiary in a qualifying executive or managerial capacity within one year. The director requested that the petitioner submit a letter from the foreign entity explaining the need for a new office in the United States and the proposed number of employees and positions, the amount of the U.S. investment, and how the proposed venture would support the beneficiary’s position within one year. The director also asked the petitioner to provide a business plan including a timetable for each proposed action during the first year and an organizational chart for the proposed U.S. company showing all proposed staffing, a summary of their duties, and expected education levels and salaries. Further, the director requested that the petitioner submit evidence to demonstrate the size of the foreign entity’s investment in the petitioner, including documentary proof of capital contributions made by the foreign entity and other supporting documentation related to the foreign entity’s financial position, including tax documents, annual reports, bank statements and/or bank letters, or other such evidence necessary to establish the foreign entity’s ability to invest in the petitioner.

In response, the petitioner submitted a support letter from the foreign entity’s Chairman [REDACTED] stating that the beneficiary had been employed with the company for the last twenty years and that she had “expertise in finance and accounting.” Mr. [REDACTED] further indicated that the beneficiary had taken on “the challenge of exploring and developing new business opportunities in the North America region of behalf of the [foreign entity].” Mr. [REDACTED] asserted that the foreign entity had entered into a joint venture with the petitioner, and that pursuant to this, the beneficiary would act as vice president of the U.S. company.

Additionally, the petitioner provided a support letter from its president, [REDACTED] Mr. [REDACTED] explained the beneficiary’s proposed duties in the capacity of vice president as follows:

[The beneficiary] is in charge of business development and financial management matters of [the petitioner]. As the head of the business development team, she is responsible to arrange attendances [sic] of various trade shows and expos. In addition, she arranges visits to leading automobile parts manufacturers in the United States. As the head of the financial management, she prepares books and records of [the petitioner] in accordance with applicable accounting principles. She also negotiates loans and other financing transactions with major financial institutions in the United States.

Mr. [REDACTED] further indicated that the planned initial investment in the petitioner was \$80,000 and that the shareholders of the petitioner had agreed to transfer this capital in installments “due to the uncertainty in business development in the U.S.” Mr. [REDACTED] confirmed that \$3,258 had been initially transferred from the foreign entity to the petitioner in June 2013 and that the foreign entity was scheduled to make another transfer of \$15,000 in August 2013. Mr. [REDACTED] stated the expectation was that all committed capital would be transferred to the petitioner by the end of the year.

The petitioner also presented a business plan, as was requested by the director. The petitioner stated that it was established as a regional sales office for the foreign entity to sell the company's automobile hydraulic lubrication systems. The petitioner indicated that it was created pursuant to a joint venture agreement between Mr. [REDACTED] stated to own 51% of the outstanding stock of the petitioner, and the foreign entity, which the petitioner claims owns 49% of its outstanding stock. The petitioner explained that, pursuant to this joint venture agreement, that it "holds an exclusive right to sell and market [the foreign entity's] products in the North America region."

Further, the business plan included organizational charts for 2012 and 2013. The 2012 chart illustrates that the petitioner would have only two employees, Mr. [REDACTED] as president, and the beneficiary as vice president. The 2013 chart indicates that the petitioner would hire four sales representatives by the end of that fiscal year. The plan further stated that the Mr. [REDACTED] and the foreign entity had agreed in their joint venture agreement to jointly contribute \$80,000 of initial capital to the petitioner, with each investor providing an amount consistent with their ownership share in the company. A table provided by the petitioner specified that Mr. [REDACTED] would contribute \$40,800 to the petitioner, while the foreign entity would provide \$39,200. The petitioner stated that its employees would "attend expos and trade shows" and "approach leading automobile manufacturers and automobile parts manufacturers for sales opportunities."

The director ultimately denied the petition, concluding that the petitioner had not established that it would support the beneficiary is a qualifying executive or managerial capacity within one year. The director indicated that the petitioner had not shown the size of the U.S. investment, noting that the evidence did not demonstrate that the asserted investments had been transferred to the U.S. company. Further, the director stated that the petitioner had not sufficiently described its planned staffing for the first year and how this planned hiring would allow the beneficiary to act in a qualifying capacity. The director noted that in the beneficiary's proposed role, she would act as a first line supervisor of non-professional employees, rather than in an executive or managerial role.

On appeal, counsel contends that the director applied a legal standard not warranted by the regulations by requiring the petitioner to submit bank statements to demonstrate that it had received the full amount of the intended investments. Counsel states that the appropriate contributions have been made by the foreign entity and Mr. [REDACTED] and that these parties have exceeded the original amount of intended investment specified in their claimed joint venture agreement. Further, counsel states that it plans on hiring four sales representatives within the first year of operation and contends this is sufficient to establish that the petitioner will support the beneficiary in a qualifying capacity during the first year.

Furthermore, counsel submits an additional support letter from the petitioner's president Mr. [REDACTED] Mr. [REDACTED] states that he has contributed over \$100,000 for the purchase of materials for the petitioner, and that "under accounting principles," he has fulfilled his investment obligation under the claimed joint venture agreement. Counsel also submits a copy of a bill of lading and records of shipping and indicates that this evidence establishes that Mr. [REDACTED] has paid significant consideration for the petitioner's materials. Likewise, counsel provides a bank statement indicating the transfer of \$14,685 from the foreign entity to the petitioner on July 29, 2013.

In a support letter, Mr. [REDACTED] reiterates the petitioner's intention to hire four sales representatives during its first year of operations. He states that these employees "must have worked in the industry for years" and that these representatives "must be capable of locating local and regional material vendors, of identifying quality of materials, and of pricing the materials." Mr. [REDACTED] further specifies that once these vendors are identified, the beneficiary "will take over and negotiate contacts on behalf of the petitioner" and that she will have the authority to sign these contracts.

Lastly, the petitioner provides a ten-year lease agreement for a 10,000 square foot warehouse space in Pennsylvania to commence on January 1, 2013.

B. Analysis

Upon review of the record, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity after one year.

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 one year. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). 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, USCIS 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.*

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 duties offered by the petitioner, such as being in charge of business development and financial management matters, heading the business development team, arranging attendance at various trade shows and expos and visiting with leading automobile parts manufacturers, and preparing books and records in accordance with applicable accounting principles are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The duties and the evidence of record generally include no specific examples or documentation to substantiate the beneficiary's proposed duties. Further, the petitioner does not specifically describe any business development that the beneficiary will undertake to expand the business during the first year, beyond arranging attendance at trade shows and visits with unidentified automobile parts manufacturers. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Overall, the petitioner has failed to provide a sufficiently detailed explanation of the beneficiary's proposed activities in the course of her daily routine. The actual duties themselves will 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 job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 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(i)(3)(v).

In an RFE, the director requested that the petitioner submit its organizational chart, showing all proposed staff with summaries of their duties, education levels, and salaries. In response, the petitioner provided an organizational chart listing four prospective sales representative positions. However, the petitioner failed to submit all of the requested evidence. 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).

On appeal, the petitioner indicates that the stated sales representatives "must be capable of locating local and regional material vendors, of identifying quality of materials, and of pricing the materials" and that they must have industry specific experience, but fails to provide sufficient detail regarding the required experience or educational credentials of these proposed employees. As noted previously, the foreign organizational chart indicates that the beneficiary will directly oversee the proposed sales representatives. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Indeed, the petitioner directly asserts that the beneficiary will continue to act in such a non-qualifying position after one year. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Further, without supporting documentation on the credentials of the proposed sales representatives, it cannot be determined that these proposed subordinates will qualify as professionals, as defined by the regulations. In fact, the beneficiary's subordinates will be sales representatives, a profession not typically afforded recognition as professional according to the regulations and the petitioner has not submitted sufficient evidence to demonstrate their professional status. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The petitioner has not established the size of the foreign entity's United States investment as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). As previously discussed herein, the petitioner indicates that the planned investment in the petitioner is \$80,000. In response to the director's RFE, the petitioner indicated that this investment would be split between the foreign entity and the petitioner's president Mr. [REDACTED] consistent with their ownership interests and that this proposed investment was set forth in a joint venture agreement. However, the petitioner has not submitted the claimed joint venture agreement as necessary to substantiate these claims. 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)).

Counsel also contends that the director applied an evidentiary standard not required in the regulations by requiring the petitioner to document that the petitioner received the full amount of the proposed investment. This office does not find counsel's assertion persuasive. 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). Further, USCIS has long found it relevant to require a petitioner to substantiate proposed investment in a proposed new office through documentation, the most credible of which, is evidence demonstrating the actual receipt of funds. The petitioner submitted documentation sufficient to demonstrate that the foreign entity contributed only \$3,258 to the proposed new office prior to the filing of the petition, and \$17,943 on July 29, 2013, an amount well short of the foreign entity's claimed commitment of \$39,200 supposedly set forth in the joint venture agreement. Likewise, the petitioner has not demonstrated that Mr. [REDACTED] has contributed his \$40,800 investment, which is offered as required to launch the petitioner's new operations. Further, bills of lading and invoices submitted on appeal do not demonstrate this investment on the part of Mr. [REDACTED] as is asserted by the petitioner.

The petitioner failed to submit a credible business plan in response to the director's request. The director requested that the petitioner submit a business plan that detailed timetables for various proposed actions that would be undertaken in the first year to commence the petitioner's operations. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as

job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

Here, the petitioner projects it will earn \$100,000 in revenue during its first year of operations. The petitioner has not established how this goal will be achieved or how this level of revenue will allow the petitioner to support the beneficiary in a qualifying executive or managerial capacity after the first year. Indeed, as previously stated, the business plan does not provide detailed actions and timetables necessary to assess whether the petitioner's plan is viable and likely to succeed, as was specifically requested by the director. 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). Further, the petitioner provides none of the evidence indicative of a credible business plan, such as market and competitor analysis, proposed marketing or advertising, specific discussion of products, pricing and/or sources of supply, timetables for hiring, or supported financial projections. In sum, due to the lack of sufficient detail and supporting documentation, the business plan does not support a finding that the petitioner will employ the beneficiary in a managerial or executive capacity after one year.

In conclusion, and for the reasons discussed above, the petitioner has failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity within one year. For this reason, the appeal must be dismissed.

B. Sufficient Premises

The other issue addressed by the director is whether the petitioner demonstrated that it has secured sufficient premises to house the proposed new office.

As stated previously, the petitioner submitted a two-year lease agreement with a [REDACTED] dated May 1, 2013, for an apartment of unspecified size and use in Flushing, NY. The petitioner also provided photographs of the beneficiary sitting at a desk and a door affixed with a sign showing the petitioner's company name.

In the RFE, the director asked that the petitioner indicate the square footage of the premises, explain the type of building the petitioner is occupying and how it is sufficient to conduct its business, including supporting photographs.

In response, the petitioner's president stated that the aforementioned apartment was sufficient premises for its operations during the next year, noting that the company did not currently plan to warehouse inventory in the United States, but only that it requires "an office that is spacious enough to store business records and to house two to six personnel." The petitioner did not disclose or document the square footage of the apartment or specifically articulate how the premises would be sufficient for its operations.

The director concluded that the petitioner had not established that the petitioner had secured sufficient premises to house the new office. The director reasoned that the submitted lease was for a residential space

and that the petitioner had failed to articulate or document its square footage thereby leaving question as to whether the space could sufficiently house the new operation.

On appeal, counsel now submits a ten-year lease agreement for a 10,000 square foot warehouse space in Pennsylvania to commence on January 1, 2013. Counsel contends that this warehouse space, along with the previously referenced office space, demonstrates that the petitioner has secured sufficient premises to house the new office.

Upon review of the evidence, the petitioner has not established that it has secured sufficient premises to house the proposed new office.

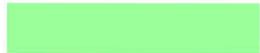
If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. Further, consistent with this requirement, the regulations directly state that the petitioner must demonstrate that it has secured sufficient premises to house the new operation and thereby immediately commence doing business. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

Here, the director requested in the RFE that the petitioner indicate the square footage of the premises, explain the type of building where the office is located, and how it is sufficient to conduct its business. However, the petitioner did not detail the square footage or specifically explain how the premises would be sufficient for its operations, but only generally stated without supporting explanation or evidence, that it was indeed sufficient. Now on appeal, counsel submits an additional lease.

As noted previously, 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).

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 petitioner's submittal of the warehouse lease on appeal. Regardless, even if considered, the submittal of this lease is questionable considering the petitioner's assertion in response to the director's RFE that no warehouse space was required for the business. 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).

Therefore, the petitioner has not submitted sufficient evidence to demonstrate that it has secured sufficient premises. The petitioner has merely submitted a copy of a residential lease, thereby leaving question as to



its use for commercial purposes and its proposed use by up to six employees during the first year. The petitioner has not described its anticipated space requirements for its import and export business and the lease in question does not specify the amount or type of space secured. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. For this additional reason, the petition must be dismissed.

C. Qualifying Relationship

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the foreign entity.

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[.]

* * *

(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 . . . [.]

In the Form I-129, the petitioner asserted that it and the foreign entity are affiliates. In support of this assertion, the petitioner submitted the foreign entity's articles of incorporation, dated November 18, 2007, which indicates in Article 12 that the foreign entity was owned and controlled by the following shareholders: (1) [redacted] - 90%, (2) [redacted] - 5%, and (3) [redacted] - 5%. The petitioner did not articulate, or submit evidence to demonstrate its ownership.

In the RFE, the director asked that the petitioner provide additional evidence to demonstrate common ownership and control between it and the foreign entity. Specifically, the director requested that the

petitioner submit evidence to demonstrate its ownership, and ownership in the foreign entity, including the following with respect to each entity, to the extent such evidence was applicable: (1) most recent Forms 10-K; (2) a most recent annual report; (3) relevant shareholder meeting minutes; (4) articles of incorporation; (5) stock purchase agreements; (6) stock certificates; (7) a stock ledger; (8) proof of relevant stock purchases; (9) documentation outlining investment in the company; and/or (10) relevant tax documentation.

In response, the petitioner submitted two stock certificates indicating that [REDACTED] owns 102 shares of its stock and that the foreign entity owns 98 shares. The petitioner stated that the aforementioned ownership was established pursuant to a joint venture agreement between Mr. [REDACTED] and the foreign entity whereby the parties agreed to invest initial capital of \$80,000. A table in the petitioner's submitted business plan illustrated that Mr. [REDACTED] held 102 shares based upon a \$40,800 capital contribution "to be furnished" and the foreign entity held 98 shares based on the promise to provide \$39,200 in capital. The petitioner submitted no additional evidence to demonstrate ownership in the foreign entity.

Upon review of the submitted evidence, the petitioner has not demonstrated that it has a qualifying relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the record reflects that the petitioner and the foreign entity are not under common ownership and control. As indicated by the evidence discussed above, the petitioner asserts that the foreign entity is 95% owned by [REDACTED] while the petitioner is 51% owned by Mr. [REDACTED]. Therefore, the entities do not meet the definition of affiliates as defined by the regulations, as they are not owned or controlled by the same company or individual nor owned and controlled by the same group of individuals.

Further, the petitioner has not provided an adequate response to the director's RFE with respect to its ownership. The petitioner has only submitted stock certificates without additional supporting evidence to substantiate these certificates. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Indeed, this documentation was requested in the director's RFE, but the petitioner failed to provide any of this supporting evidence. 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).

Without full disclosure of all relevant documents, USCIS is unable to determine actual ownership in the petitioner.

Indeed, discrepancies and insufficiencies in the evidence presented with respect to ownership in the petitioner leave questions as to its actual ownership. For instance, the petitioner asserts that it was established pursuant to a joint venture agreement whereby Mr. [REDACTED] and the foreign entity agreed to invest a certain amount in the entity. However, this transaction is more indicative of the formation of a limited liability company or partnership, rather than a corporation, where shares are typically issued and purchased by the parties, and not issued based upon a promise to invest in the future. The petitioner has not submitted sufficient evidence to demonstrate that any share purchases were completed by its stated owners. In fact, as previously discussed herein, the evidence submitted fails to demonstrate that these stated owners even invested the amounts asserted in the claimed joint venture agreement and has not submitted the asserted joint venture agreement to substantiate its ownership claims. 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). 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)).

For these foregoing reasons, the petitioner has not submitted sufficient evidence to demonstrate that it has a qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

D. Managerial or Executive Capacity (Foreign Entity)

Also beyond the decision of the director, the petitioner has not demonstrated that the beneficiary acts in a qualifying managerial or executive capacity with the foreign entity.

In support of the petition, the petitioner stated that the beneficiary had been employed with the foreign entity since 1992, and that she currently works in the capacity of deputy general manager and chief financial officer “overseeing [the] company’s day-to-day operation and accounting/financial operation and analysis.”

In the RFE, the director requested that the petitioner submit the following to substantiate the beneficiary claimed qualifying employment abroad: (1) copies of training, pay or personnel records; (2) a foreign organizational chart listing the employees within the beneficiary’s department by name, with a summary of their duties, education levels, and salaries; and (3) a letter from the foreign entity detailing the beneficiary’s executive or managerial decisions and duties, including the percentages of time the beneficiary spends on her various tasks.

In response, the petitioner provided little of the information requested by the director. However, the petitioner did submit a letter from the foreign entity's chairman largely reiterating the assertions previously made on the record with respect to the beneficiary's employment. Specifically, the foreign entity stated that the beneficiary had worked for the company for the previous twenty years and that "due to her outstanding performances" was promoted to chief financial officer in 2006 and deputy general manager in 2009.

As noted previously, when examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). However, the petitioner has failed to delineate the specific duties of the beneficiary or the percentage of time she spends on qualifying versus non-qualifying operational tasks, as requested by the director. 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). Without a detailed duty description relevant to the beneficiary's foreign employment, it cannot be determined whether she acts primarily in a qualifying managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The actual duties themselves will 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 job duties, United States Citizenship and Immigration Service (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 business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Likewise, the petitioner has submitted little other supporting evidence to demonstrate that the beneficiary acts in a qualifying managerial or executive capacity abroad. For instance, the petitioner has not submitted a detailed foreign organizational chart indicating the beneficiary's subordinates and their duties, education, or salaries.² Further, the petitioner did not provide any other documentation to substantiate the beneficiary's asserted executive or managerial employment, such as personnel or payment records. Without sufficient evidence of the foreign entity's organization structure and other corroborating documentation relevant to the beneficiary's claimed employment abroad, it cannot be determined whether she acts in a qualifying managerial or executive capacity. Again, 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)).

As such, the petitioner has not established that the beneficiary is employed in a qualifying managerial or executive capacity with the foreign employer. For this additional reason, the appeal will be dismissed.

² The petitioner submitted a generalized organizational chart of the foreign entity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.