



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF ZW-, INC.

DATE: OCT. 20, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a cell phone and accessory retailer, seeks to temporarily employ the Beneficiary as its CEO under the L-1A nonimmigrant classification for intracompany transferees. See Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1A classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee to the United States to work temporarily in an executive or managerial capacity.

The Director, Vermont Service Center, denied the petition, concluding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Beneficiary will be employed primarily in an executive capacity in the United States.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

To establish eligibility for the L-1 nonimmigrant visa classification, a qualifying organization must have employed the Beneficiary in a 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. Section 101(a)(15)(L) of the Act. 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. *Id.*

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, 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.

II. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The Director denied the petition based on a finding that the Petitioner did not establish that the Beneficiary will be employed in a managerial or executive capacity in the United States.

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.

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.

Further, “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.” *Id.*

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. *See* section 101(a)(44)(C) of the Act.

A. Evidence of Record

The Petitioner filed the Form I-129 on July 9, 2015. On the Form I-129, the Petitioner indicated that it has “7+” employees in the United States and a gross annual income of \$799,149.00.

In its letter of support, the Petitioner explained that it operates two cell phone stores that offer a selection of cell phones, cell phone accessories, and repair services. The Petitioner stated that the Beneficiary will be employed in a primarily executive capacity in the United States and described his position and duties as follows:

Executive Capacity – 60%

1. Directs the management of the organization or major function of the organization: (20%)
 - Responsible for all financial, operational, administrative and legal aspects of the daily organization management of the company, including finance, sales, marketing, inventory, purchasing and sound management of all fiscal resources, supervision of established staff member and operations in accordance with standard business practice;
 - Leverage enterprise knowledge of significant development and trends in the industry to direct managers in purchasing of inventory, sourcing of vendors and negotiate with vendors;
 - Ensure program compliance and program and fiscal accountability;
2. Establishes the goals and policies of the organization, component, or function: (20%)

- Develop the strategy of the company using performance measurement to guide strategic and operational decision-making;
 - Implement board-approved strategic plan, and implement other board and agency plans in a timely way as they relate to the capital campaign, programs, annual fund development, communications and business development;
 - Determine business expansion possibilities and ensure efficient and cost effective management of company based on quarterly financial audit and reviews;
 - Develop and administer board-approved personnel policies;
3. Exercises wide latitude in discretionary decision-making: (15%)
- Give direction and leadership towards the achievement of the organization's proprietary philosophy, mission, strategy, and annual goals, and objectives;
 - Provide leadership in developing organizational and financial plan, and carry out plans and policies as authorized by the board;
 - Assist the shareholder by maintaining and promoting the vision and mission of the company and in achieving goals and objectives of the strategic plan;
4. Receives only general supervision . . . (5%)
- Work with the stakeholders to set investment and management policies consistent with the goal to expand global investment portfolio;
 - Liaison with business brokers and investigate prospective investment deals for the company;
 - Identify and cultivate partner organization in arranging new business venture, investment, sales, loans and vendor agreements, etc;
 - Keep the shareholder informed on the conditions of the company and other important factors affecting the health of the company's investment portfolio and market development & public relations strategies;

Managerial Capacity: (40%)

5. Manages the organization, or a department, subdivision, function or component of the organization: (15%)
- Maintain fiscal responsibility for the annual budget and report to the board regularly;
 - Directing public relations functions by establishing and strengthening working relationship with industry partners and vendors at the local, regional, national and international levels;
 - Identify and develop new partnership with business community leaders;

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6. Supervises and controls the work of other supervisory/professional/managerial employees or manage an essential function within the organization/department/subdivision: (15%)
 - Ensure and enhance corporate operations by implementing inventory control and administrative operating systems through managers;
 - Implement policies for adequate supervision and evaluation of all staff;
 - Direct supervision of managers and oversee all disciplinary actions;
7. Has the authority to hire, fire or recommend those as well as other personnel actions: (5%)
 - Oversee and support current program staff and develop short and long term staff development plan;
 - Communicate routinely with parent company president and other key committee leaders;
 - Ensure proper hiring, disciplinary and termination procedure as required by law;
8. Exercises discretion over the day-to-day operations . . . (5%)
 - Oversee the current programs of the company and working with staff, develop programs to achieve the objectives of the company's strategic plan;
 - Implement marketing timeline and communications strategic plan approved by the shareholders[.]

The Petitioner submitted its organizational chart depicting the Beneficiary as the CEO, reporting to the president, [REDACTED]. According to the chart, the Beneficiary will directly supervise a "Vice President, Sales" and a "Vice President, Operations." The chart shows that the vice president of sales supervises one marketing specialist and one store manager, while the store manager supervises one sales staff at store #1, two sales staff at store #2, and a contracted store maintenance employee. The chart further shows that the vice president of operations supervises an HR specialist and an outsourced accountant. In total, the chart names 10 employees (including the Beneficiary) and two contractors. The Petitioner also provided job descriptions for the two vice president positions.

On the Form I-129, the Petitioner indicated that the Beneficiary's physical work location will be [REDACTED] Texas. The Petitioner submitted a lease agreement between [REDACTED] (landlord) and [REDACTED] (tenant), dated September 19, 2013, for a 742 square foot store at [REDACTED]. The Petitioner also submitted a renewal agreement for a lease agreement originally dated June 24, 2010, between [REDACTED] (landlord) and [REDACTED] (tenant), for a 1,721 square foot store at [REDACTED].

The Director issued a request for evidence (RFE) advising the Petitioner that the description of the Beneficiary's proposed duties does not appear to be consistent with the current scope and structure of the U.S. company. The Director also noted that the Petitioner did not submit documentary evidence of its current staffing level. The Director instructed the Petitioner to submit evidence

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demonstrating that the Beneficiary will be employed in a managerial or executive capacity in the United States. The Director also advised that the submitted lease agreement appears to be between two entities or individuals not related to the petitioning company, and instructed the Petitioner to submit clarification regarding its physical premises.

In response to the RFE, the Petitioner resubmitted its initial letter and reiterated that the Beneficiary “is expected to perform 60% executive duties and 40% managerial duties.”

The Petitioner stated that it had 10 employees as of the date of the RFE response and submitted an updated organizational chart outlining the same structure described at the time of filing, with different employees in some of the positions. The Petitioner submitted its IRS Forms 941, Employer’s Quarterly Federal Tax Return, along with its Texas Employer’s Quarterly Reports, for the first, second, and third quarters of 2015. According to the Employer’s Quarterly Report for the third quarter of 2015, the Petitioner had six employees in July 2015 when the petition was filed, eight employees in August 2015, and six employees in September 2015. The wage report confirms that the Petitioner paid wages to the employees identified in the initial organizational chart as vice president operations, HR specialist, marketing specialist, and three sales staff.

With respect to the lease agreements, the Petitioner explained that [REDACTED] is the vice president of [REDACTED] which entered into sublease agreements with the Petitioner for the two [REDACTED] Texas store locations at [REDACTED] and [REDACTED]. The Petitioner submitted copies of both agreements, which indicate that the Petitioner licenses/subleases only designated portions of the stores. This evidence also suggests that [REDACTED] operates its own business at the same locations.

The Petitioner also submitted its 2014 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which listed its business activity as “gasoline statio[n]” and its product or service as “conv[enience] store.”

The Director denied the petition on April 22, 2016, concluding that the Petitioner did not establish that the Beneficiary would be employed in a managerial or executive capacity in the United States. In denying the petition, the Director discussed the Beneficiary’s subordinates’ duties and found that they would not relieve him from performing non-qualifying duties. The Director found that the Petitioner did not demonstrate that the U.S. company has a level of management sufficient to sustain the executive position of CEO or that the Beneficiary will be primarily engaged in executive duties. The Director further determined that the Petitioner did not establish that the Beneficiary would be primarily engaged in supervising and controlling the work of supervisory, professional, or managerial employees.

On appeal, the Petitioner contends that the Beneficiary is not required to primarily supervise and control the work of other supervisory, professional, or managerial employees in order to be considered an executive and that his subordinate supervisory employees need not hold professional-level positions in order for him to qualify as a CEO. The Petitioner states that it now

has five store locations and seven employees, plus contracted third parties for services such as accounting and maintenance. The Petitioner submits evidence related to three additional stores and an updated organizational chart in support of the appeal.

B. Analysis

Upon review of the petition and the evidence of record, including materials submitted in support of the appeal, we conclude that the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

The Petitioner claims that the Beneficiary will perform primarily executive duties. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within an organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.*

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner’s description of the job duties. *See* 8 C.F.R. § 214.2(1)(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 managerial and executive capacity each have two parts. First, the Petitioner must show that the Beneficiary will perform certain high-level responsibilities. *Champion World, Inc. v. INS*, 940 F.2d 1533 (9th Cir. 1991) (unpublished table decision). Second, the Petitioner must prove that the Beneficiary will be *primarily* engaged in managerial or executive duties, as opposed to ordinary operational activities alongside the Petitioner’s other employees. *See Family Inc. v. USCIS*, 469 F.3d 1313, 1316 (9th Cir. 2006); *Champion World*, 940 F.2d 1533. It is the Petitioner’s burden to establish that someone other than the Beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, the Petitioner characterized the Beneficiary’s proposed role as primarily executive and provided a lengthy, but general, job description that does not clearly identify the specific executive duties the Beneficiary would perform in the context of the Petitioner’s business operations. Rather, many of the executive responsibilities that would require 60% of the Beneficiary’s time merely paraphrase the statutory definition of “executive capacity.” For example, the Petitioner stated that

the Beneficiary will devote 20% of his time to directing the management of the organization, which includes responsibility for all daily financial, operational, administrative, and legal aspects of the company, directing managers in inventory purchases, and ensuring program compliance, but has not provided any insight as to what he will actually do on a day-to-day basis or explained who will be performing the financial or administrative operations that the Beneficiary will supervise. The Petitioner also stated that the Beneficiary will devote another 20% of his time to establishing the goals and policies of the organization and 15% of his time to exercising wide latitude in decision making, but again has not articulated the specific tasks associated with these duties, or explained how the Beneficiary will carry out these duties on a day-to-day basis within the context of its actual business. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *See 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The Petitioner further claims that the Beneficiary will allocate 40% of his time to managerial duties and included percentages of time he will devote to those duties. Again, while some of those duties generally paraphrase the statutory definition of "managerial capacity," the Petitioner has not provided the specific tasks that the Beneficiary will perform in carrying out the listed duties within the context of its business operations. For example, the Petitioner stated that the Beneficiary will devote 15% of his time, to managing the organization and 5% of his time to exercising discretion over the day-to-day operations, but again has not articulated the specific tasks associated with these responsibilities, or explained how the Beneficiary will carry out these duties on a day-to-day basis. 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. at 1108; *aff'd*, 905 F. 2d 41 (2d. Cir. 1990).

The Petitioner did not submit any additional information or clarification of the Beneficiary's proposed duties in response to the request for evidence or in support of its appeal. Here, while the Beneficiary may hold authority consistent with an executive or managerial position, without a specific and detailed breakdown of how the Beneficiary will spend his time, the Petitioner has not established that he would primarily perform executive or managerial duties.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed executive capacity of a Beneficiary, including the Petitioner's organizational structure, the duties of the Beneficiary's subordinate employees, the presence of other employees to relieve the Beneficiary from performing operational duties, the nature of the Petitioner's business, and any other factors that will contribute to understanding a Beneficiary's actual duties and role in a business.

The Petitioner claimed to have "7+" employees at the time of filing and submitted an organizational depicting nine employees and two contractors. However, it later provided evidence that it paid wages to only six employees in July 2015 when the petition was filed. The Petitioner claimed that

the Beneficiary will directly supervise two subordinate vice presidents who will relieve him from performing non-qualifying duties, and did not provide position descriptions for any other employees. However, the Petitioner did not submit evidence that it actually employs the vice president of sales and did not identify who will perform the job duties listed for that position while it is vacant. Therefore, there are inconsistencies in the record with respect to the Petitioner's staffing levels and structure at the time of filing. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While the Petitioner documented its employment of the vice president of operations, the job duties provided for this position include general managerial duties that do not directly correlate to the Petitioner's actual business operations. For example, the Petitioner stated that the vice president of operations will provide overall direction of the company's operations infrastructure, establish a human capital acquisition plan, monitor legal affairs and internal operations with support and advisory support from outside legal counsel, and be responsible for all program planning, organizing, operating, and staffing. On appeal, the Petitioner correctly states that the Beneficiary is not required to primarily supervise and control the work of other supervisory, professional, or managerial employees in order to be considered an executive and that his subordinate supervisory employees need not hold professional-level positions in order for him to qualify as a CEO. However, while the Petitioner is not required to demonstrate that the Beneficiary has subordinate employees who will assist him, it is necessary to demonstrate that someone other than the Beneficiary will carry out the day-to-day routine duties required to continue operations. Here, the Petitioner has submitted inconsistent information regarding its staffing levels and minimal information regarding the duties actually performed by the Beneficiary and his subordinate employees in carry out the day-to-day operations of the business.

While the Beneficiary may be the Petitioner's senior employee, this alone is not sufficient to establish that he will be *primarily* employed as an executive. The designation hinges on whether or not the Petitioner demonstrates that it has the requisite level of subordinate staff capable of carrying out the duties associated with the day to day operation of the business. In this case, incorporating our earlier discussion of the deficiencies of the job description provided and the inconsistency in how the Petitioner has presented its business, we find that the Petitioner has not established that it has an organizational structure sufficient to support the Beneficiary in a position that is primarily executive in nature.

The record does not establish, in the alternative, that the Beneficiary would be acting in a managerial capacity. The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* sections 101(a)(44)(A)(i) and (ii) of the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(4). If a

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beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

In this case, the Petitioner claims that the Beneficiary will directly supervise two subordinate employees, a vice president of sales and a vice president of operations, to relieve him from performing non-qualifying duties, and did not provide position descriptions for any other employees. The brief job descriptions for the two subordinate vice president positions do not indicate that the positions are supervisory, managerial, or professional, and, as noted, the Petitioner has documented its employment of only one of these employees. The Petitioner has not demonstrated that the Beneficiary's duties will primarily focus on the management of the organization and the supervision of managerial, professional, or supervisory employees, nor has the Petitioner claimed that the Beneficiary would primarily manage an essential function of the company. As noted above, the Petitioner did not submit a detailed description of the Beneficiary's proposed position or those of his subordinates sufficient to establish that the Beneficiary's daily routine will consist of primarily managerial duties. The Petitioner has not submitted evidence that the Beneficiary's subordinate employees will relieve him from performing non-qualifying operational and administrative duties at the U.S. company.

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. USCIS* 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d at 42; *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g., *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the record contains some discrepancies regarding the actual size, scope and nature of the Petitioner's operations. The Petitioner claimed at the time of filing that it is operating two retail stores selling cell phones and accessories as July 2015. It submitted copies of its tax returns for 2013 and 2014 showing that it operates a gas station and convenience store. On appeal, the Petitioner claims that it is now operating five cell phone and accessories stores in Texas. However, the evidence submitted to show that the Petitioner is now operating three "new" stores pre-dates the filing of the petition,¹ and raises questions regarding the actual scope of the company's operations as

¹ The Petitioner submitted evidence that it filed two assumed name certificates with the [redacted] County Clerk on March 26, 2015, to do business as [redacted] at [redacted] Texas, and at [redacted]

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of July 2015. Regardless of whether the Petitioner was operating two or as many as five stores at the time of filing, it is unclear how the six employees documented in the record would relieve the Beneficiary from performing non-qualifying duties associated with operating multiple retail locations. Here, it is not the size of the company that is determinative, but rather that the unresolved discrepancies in the record and the lack of sufficient information pertaining to the Beneficiary's actual duties and those of his subordinates.

Further, we note that the Petitioner has not filed a petition for a "new office" and therefore is not subject to the physical premises evidentiary requirement at 8 C.F.R. § 214.2(l)(3)(v)(A). However, a petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic, and continuous manner. See 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the Petitioner must possess sufficient physical premises to conduct business.

The original lease agreement between the property owner and [REDACTED] clearly states that he cannot sublease the premises or any portion thereof without the prior written consent of the lessor, [REDACTED]. The Petitioner has submitted copies of three sublease/license agreements in which [REDACTED] company serves as the sublessor, but it has not provided evidence of the property owner's consent for any of these sublease/license arrangements. In addition, the terms of the sublease for the [REDACTED] location indicate that the Petitioner has subleased [REDACTED] square feet within the store; however, as noted above, the lease between [REDACTED] and [REDACTED] states that the size of the leased store is only 742 square feet. This lack of evidence, coupled with other discrepancies outlined above, further raises concerns as to the Petitioner's claimed 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. 158, 165 (Comm'r 1998) (quoting *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). 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. at 591.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the Beneficiary will be employed in a managerial or executive capacity in the United States.

III. QUALIFYING RELATIONSHIP

Beyond the decision of the Director, the Petitioner has not 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

[REDACTED] in [REDACTED] Texas. The Petitioner also submitted a license/sublease agreement for the [REDACTED] address which is dated January 1, 2015.

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“parent and subsidiary” or as “affiliates.” See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

As noted, the Petitioner indicated on the Form I-129, that it is an affiliate of the Beneficiary’s foreign employer, [REDACTED]. Where asked to explain the company stock ownership and managerial control of each company, the Petitioner stated:

The Foreign Affiliated Company is 2/3rd (approximately 66.67% owned and controlled by [the Beneficiary] and [REDACTED]

The U.S. Company is 50% owned and controlled by [the Beneficiary] and [REDACTED]

The Foreign Affiliated Company and the U.S. Company are affiliated through the common majority control of [the Beneficiary] and [REDACTED]

In support of the petition, the Petitioner submitted a Stock Purchase Agreement, dated December 15, 2014, where the Beneficiary and [REDACTED] each agreed to purchase 400,000 and 100,000 common shares, respectively. The Petitioner also submitted copies of three undated Stock Certificates, as follows:

- Stock Certificate No. 2: [REDACTED] owner of 500,000 common shares.
- Stock Certificate No. 3: [Beneficiary], owner of 400,000 common shares.
- Stock Certificate No. 4: [REDACTED] owner of 100,000 common shares.

The Petitioner also submitted evidence that the Beneficiary, [REDACTED] and one other individual, each own one-third of the foreign entity.

At the time of filing, the Petitioner emphasized that [REDACTED] and the Beneficiary are father and son and that the two of them together owned and controlled at least 50 percent of both the U.S. and foreign entities, thus establishing an affiliate relationship. The Petitioner did not submit any evidence that these two individuals had agreements in place to vote in concert as one in order to exercise control over either entity and instead seemed to rely on their familial relationship. The evidence submitted at the time of filing reflects that the two entities are not “owned and controlled by the same group of individuals, each individual owning controlling approximately the same share or proportion of each entity,” as the two entities are not owned by the same two groups of three individuals, but rather have only two owners in common. See 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). We note the claimed familial relationship does not constitute a qualifying relationship under the regulations. See *Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as “affiliates” within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner’s claims that the two companies “are owned and controlled by the same individuals, specifically the Ore family”).

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In response to the RFE, the Petitioner stated that the Beneficiary alone has *de facto* control of 66.67% of the foreign entity and 50% of the petitioning company because [REDACTED] agreed that he should be his “proxy holder” for his interest in both companies. The Petitioner submitted two brief “proxy letters,” both dated December 15, 2014, granting the Beneficiary authorization to vote as proxy of [REDACTED] in all matters pertaining to each company, but did not explain why it did not make this claim of de facto control or submit this evidence related to proxy voting at the time of filing in July 2015. Accordingly, the record contains contradictory and inconsistent evidence as to the actual control of both the U.S. and foreign entities.

In addition, there is an unresolved inconsistency in the record with respect to the Petitioner’s actual ownership. The Petitioner submitted its 2013 and 2014 IRS Form 1120S, U.S. Income Tax Return for an S Corporation. The 2013 Form 1120S includes a Schedule K-1, Shareholder’s Share of Income, Deductions, Credits, etc., listing [REDACTED] as the owner of 100% of the U.S. company’s stock for the year 2013. The 2014 Form 1120S does not include the Schedule K-1 specifically, but does indicate at Line I that the company had only one shareholder in 2014. In addition, the 2014 Form 1120S includes a Shareholder’s Basis Statement, which is a worksheet used to calculate the information contained in the Schedule K-1, indicating that [REDACTED] owned 100% of the U.S. company for the entire tax year.

This evidence contradicts the Petitioner’s claim that the Beneficiary and his father acquired a combined 50% interest in the U.S. company in 2014. The Petitioner has not resolved these inconsistencies with independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92.

Based on the deficiencies and inconsistencies discussed above, the Petitioner has not established that the United States and foreign entities are qualifying organizations. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is denied.

Cite as *Matter of ZW-, Inc.*, ID# 12604 (AAO Oct. 20, 2016)