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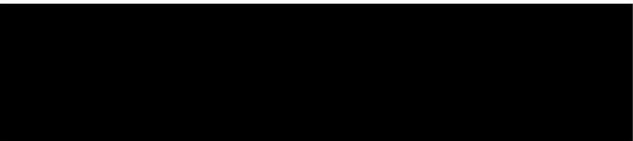
File: WAC 08 101 51710 Office: CALIFORNIA SERVICE CENTER Date: **FEB 23 2009**

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to 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 California corporation, claims to be a subsidiary of INAL LLC, located in Moscow, Russia. The petitioner seeks to employ the beneficiary as the executive director of its new office in the United States for a period of one year.

The director denied the petition on five separate and independent grounds. Specifically, the director determined that the petitioner had failed to establish: (1) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity; (2) that the foreign entity had made a sufficient investment in the U.S. entity to pay the beneficiary's salary and commence doing business; (3) that the petitioner has secured physical premises to house the new office; (4) that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity within one year; and (5) that the U.S. company and the foreign entity have a qualifying relationship.

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 asserts that the director's analysis of the evidence submitted was flawed, and contends that the director reached unreasonable conclusions. Counsel asserts that all requirements for a new office L-1A petition have been met. Counsel submits a brief, but no additional evidence, in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 involves 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.

The first issue addressed by the director is whether the petitioner established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

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

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

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

The petitioner filed the nonimmigrant petition on February 26, 2008. On Form I-129L, the petitioner stated that the beneficiary has been employed by the foreign entity as "Company President/Engineering Manager" with responsibility for "running day-to-day operations, making staffing and business decisions, making all engineering/construction decisions." In a letter dated February 23, 2008, the petitioner stated that the foreign entity is "primarily involved in commercial real estate marketing, construction, rent and sales."

The petitioner submitted an organizational chart depicting the structure of the foreign entity. On the chart, the beneficiary is identified as company president. The chart shows that he directly supervises a general director, who in turn supervises an engineering manager, an office manager, an art director, a chief accountant, and an attorney. The chart also includes an economist who reports to the accountant, a systems administrator who reports to the art director, and five employees who report directly or indirectly to the engineering manager – a foreman, a supply director, a supply manager, a sales manager and "industrial site." The names of the beneficiary's direct and indirect subordinates were not included on the chart.

The director found this evidence insufficient to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. On March 6, 2008, the director issued a request for additional evidence (RFE), instructing the petitioner to provide, *inter alia*, the following: (1) the total number of employees at the foreign location where the beneficiary has been working; (2) a more detailed organizational

chart clearly identifying all employees who report to the beneficiary by name and job title; (3) brief descriptions of job duties for all employees working under the beneficiary's supervision; and (4) a more detailed description of the beneficiary's duties abroad and the percentage of time the beneficiary spends on each of his listed duties. The petitioner also requested copies of the foreign entity's payroll records as evidence of the beneficiary's employment with the foreign entity.

In a response dated April 14, 2008, counsel for the petitioner stated that the beneficiary is a founder of the foreign entity and has been its president and chief engineer since the company was established. Counsel stated that the beneficiary's duties include "making day-to-day business decisions, hiring, firing, investment decisions and engineering design." The petitioner re-submitted the organizational chart for the foreign entity that was provided at the time of filing.

The petitioner also submitted copies of the foreign entity's payroll journal for the months of November and December 2007 and for three months in 2008. The petitioner did not provide English translations of the 2008 payroll journals. The payroll journal for December 2007 indicates a total of 17 employees, including the beneficiary as head engineer, a logistics manager, a foreman, an office manager, a sales manager, an economist, a lawyer, an art director, "chief of the department IV," and seven "common laborers."

The director denied the petition on May 3, 2008, concluding that the petitioner did not establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner failed to provide the requested detailed position description for the beneficiary or the requested information regarding the duties performed by the beneficiary's subordinates. The director noted that the beneficiary would not be considered to be a qualifying manager or executive based on his job title and placement on the organizational chart.

On appeal, counsel for the petitioner asserts the following:

[The beneficiary] is the General Director and Chief Engineer of [the foreign entity] from the moment of its creation, which makes him the chief executive as well as the chief technical officer by Russian usage of trade. He controls and manages the organization and also makes all important engineering decisions. In these circumstances, no statute, regulation or other precedent requires statement of every subordinate's qualifications or salary. A chart of the Russian office organization was submitted where it included self-explaining titles. . . . The salaries were submitted separately and could be seen on the payroll. The argument that the government is not convinced that the beneficiary is planning to fulfill managerial or executive duties is not warranted.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job

duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner has failed to provide a description of the beneficiary's duties sufficient to establish that he was employed by the foreign entity in a primarily managerial or executive capacity. The job descriptions submitted by the petitioner prior to the adjudication of the petition consisted of two sentences. Specifically, the petitioner stated that the beneficiary is "responsible for running day-to-day operations, making staffing and business decisions, making all engineering/construction decisions," and that he is responsible for "making day-to-day business decisions, hiring, firing, investment decisions and engineering design." Contrary to counsel's assertions otherwise, these general statements are not sufficient to establish that the beneficiary has been employed in a primarily managerial or executive position, as they offer no insight into the actual tasks he performs with respect to the foreign entity's overall business and engineering activities. 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 has failed to provide any detail or explanation of the beneficiary's activities in the course of his 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).

Furthermore, the director specifically requested that the petitioner provide a "more detailed description of the beneficiary's duties abroad," with instructions that the petitioner "be specific" and indicate the percentage of time the beneficiary spends on his duties. Given these specific requests, the one-sentence description provided by counsel was not responsive to the director's inquiries. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition, the petitioner has given the beneficiary several managerial job titles, but there are inconsistencies in the record regarding his actual position in the foreign entity's organizational hierarchy. The petitioner initially referred to the beneficiary as "company president/engineering manager." He is depicted as company president on the organizational chart and as "head engineer" on the foreign entity's payroll records. The minutes from a board meeting held by the foreign entity on January 11, 2008 identify the beneficiary as "engineering manager." On appeal, counsel refers to the beneficiary as "general director" of the foreign entity, but other documentation in the record, including payroll records, a letter from the foreign entity, and the January 11, 2008 board meeting minutes, indicate that the position of general director is held by a Mr. Shekelev. 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). Other than the foreign entity's self-prepared organizational chart, there are no documents in the record referring to the beneficiary as the president of the foreign entity.

Regardless, contrary to counsel's suggestion on appeal, a beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of the beneficiary's job title, placement on a general organizational chart or broadly-cast business responsibilities. The director's requests for information regarding the beneficiary's duties and the job duties of the employees

he is claimed to supervise were reasonable, and the director's failure to respond to such requests will not be excused.

Overall, based on the limited evidence in the record, it cannot be concluded that the beneficiary has been performing primarily managerial or executive duties for the foreign entity. Accordingly, the appeal will be dismissed.

The second issue addressed by the director was whether the petitioner established the size of the U.S. investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

The petitioner's initial evidence included the minutes of a "joint meeting" held on January 11, 2008 by the foreign entity's shareholders. At the meeting, the company resolved to send its engineering manager (the beneficiary) and its art director to the United States to open a "branch" office and approved a \$200,000 investment for the first three months.

In the RFE issued on March 6, 2008, the director requested an original letter from the foreign company indicating, in part, the amount of investment actually committed, and an explanation as to how the foreign company will pay the beneficiary the salary of \$75,000 per year and commence doing business in the United States. The director also requested copies of the petitioner's bank statements.

Further, the director requested information regarding the total costs involved in commencing business in the United States. In this regard, the director instructed the petitioner to submit a detailed description of all start-up costs including payments for leases or rents, purchase of equipment, inventory on hand, etc. The director also requested a business plan detailing the business to be conducted and projections for business expenses, sales, gross income and profits and losses.

In response, the petitioner submitted a letter from the foreign entity dated March 31, 2008. The foreign entity stated the following:

The initial investment of [the foreign company] into its subsidiary [the petitioner] is US\$200,000. This amount is sufficient to cover initial expenses and employee compensation. This initial expense report is attached.

The AAO cannot locate an initial expense report among the evidence submitted. The petitioner provided evidence that the petitioner opened a business checking account and made an opening deposit of \$100.00 on March 13, 2008. The petitioner also provided evidence that a wire transfer in the amount of \$20,000 was sent to this account by the foreign entity on April 15, 2008.

The director denied the petition, determining that the \$20,000 transferred by the foreign entity is insufficient to meet the projected start-up expenses and the beneficiary's salary.

On appeal, counsel for the petitioner asserts that the director's conclusion that the U.S. company is not adequately capitalized is flawed. Counsel asserts that the remainder of the \$200,000 initial investment is still with the Russian company pending approval of the beneficiary's petition. Counsel notes that the petitioner submitted financial documentation for the foreign entity to establish that the funds are readily available.

Upon review, the AAO concurs that the petitioner has not adequately established the size of the United States investment. Preliminarily, the AAO notes that the record contains no business plan or other evidence detailing the anticipated start-up costs for the petitioning company, although such evidence was specifically requested by the director. While the \$200,000 figure provided is significant, without additional information regarding how and when the investment will be used, it cannot be determined that this amount will be sufficient to allow the petitioner to commence doing business operations in the United States and move forward with its plan to expand to the point where it would realistically support an executive or managerial position within one year. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). According to the foreign entity's resolution of January 11, 2008, this amount is only intended to cover the first three months of expenses. Absent a business plan or other projections of the company's anticipated start-up costs, operating expenses, and projected income, it cannot be concluded that the \$200,000 investment would meet the petitioner's projected needs for the first year of operation.

Furthermore, the record as presently constituted contains no evidence of any funds already provided to the U.S. entity for the purpose of establishing the subsidiary company at the time of filing, nor any evidence that the company even had a bank account as of the date of filing. The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

The third issue addressed by the director is whether the petitioner established that it secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time of filing, the petitioner submitted a copy of its office lease for two offices comprising 457 square feet. The term of the lease was for six months, commencing on March 1, 2008. The lease provides that the premises shall be used for general office purposes only. The lease agreement was not signed by the petitioner's or the lessor's representative.

The director denied the petition, observing that the lease agreement was not signed by both parties. The director also observed that the term of the agreement was for only six months, while the requested period of employment for the beneficiary is one year.

On appeal, counsel contends that the director inappropriately concluded that the petitioner is not intending to maintain physical premises for a year. Counsel argues that the six-month lease term is reasonable under the circumstances. Counsel further states that the copy of the lease agreement was provided by the landlord and "only bore one signature." Counsel asserts that the lack of a signature "does not mean that the agreement is somehow inadequate or defective."

Upon review, counsel's assertions are not persuasive. First of all, the petitioner has not described its anticipated space requirements or even the type of business it will operate. It is not possible to determine, without such information, what amount and type of space would be "sufficient" to satisfy the regulatory requirement. Furthermore, the lease provided by the petitioner is not signed by either party. A lease agreement that has not been executed is not, in fact, adequate proof that the petitioner has secured physical premises for its office. The petitioner has not provided a copy of the executed agreement on appeal, or any other evidence, such as documentation of rent payments made to the landlord, or a letter from the landlord confirming the petitioner's tenancy. 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. at 165.

The petitioner has not submitted evidence on appeal to overcome the director's determination. For this additional reason, the appeal will be dismissed.

The fourth issue to be addressed is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity within one year of commencing operations.

In its letter dated February 23, 2008, the petitioner described the beneficiary's proposed position as follows:

[The beneficiary's] duties as the executive director will include direction and management of [the petitioning company], establishing goals and policies of the organization, exercise wide latitude in discretionary decision-making and day-to-day decisions, supervising personnel, reporting to the parent company and ensuring that transfers of funds are conducted timely.

The petitioner stated that the U.S. company "is set up for exportation and importation purposes as well as commercial real estate transactions." The petitioner did not provide any further information regarding the company, its proposed employees, or the beneficiary's duties.

In the RFE issued on March 6, 2008, the director requested that the petitioner provide information regarding the proposed number of employees in the U.S. company and the types of positions they will occupy as well as an explanation as to how the U.S. business will, within one year, support a managerial or executive position. The director also requested a business plan including specific details as to the business to be conducted, and one, three and five-year projections for business expenses, sales, gross income and profits or losses. Finally, the director requested a copy of the U.S. company's proposed organizational chart describing its anticipated managerial hierarchy and staffing levels within twelve months of establishment, along with brief descriptions of job duties for any employees who will work under the beneficiary's supervision.

In response to the director's request, counsel for the petitioner stated that "although American style feasibility study or business plan were not available in Russia, it is clear that in the current economic climate and the position of American currency, [the foreign entity] shall benefit from opening a subsidiary in the U.S." Counsel stated that the petitioning company would be "an employer an investor and a taxpayer," and therefore beneficial to the American economy.

Counsel further indicated that the U.S. office will initially employ the beneficiary, an art/advertising director, and a secretary/executive assistant in the first "few months" and that "it will grow as the business grows."

In a letter dated March 31, 2008, the foreign entity provided the following information:

1. In the current conditions of the declining U.S. dollar and the situation in the real estate market, [the foreign entity] decided it would be rational to open an office in the U.S. and make investments in the American economy. The decision with respect to the issue was made at the members' meeting, a copy of the minutes of which was submitted earlier.
2. The tentative number of employees at [the petitioning company] is three (3) This number is determined to be reasonable for the first two months if and after the visa requested in this petition is issued, with the plans to expand under the management of the regional manager, advertising manager (art director) and secretary.

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 within one year. In denying the petition, the director emphasized the petitioner's failure to provide information regarding the proposed organizational structure within one year and information regarding the types of employees to be supervised by the beneficiary. The director noted that without job descriptions for the beneficiary's subordinates, it could not be concluded that the beneficiary would be supervising a subordinate staff of professional employees.

On appeal, counsel asserts that the petitioner clearly stated that the beneficiary would supervise the art and advertising director and the secretary/office manager. Counsel asserts that the art director's duties were described and also described in a separate L-1B petition, and that the office manager's duties are self-explanatory and will include "managing the office and secretarial work."

Upon review, the petitioner's assertions and additional evidence are not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity within one year.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

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. 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 therefore. Most importantly, the business plan must be credible.

*Id.*

Here, the petitioner has not adequately described the beneficiary's proposed duties, the type of business to be operated by the U.S. company, or the proposed organizational structure of the U.S. company after the first year of operations.

First, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after one year in operation. Rather, the description provided merely paraphrases the statutory definitions of managerial and executive capacity. See section 101(a)(44)(A) and (B) of the Act. For example, the petitioner indicates that the beneficiary will be "establishing goals and policies of the organization," "exercising wide latitude in discretionary decision-making and day-to-day decision," "supervising personnel," and "reporting to the parent company." 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While it appears that the beneficiary would exercise the requisite authority over the U.S. company as its senior employee, the brief position descriptions provided fall significantly short of establishing that the beneficiary's primary duties would be managerial or executive in nature.

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The petitioner failed to specifically describe its proposed staffing plan beyond the first two to three months of operation, and the record contains no indication as to how many and what types of staff would be employed by the end of the first year of operations. On appeal, counsel emphasized that the beneficiary will supervise an art director and secretary/office manager. However, the petitioner has still not adequately outlined the proposed structure of the U.S. entity as of one year from the date the petition was filed, nor has it sufficiently indicated when employees will be hired or the duties to be performed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner concedes that the foreign entity did not develop a business plan for the new U.S. subsidiary. However, it provided no explanation for its failure to provide the proposed number of employees and the types of positions they will hold or an explanation as to how the proposed business venture will grow to support a managerial or executive position. 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).

Finally, the AAO notes that the petitioner has not adequately explained the type of business the U.S. company will operate. The petitioner initially indicated that it is "set up for exportation and importation purposes as well as commercial real estate transactions." The foreign entity's meeting minutes discussing the establishment of the U.S. company mentions the U.S. real property and construction market. The foreign entity later indicated that the U.S. entity will "make investments in the American economy." Based on these varying descriptions and the lack of any business plan, it is not clear that the petitioner has firmly decided on a course of action for the U.S. office.

As the petitioner fails to explain what tasks the beneficiary and his subordinate staff will perform after the petitioner's first year in operation, or what type of business it will pursue, it cannot be confirmed that the beneficiary will be "primarily" employed as a manager or executive within one year. The minimal evidence submitted does not 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. Accordingly, the appeal will be dismissed.

The final issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign entity. To establish a "qualifying relationship" under the Act and the regulations,

the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

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

The petitioner indicates that it is a wholly-owned subsidiary of the foreign entity, INAL, LLC. In the request for evidence issued on March 6, 2008, the director instructed the petitioner to submit evidence to provide proof of the foreign entity's stock purchase, a copy of the petitioner's articles of incorporation, stock certificates, stock ledger, and Notice of Transaction Pursuant to Corporations Code Section 25102(f).

In response, the petitioner submitted a copy of its articles of incorporation filed with the California Secretary of State on February 6, 2006. The articles indicate that the petitioner is authorized to issue 100 shares of stock. The petitioner submitted a copy of its stock certificate number one, which indicates that 100 shares were issued to the foreign entity, and a copy of the petitioner's stock ledger, which indicates that the foreign entity paid \$500 for the purchase of the 100 shares.

The petitioner also submitted a bank statement showing that the U.S. company received a wire transfer from the foreign entity in the amount of \$20,000 on April 15, 2008. The petitioner submitted a letter dated April 16, 2008 from Wells Fargo Bank which states the following:

This letter is to confirm that a wire transfer was deposited on April 15, 2008 into the account of [the petitioning company]. The owner of the company is [REDACTED] and the account is in good standing with Wells Fargo Bank.

The bank letter indicates that the sender of the wire transfer was "Inal.Inn" and the reference for the funds transfer was "expenses of representative."

The petitioner also submitted a copy of "Authorization for Information in Connection with a Business Account Application," which the petitioner completed in the process of opening a bank account. [REDACTED] is identified as the "owner/key individual." The application indicates the petitioner's business type as "Corporation Type S."

The director denied the petition, concluding that the evidence submitted was insufficient to establish the claimed qualifying relationship. The director noted that the petitioner failed to submit the Notice of Transaction or evidence that the foreign company has paid for the ownership of the shares issued by the petitioner.

Specifically the director stated:

First, without evidence that the foreign company had actually paid for ownership of the shares issued by the petitioner, the petitioner has not established that foreign company is the actual owner of such shares. Second, the petitioner did not explain why it did not comply with the requirement of the California Corporations Code when it failed to notify the California Department of Corporations of the stock issuance to the foreign company. Third, the documents issued by Wells Fargo Bank identify [REDACTED], not the foreign company, as the sole owner of the petitioner. The petitioner did not explain this discrepancy.

On appeal, counsel asserts that the allegation that the foreign entity did not pay for the U.S. company's stock is unfounded. Counsel notes that the petitioner provided evidence that it transferred \$20,000 to the petitioner's account from Russia, and notes that as a new company, the petitioner's stock "has rather symbolic value." Counsel asserts that he is submitting a copy of the petitioner's timely-filed Notice of Transaction with the appeal. However, the AAO notes that no documentary evidence has been submitted with counsel's brief.

Counsel further asserts that the letter issued by Wells Fargo Bank showing [REDACTED] as the owner is simply because [REDACTED] is the company employee who opened the account. Counsel asserts that a mistake by the banking clerk should not outweigh all the evidence to the contrary including the petitioner's articles of incorporation, stock ledger and stock certificate.

Upon review, counsel's assertions are not persuasive. The petitioner has not submitted sufficient evidence on appeal to overcome the director's determination.

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

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*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Here, while the petitioner has submitted a stock certificate and stock ledger indicating that the foreign entity is the sole owner of the company, the petitioner has not adequately documented the foreign entity's purchase of the stock. According to the stock ledger, the foreign entity paid \$500 for 100 shares of the U.S. company's stock on February 6, 2008. There is no evidence that the petitioner has received these funds from the foreign entity. The funds transferred to the petitioner's account in April 2008 were annotated as "expenses of representative," and the AAO will not assume that those funds included payment for the stock purportedly purchased in February 2008.

The AAO acknowledges the petitioner's claim that the petitioner's bank simply made a mistake by identifying ██████████ as the company owner in its letter dated April 16, 2008. However, as noted above, the bank's records also indicate that the petitioner is an "S Corporation." To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and

the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. 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).

Based on the foregoing, the petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

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.