

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

87

**PUBLIC COPY**



File: SRC 05 054 51613 Office: TEXAS SERVICE CENTER Date: DEC 27 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

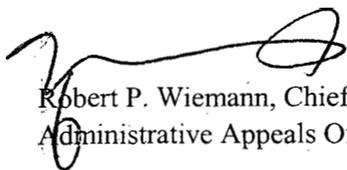
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF THE PETITIONER:

SELF-REPRESENTED

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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. 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 extend the employment of its president/director as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, is engaged in the sale of solar pool heaters and control systems. The beneficiary was initially granted a one-year period in L-1A classification in order to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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, the petitioner disputes the director's decision and asserts that the director mistakenly assumed that since the beneficiary was the only employee as of the date of filing, he was not relieved from performing the non-managerial functions of the business. The petitioner contends that "specific operating procedures and processes had been put in place from the outset that alleviated the beneficiary from carrying out non-managerial duties." The petitioner further emphasizes that the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) "does not stipulate the need for employees to be in place." The petitioner submits a brief and 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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States 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 nonimmigrant visa petition was filed on December 20, 2004. On the Form I-129 petition, the petitioner indicated that the beneficiary would continue to serve as president/director with responsibility to "direct, manage [and] co-ordinate business."

In a letter dated December 16, 2004, the petitioner further described the beneficiary's duties as follows:

[The beneficiary] has been responsible for marketing, managing and directing the company in order to provide services and goods to customers, research business opportunities domestically and internationally and assist in any negotiation and management to bring such opportunities to fruition. In the short period of time since taking on this role with [the petitioner], [the beneficiary] has proved invaluable in establishing [the petitioner] within the market place.

Despite a difficult year for businesses through out [sic] Florida from the aftermath of four hurricanes and particularly at a peak time for the solar industry, [the beneficiary] has established a principal office in Winter Park, Florida, secured two exclusive marketing and servicing territories within Central Florida. . . for a Florida based manufacturing company [REDACTED]. He has established a "Trade Centre" in Central Florida the first of its kind in the region albeit delayed due to the impact of hurricanes on the industry. [The petitioner] with orders on its books through December & January, is now poised to make further inroads into the market place under the direction of [the beneficiary] and with the creation of additional job requirements for two field sales personnel, a warehouse assistant/driver and office assistant will bring the number of direct employees to five within a very short period of time in addition to the employment of sub-contractors.

In addition to this, through local and international marketing campaigns initiated by [the beneficiary], [the petitioner] is having discussions locally with builders to supply both equipment and services and at an international level[.] [The petitioner] are [sic] in the final stages of setting an agreement with a Hungarian alternative energy company to market and import the product range from [the petitioner].

To enhance [the petitioner's] opportunities and further develop within the engineering field, [the beneficiary] has made a request to sit for the State Certified Electrical License for which he is well qualified and which is under full consideration at this time by the State Electrical Licensing Board.

\* \* \*

[The beneficiary] will continue to be responsible for the direction and development of the corporation, marketing of the company and development of an in house product range, further targeting the export market to take the company to its full potential.

The petitioner stated in its December 16, 2004 letter that the petitioner "markets designs, and develops solar derived energy systems to meet customer and client requirements and are exclusive distributors of solar pool heaters and control systems for a Florida based manufacturer." The petitioner further stated that the company "provides equipment and services to a diverse range of clients and customers" and provides "technical support to clients and customers by offering on-site troubleshooting, servicing and repairs."

The petitioner also provided a copy of the beneficiary's resume, which provides the following description of his position as "president and technical director" of the U.S. company:

Responsibilities

- **Marketing**, managing, directing & co-ordinating company operations and personnel in order to maintain and provide goods and services to customers.
- Responsible for overall financial management and profitability.

Activities

- **Establish** principal office for Sales, marketing and promotion of business activities and services.
- **Expand** market and open 'Trade Center' in central Florida as a sales and distribution center for local and internet sales.
- **Management & co-ordination** of specific projects.
- **Communicate** effectively with clients & customers at all levels.
- **Appraise** applications, determine & quote contracts, prices, etc.
- **Quantify & evaluate** subcontractor capabilities and negotiate with suppliers.
- **Provide** technical support to clients & customers.
- **Plan & schedule** sales orders and service work load.
- **Direct** sales of control equipment and products.

- Training of personnel, producing technical documentation & operation manuals ensuring successful integration of specific proposals & applications.

The director issued a request for additional evidence on February 19, 2005. In part, the director instructed the petitioner to submit evidence that the U.S. company had employees as of the date of filing the petition, including copies of state quarterly payroll taxes filed for the previous four quarters. The director noted that "the duties and titles for these employees must demonstrate that these employees relieve [the beneficiary] from non-managerial duties."

In a response dated April 29, 2005, the petitioner confirmed that the beneficiary "was the only person directly involved" with the **petitioning** company when the petition was filed. The petitioner again emphasized the impact of the Florida hurricane season on the company's growth and noted that it had arranged the drop shipment of sales orders direct from the manufacturer to its customers until the company was able to open its trade/distribution center in December 2004. The petitioner stated that since the manufacturer was handling the storage, packing and shipping of the products, the beneficiary was able to "concentrate on establishing [the petitioner] within the market place."

The petitioner further stated that sales of its products are marketed locally and through the company's web site, on-line store and an eBay store. The petitioner indicated that its current staff as of April 2005 included the beneficiary and a general administrative assistant who is responsible for order processing and shipment scheduling. The petitioner also noted that it has immediate vacancies for a bookkeeper/financial officer who will be responsible for invoicing and handling of accounts, and for a warehouse technician who will undertake general warehouse duties and be responsible for packaging, receiving and dispatch of products. Finally, the petitioner stated that it currently utilizes the services of a certified public accountant who "is handling the company accounts, payroll, etc."

The director denied the petition on August 29, 2005 concluding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director observed that the beneficiary was the sole employee of the company as of the date of filing and determined that the petitioner had failed to demonstrate that the beneficiary is relieved of performing non-managerial duties. Thus, the director concluded that the U.S. company had not grown to the point where it could employ the beneficiary in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director misapplied the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D), noting that the regulation "does not stipulate the need for employees to be in place" as a requirement for an extension of a petition that involved a new office. The petitioner asserts that it provided the required statement regarding the staffing of the new operation including the number of employees and types of positions held. The petitioner argues that it has established that the business is able to support the beneficiary in a managerial or executive position and asserts that the fact that there are no employees "should not have been a consideration for denying the petition."

The petitioner further asserts that the director mistakenly assumed that the beneficiary was not relieved from performing non-managerial duties at the time the petition was filed, and must therefore be responsible for

performing a combination of executive, managerial and non-managerial duties. The petitioner contends that at the time of filing, the beneficiary was primarily functioning in an executive capacity, and that "specific operating procedures and processes had been put in place from the outset that alleviated the beneficiary from carrying out non-managerial duties until such times as the business warranted the employment of others to carryout [sic] these duties in house."

Specifically, the petitioner asserts that it had arranged for products to be shipped to its customers directly from the product manufacturer, thus relieving the beneficiary from performing packing, shipping and inventory processing duties. The petitioner states that it has operated an on-line store to obtain and process sales, and that the beneficiary was thus relieved from carrying out non-managerial duties with respect to performing sales, producing invoices, accepting payments and depositing funds. Finally, the petitioner states that the beneficiary's salary was paid by the company's United Kingdom affiliate, thus relieving the beneficiary from performing payroll-related duties. The petitioner provides a summary of actions carried out by the beneficiary between April and December 2004, and asserts that the utilization of internet sales and direct shipping from the manufacturer relieved the beneficiary from undertaking non-managerial work and allowed him "to primarily concentrate on developing and further establishing the organization."

**In support of the appeal**, the petitioner submits, among other documents, a September 12, 2005 letter from a vice president of [REDACTED] who confirms that his company shipped its products directly to the petitioner's customers between the months of May 2004 and November 2004. According to the letter, all product shipments have been sent directly to the petitioner's Minneola, Florida warehouse since November 2004.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. 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 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 show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees, performance of the duties of another type of non-managerial or non-executive position, or other involvement in the operational activities of the company.

Here, the petitioner's description of the beneficiary's job duties fails to establish that he would perform primarily managerial or executive duties under the extended petition. For example, the petitioner stated that the beneficiary has been responsible for "marketing, managing and directing the company in order to provide services and goods to customers," and researching business opportunities. The petitioner further stated that

the beneficiary would continue to be responsible for the "direction and development" of the company, marketing the company, and developing an in-house product range. Based on this vague description, the director was unable to determine what specific role the beneficiary had in business development, market research, promotion, product development and provision of goods and services and could not reasonably determine whether he was directly involved in performing non-qualifying duties associated with these functions, or whether he supervised the performance of these functions through subordinate employees. In addition, the initial description did not identify the number or type of employees supervised by the beneficiary, nor did it indicate what day-to-day tasks the beneficiary performs to "manage and direct" the company's daily operations. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Although the petitioner also submitted a copy of the beneficiary's resume, the job description included therein does not assist in establishing that the beneficiary performs primarily managerial or executive duties. For example, the resume indicates that the beneficiary is responsible for "management & co-ordination of specific projects," but does not clarify the types of projects managed or the actual managerial duties involved. Furthermore, according to the beneficiary's resume, he is responsible for "training of personnel," "quantify[ing] and evaluat[ing] subcontractor capabilities," planning and scheduling sales orders and service workload, and directing "sales of control equipment and products. However, as of the date of filing the petitioner did not claim to have any personnel or subcontractors to sell or service its products, and the probative value of this job description is limited. To the extent that the petitioning company is directly selling and servicing products, the petitioner has not established that anyone other than the beneficiary was performing these duties. In addition, the beneficiary's stated responsibilities for providing technical support to clients, negotiating with suppliers, determining and quoting prices, and communicating with clients and customers have not been shown to be managerial in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because many of the beneficiary's duties, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See e.g., IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible depiction of the beneficiary's role within the organizational hierarchy. As observed by

the director, the record does not demonstrate that the petitioner has a sufficient number of employees who could perform the non-managerial duties associated with operating the petitioner's business on a day-to-day basis.

The petitioner correctly notes on appeal that the regulations do not explicitly require the U.S. company to establish that it has hired employees during the first year of operations. The AAO acknowledges that in certain situations a beneficiary who is the sole employee of a company may qualify as a manager or executive. It is the petitioner's obligation to establish however, through independent documentary evidence that someone other than the beneficiary performs the day-to-day non-managerial and non-executive tasks of the petitioning entity.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing, the petitioner was a one-year-old company that was operating primarily as a distributor of solar heating equipment for swimming pools. Specifically, it had exclusive authorization to market, sell and service swimming pool heating equipment in two Florida counties. As of December 2004, the beneficiary was the petitioner's sole employee. The petitioner reasonably requires employees to market and sell the products, respond to customer inquiries, provide customer service and technical support, maintain the company's day-to-day finances, manage accounts payable and receivable, submit orders to the product manufacturer, and perform routine clerical and administrative tasks associated with operating a small business. Although the petitioner states that its sales activities were handled via its internet stores, the petitioner has not established that all of its sales occur over the internet, nor has it clarified who performs non-managerial duties associated with maintaining the web sites or listing products on the online auction site. Thus, while many of the petitioner's actual sales transactions may be automated, there is no evidence that the beneficiary would be relieved from performing non-qualifying tasks associated with the sales and marketing function.

The petitioner also places great emphasis on the fact that the U.S. company arranged for the manufacturer of its products to ship orders directly to customers, thus relieving the beneficiary from having to pack and ship products and track inventory. However, the evidence submitted on appeal clarifies that this arrangement with the product manufacturer ended in November 2004. As of the date this petition was filed, the petitioning company was responsible for packaging and shipping products to its customers from its own warehouse. It is reasonable to assume, and has not been shown otherwise, that the beneficiary, as the only employee of the

petitioning company, would have been responsible for performing these non-qualifying duties at the time of filing. On appeal, the petitioner states that it is currently using the services of a certified public accountant to handle the company's accounts; however, there is no evidence that the company employed the accountant at the time the petition was filed, and the petitioner's December 2004 profit and loss statement shows no fees paid for professional services. 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)).

Furthermore, although the petitioner disputes the director's reliance on the petitioner's staffing levels, there is no indication in this matter that the director did not consider the reasonable needs of the organization. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was unable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Contrary to the petitioner's assertions, the record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, marketing, advertising, customer service, financial, administrative and clerical functions.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner asserts on appeal that the beneficiary functions primarily in an executive capacity, and the fact that there are no employees does not detract from the fact that his duties are primarily executive in nature. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex 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.* In this case, while the beneficiary

evidently exercises discretion over the business as its sole employee, the petitioner has not established that his primary duties are the high-level duties contemplated by the statutory definition.

Although the petitioner appears to have hired an administrative employee subsequent to the filing of the petition and claims that the U.S. company will be staffed in the near future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO is sympathetic to the petitioner's claim that its business was hampered by a succession of hurricanes that impacted the state of Florida in 2004. However, notwithstanding any difficulties, the petitioner appears to have been doing business continually since the beneficiary's arrival in the United States and will not be excused from the regulatory requirement that the company support the beneficiary in a managerial or executive capacity.

While the AAO recognizes that the beneficiary exercises managerial authority over the day-to-day affairs of the business, the fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The actual duties themselves reveal the true nature of the employment. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record as presently constituted does not contain evidence of a qualifying relationship between the foreign petitioner and the U.S. entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims to be an affiliate of ██████████, located in the United Kingdom, based on common ownership and control by the beneficiary. Specifically, the petitioner states that the beneficiary owns a 50 percent interest in each company and in fact controls both companies. In support of the petition, the petitioner submitted the U.S. company's stock certificates numbers one and two, which indicate that the company's 1,000 issued shares are owned in equal proportions by the beneficiary and his spouse. With respect to the foreign entity, the petitioner submitted the foreign entity's United Kingdom Form 363s Annual Return for the year ended on May 31, 2004 which confirms that the company has issued 5,000 shares of stock, and appears to show at section 4, Details of Shareholders, that 500 shares of stock were transferred from the beneficiary's spouse to him on June 15, 2003, thus giving him a total shareholding of 2,500 shares.

However, the petitioner also submitted the foreign entity's "Director's Report and Financial Statements for the Year Ended 31 May 2004," which identifies the beneficiary as the holder of only 2,000 of the company's

5,000 issued shares. The same document indicates in the notes to the financial statements, at note 14 "Controlling interest," that "there is no one person with a majority shareholding in the company." 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). The record does not persuasively support the petitioner's claim that the beneficiary holds a 50 percent controlling interest in the foreign entity, and thus the petitioner has not established that the petitioner and the foreign entity are affiliates. 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 Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.