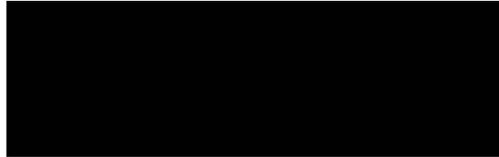


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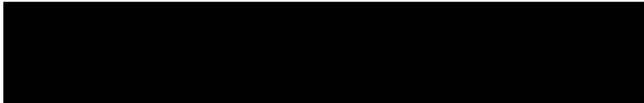
**U.S. Citizenship
and Immigration
Services**

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D-7

File: LIN 03 184 50897 Office: NEBRASKA SERVICE CENTER Date: **MAY 04 2006**

IN RE: Petitioner: 
Beneficiary:

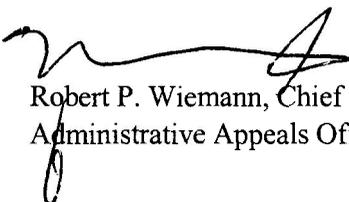
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 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 is a Missouri corporation engaged in the export and sale of radio and television broadcast equipment. It claims to be an affiliate of Broadcast World Philippines Systems, Inc., located in Makati City, Philippines. The petitioner seeks to employ the beneficiary as its vice president of finance for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would 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, counsel for the petitioner asserts that the director “misstates and mixes the distinction between the manager of a function with that of other managers and relies upon unsupported assertions of Congressional intent for authority.” Counsel further contends that the director’s decision suggests “an effort by the Director to substitute his business judgment for that of the petitioner.” Counsel submits a brief 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.

At issue in the present matter is whether the beneficiary will be employed by the United States entity in a managerial capacity. Specifically, counsel clarifies on appeal that the beneficiary will serve as a manager of an "essential function" within the petitioner's 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. 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.

The nonimmigrant petition was filed on May 21, 2003. In a May 14, 2003 letter appended to the petition, the petitioner addressed the beneficiary's proposed job duties and reason for her transfer to the U.S. from the claimed foreign affiliate:

[The petitioner] now seeks to bring [the beneficiary] to its Illinois office to oversee the management of its finance function and coordinate the finances of the two affiliates. Her presence in the United States will provide for the more speedy resolution of financial issues relating to existing contracts and also quicker consummation of new ventures.

As Vice President of Finance, [the beneficiary] will have over-all responsibility for the management of the corporation's finances. This will include the same general duties described above which she has been carrying out for [the foreign entity] for these past nine years. As stated above, the primary purpose in seeking to transfer [the beneficiary] to [the petitioner] is to enable [the foreign entity] to more quickly and efficiently deal with the types

of complex financial problems that arise in large contracts. In this respect, [the beneficiary] will be performing the duties typical of a chief financial officer of a corporation, whose responsibilities normally include the raising of capital as well as the planning, managing and evaluation of major contracts.

[The beneficiary] will be overseeing the corporation's finance strategy for the United States She will work in tandem with our present C.P.A. firm . . . and also with corporate counsel She will also work with me, the corporation's president, to oversee the development of this new, over-all strategy for insuring the better satisfaction of our existing customer base and the rapid expansion of future business. Once [the beneficiary's] transfer has been approved a support staff of three to four new employees will be hired to assist her, with a view to one of them eventually becoming a manager. This is the same staffing arrangement that [the beneficiary] currently has with [the foreign entity].

The success of [the petitioner's] ability to coordinate its expanded financial activities depends upon the use of a unified system of procedures. It will be necessary for [the beneficiary] to review existing [U.S. company] procedures, decide if any adjustments are justified, and then get the budget and time-line approved by the Board. While these adjustments are being done, the plan will be tested on a small scale with in-put from managers at [the foreign entity]. Next, feedback will need to be analyzed to see if further modifications are required; the new system will again be tested; new staff will be trained and the program finally launched. . . .

The petitioner noted that the beneficiary's financial duties with the foreign entity have included: supervising and managing all important financial functions, including all accounting functions and providing financial information; making recommendations to the Board regarding financial control issues; providing advice concerning business acquisitions and related financial analysis; and negotiating any complex financial arrangements with suppliers and customers. The petitioner also submitted an April 30, 2003 letter from the vice president, sales and marketing of the foreign entity, who stated that the beneficiary would be transferred to the U.S. due to the importance of handling financial dealing with suppliers "with dispatch." The vice president stated "these contracts tend to be very complex and time has proven the inefficiency of attempting to manage them from halfway around the world."

The I-129 petition showed that that the petitioner was established in 1998, had one employee at the time the petition was filed, and reported gross annual income of \$301,876.

On August 7, 2003, the director issued a request for evidence instructing the petitioner to submit, among other things, additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity in the United States. Specifically, the director requested: (1) a detailed description of the beneficiary's proposed actual daily duties as well as an estimate of the percentage of time the beneficiary will dedicate to each of her daily duties in the U.S.; and (2) a detailed organizational chart of the U.S. entity showing the beneficiary's proposed position in relation to others in the company and including the names of all "actual existing" departments, teams, employees, their titles and a description of their job duties. The director cited the statutory definitions of managerial and executive capacity and advised the petitioner that it

must submit evidence to establish that the beneficiary qualifies under all four criteria for either definition. The director also requested additional evidence to establish that the U.S. entity has employees, including copies of its IRS Forms 941, U.S. Federal Quarterly Tax Return, and Forms W-2, Wage and Tax Statement as evidence of wages paid to employees.

The petitioner submitted a detailed response comprising nine volumes of documentation on October 23, 2003. The petitioner provided a description of the beneficiary's duties with the foreign entity and indicated that her role with the petitioner would involve the same duties and allocation of time, described as follows:

- Supervise and manage all important financial functions, including all accounting functions described below, providing financial information that details company's assets, liabilities, earnings and expenses (60%)
Financial Accounting. Prepare balance and income statements for monthly and annual reports; maintain payroll system and data base to computerize operations; research and prepare necessary documentation to attract capital investment.
Inventory Planning and Management. Maintain data base for each item of inventory as a means of controlling expenses and improving service to customers; determine optimum amount of respective inventories.
Internal Accounting Control. Maintain the accuracy and reliability of accounting records for the purpose of safeguarding assets and improving the overall efficiency of operations.
Cost Accounting. Determine the variable and fixed costs of the business for weekly, monthly and annual analysis, and determine break even point for each; implement product cost as primary pricing tool; perform cost-benefit analysis for each product, as basis for determining profitability.
Budget System. Assist Board in decision-making process regarding finances and operations; organize monthly business performance meetings. Provide advice concerning business acquisitions and related financial analysis.
- Negotiate any complex financial arrangement with suppliers and customers. (30%)
- Make recommendations to the Board concerning issues of control, in order to uphold the integrity of the company's accounting system. (5%)
- Provide advice concerning business acquisitions and related financial matters. (5%)

The petitioner stated that the beneficiary would perform the same duties in the United States, with the following additional duties:

- Because of the transformation of [the petitioner] from a one-person operation to a fully organized business structure, her job will be to fill the finance positions needed to grow the organization.
- Once started, she will take full control of all important financial functions as describe[s] above, such as the providing of financial information in detail as to the company's overall assets, liabilities, earnings and expenses.
- After the new Board has been duly organized, she shall disclose in Board meetings her full assessment of the over-all financial standing of the company.

- She will provide and give advice about business acquisitions and related financial analysis.
- She will negotiate on all complex financial arrangements with suppliers and customers.
- She will make recommendations to the Board regarding issues of control as to uphold the integrity of the company's accounting system.

The petitioner confirmed that its only current employee is the president and chief executive officer, and the petitioner's wage records show that the company has not previously paid salaries or wages to other employees since its establishment in 1998. The petitioner's organizational chart depicts the president over the beneficiary and a corporate lawyer. The chart shows a projected finance and administration manager position under the beneficiary, who would in turn supervise an administrative assistant, a finance assistant, a property and stock custodian, a purchasing employee, and a shipping employee. The organizational chart also includes an engineering department with four proposed positions, and a sales and marketing department with six proposed positions.

The director denied the petition on April 21, 2004, concluding that the petitioner had not established that the beneficiary would be employed by the United States entity in a qualifying managerial or executive capacity. The director noted that the beneficiary would be one of only two employees of the U.S. company, along with the president and CEO who the petitioner claimed was also employed by the foreign entity. The director found that the beneficiary "will simply be an employee of the US entity performing the day to day duties and responsibilities of running the US entity out of the small bedroom/office of the CEO's home." The director went on to state:

In addition, as the sole employee, her primary assignment cannot be supervising a subordinate staff of professional, managerial, supervisory personnel or main function of the entity. The Service is not persuaded that operating a company in practically its entirety constitutes managing an essential function within an organization as set forth at §101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not demonstrated that the beneficiary would operate at a senior level within an organizational hierarchy as required for a manager of an essential function. The Service is not persuaded that Congress intended this provision to serve for self-employed individuals or entrepreneurs. . . .

The director acknowledged that the U.S. entity utilizes the services of an attorney and an accountant, but noted that these individuals are outside contractors, leaving the U.S. entity with no employees to perform its operational daily duties and functions. The director found no comprehensive description of the beneficiary's duties that persuasively demonstrates that she would primarily perform managerial or executive duties, and concluded that the U.S. company does not have the organizational complexity to warrant the services of an additional executive or managerial position.

On appeal, counsel asserts that the beneficiary qualifies as a manager pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(B) as someone who manages an essential function within the organization, functions at a senior level with respect to the function managed and exercises discretion over the day-to-day operations of the function for which she will have authority. Counsel asserts that the director "misstates and mixes the

distinction between the manager of a function with that of other managers” and claims that the director did not consider the detailed job descriptions establishing the beneficiary will be the chief financial officer for the petitioner. Counsel further claims that the fact that the president, chief executive officer and chairman of the board of directors of the foreign entity is located in the United States establishes that the petitioner “is not a mere office but the actual headquarters for an international organization.” Counsel emphasizes that the petitioner submitted extensive financial documentation establishing the volume and complexity of its business, and asserts that the evidence shows that the beneficiary will not serve as a chief financial officer “in name alone.”

Counsel objects to the director’s reasoning that the beneficiary will not serve in a senior level in the company due to the absence of personnel to perform the company’s operational daily duties and functions. Counsel contends that the director “mixes the definition of function manager with that of other managers by lumping the performance of daily operational duties with that of managing the operations of a function. In doing so the Director creates a requirement that the function manager directly supervise employees that does not exist in the regulations.” Counsel contends that the director fails to acknowledge that the petitioner’s president has been managing and will continue to manage the day-to-day operations of the petitioner while the beneficiary will only be managing the finance function. Counsel further notes that the director’s underlying objection appears to be the fact that the petitioner’s only other employee is its president and objects to the director’s requirement that the beneficiary’s supporting staff “be hired and already be in place before ‘L’ classification could be granted.”

Counsel notes the director’s reference to “supposed Congressional intent to limit the use of ‘this provision for self-employed individuals or entrepreneurs,’” observing that the director did not support this statement, and further emphasizing that the beneficiary is neither a self-employed individual nor an entrepreneur. Counsel asserts that both the U.S. and foreign entities are “stable, viable companies and beyond the entrepreneurial phase of development,” and notes that the beneficiary “is coming to manage a critical function, not to be directly involved in expanding the business.

Finally, counsel asserts that director failed to consider the complexity of the petitioner’s business as a supplier of radio and television broadcast equipment, and the “business reality” behind the beneficiary’s transfer to the United States. Counsel asserts that “[i]n disregarding the business context of the finance function from the foreign affiliate to the petitioner, the Director takes on the role of management analyst, substituting his business judgment for that of corporate decisions makers.” Counsel claims that the petitioner explained that the beneficiary would be transferred to the U.S. to allow “more speedy resolution” of financial issues relating to existing contracts and “quicker consummation of new ventures.” Counsel further notes that most of the foreign entity’s radio and television broadcast equipment is purchased from U.S. manufacturers and it is more efficient to have that work done by someone within the United States. Counsel contends that the director focused on the small size of the U.S. company, but overlooked “the fact that the petitioner and the foreign affiliate are really one and the same operation.”

Counsel’s assertions are not persuasive. Upon reviewing the petition and the evidence, the petitioner has not established that the beneficiary has been or will be employed in a managerial 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.* While the petitioner, through counsel, has clarified on appeal that the beneficiary will serve in a managerial capacity, specifically as a “function manager,” the petitioner’s description of the beneficiary’s duties is general. It is not possible to determine from the description provided whether the beneficiary’s duties are primarily managerial duties or whether the beneficiary’s duties will involve the routine daily tasks associated with accounting, data collection, and financial analysis that are inherent in the beneficiary’s responsibility for “managing all important financial functions.” The position description provided, considered within the context of the totality of the record, does not sufficiently demonstrate that the beneficiary’s tasks will be the high-level responsibilities that are specified in the definition of managerial capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

For example, the petitioner states that the beneficiary’s duties in the United States will be essentially the same as those she performs abroad, where 60 percent of the beneficiary’s time is devoted to supervising and managing all important financial functions, including preparing balance and income statements, researching and preparing documentation needed to attract capital investment, maintaining an inventory database, maintaining the accuracy and reliability of accounting records, determining the variable and fixed costs of business on a weekly, monthly and annual analysis and performing cost-benefit analysis for different products. While the foreign entity employs lower-level staff in its finance department who would presumably perform some of these non-qualifying duties associated with the petitioner’s financial function, it is evident from the record that much of the beneficiary’s time in the United States will necessarily be devoted to these non-qualifying tasks upon her transfer to the petitioning organization, which currently has one employee. The petitioner did not provide job descriptions or a projected hiring timeline for the beneficiary’s proposed subordinates, nor did it indicate who would perform all of the day-to-day finance and accounting tasks in the United States prior to the hiring of additional employees to staff the United States office, if not the beneficiary. 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)). Therefore, these duties, which account for more than half of the beneficiary’s time, cannot be classified as managerial in nature.

Similarly, the petitioner indicates that the beneficiary will devote 30 percent of her time to negotiating complex financial arrangements with customers and suppliers. In fact, the petitioner initially indicated that the primary reason for her transfer was to enable the company to more quickly and efficiently deal with complex financial problems arising in large contracts. While the petitioner emphasizes the “complexity” of its business, the record fails to establish what specific managerial duties the beneficiary performs to negotiate financing arrangements or otherwise clarify how responsibility for structuring purchase agreements rises to the level of managerial capacity. Accordingly, the petitioner has not established that the beneficiary’s responsibility for negotiating financial arrangements is a managerial duty.

Finally, the petitioner indicates that in addition to the duties that will purportedly require 100 percent of her time, the beneficiary will be responsible for the company’s finance strategy in the United States and will “oversee the development of this new, over-all strategy for . . . the rapid expansion of future business.” The

petitioner stated that the beneficiary will review existing finance procedures, establish a budget and timeline for Board approval, adjust procedures, test a plan on a small scale, analyze feedback, test a “new system,” train “new staff” and launch “the program.” The petitioner has not provided any further evidence or explanation regarding this apparent overhaul of its financial function, information regarding the above referenced “strategy,” “new system,” or “program,” a business plan outlining the expansion of the U.S. company, or any other evidence related to the petitioner’s claim that it intends to transform the company “from a one-person operation to a fully-organized business structure.” Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Overall, the petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. As noted by the director, the petitioning company has one employee. The petitioner has provided a description of job duties and a breakdown of the amount of time the beneficiary will allocate to her various duties with the foreign entity, where the beneficiary supervises a subordinate staff. The petitioner indicates that the beneficiary would perform the same duties for the U.S. Company. However, the record does not support the petitioner’s assertion that she would reasonably perform the same duties for the petitioning enterprise, which, while apparently a viable company, remains in a preliminary stage of organizational development. Collectively, this brings into question the breakdown of the beneficiary’s job duties, and how much of the beneficiary’s time will actually be devoted to the claimed managerial 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 petitioner bears the burden of documenting what portion of the beneficiary’s duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The AAO will next turn to counsel’s primary argument that the beneficiary qualifies for L-1A classification as a “function manager.” The term “function manager” applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an “essential function” within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term “essential function” is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must provide a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary’s daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner’s description of the beneficiary’s daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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).

The AAO acknowledges counsel’s assertion that the director misstated the “functional manager” standard by requiring that the beneficiary have a subordinate staff, noting that the function manager classification was creating specifically for a beneficiary who will be managing a function, will not (immediately) supervise

other employees, and who will exercise discretion over the day-to-day operations of the function. In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The addition of the concept of a "function manager" by the Immigration Act of 1990 (IMMACT 90) simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish management capacity. However, the statute continues to require that a beneficiary "primarily" perform in a managerial capacity. See sections 101(a)(44)(A) of the Act. Moreover, federal courts continue to give deference to CIS's interpretation of IMMACT 90 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305(Table), 1995 WL 576839 at *5 (9th Cir. 1995)(unpublished) (citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24; *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991).

As discussed above, the petitioner has provided a job description that fails to meaningfully convey the amount of time the beneficiary will devote to managerial duties related to managing the assigned function. 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 perspective of the beneficiary's role within the organizational hierarchy. Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees who would relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner in this matter has not adequately explained who would relieve the beneficiary from performing all the day-to-day operational duties associated with the petitioner's finance function, including research, data collection, database maintenance, analysis, and preparation of routine financial documents and reports. 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.

Furthermore, the actual nature of the petitioner's business operations remains largely unexplained, making it difficult to evaluate the proposed job duties within the appropriate context. Considering that the company has been operating with one employee for five years, the petitioner's unsupported statements that it requires the beneficiary's services as part of its "transformation" and submission of an organizational chart with seventeen proposed positions is simply insufficient to establish that the beneficiary would realistically be performing

primarily managerial duties upon her transfer to the United States. Further, the petitioner initially stated that the beneficiary would eventually hire a staff of three to four employees and subsequently submitted a proposed organizational chart depicting six subordinates. 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 proposed organizational chart also depicts an engineering division and a sales and marketing division, while the record shows that the U.S. company's business to date has been limited to facilitating purchases of equipment from U.S. manufacturers on behalf of the foreign entity. Again, the absence of a credible business plan detailing this proposed expansion prohibits a finding that the petitioner would require the beneficiary's services in a managerial capacity. While the petitioner's proposed organizational chart is impressive, it is not corroborated by any facts or evidence in the record.

For these reasons, the AAO concurs with the director's conclusion that the record does not establish the petitioner's need for the beneficiary's services in a managerial capacity. Although counsel contends that the director substituted his judgment for the business judgment of the petitioner, and placed undue emphasis on the size of the petitioning organization, it is the petitioner's burden to establish that the beneficiary will be performing primarily managerial duties as of the date the petition is filed. Counsel correctly observes 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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS 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).

For the reasons discussed above, the record does not establish that a majority of the beneficiary's duties will be managing an essential function of the petitioning organization. The record indicates that a preponderance of the beneficiary's duties will, at least initially, be operational duties related to the petitioner's finance function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Although the petitioner claims that the beneficiary's department will be staffed in the 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). Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a managerial capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish the existence of a qualifying relationship between the U.S. company and the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i). The petitioner claims to be an affiliate of the foreign entity based on common ownership by the same group of eight individuals, with each individual owning and controlling approximately the same share or

proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). The petitioner stated in its May 14, 2003 letter that a total of 100 shares of stock had been issued by the petitioner, and noted that initially, the company issued all 100 shares to the company's president. The petitioner stated that the stock was issued to its president "as a convenience" at the time of incorporation, but was later transferred "to reflect the true equity ownership of the corporation." The petitioner submitted stock certificates numbers one through eight for the foreign corporation, all dated January 28, 1995, and stock certificates numbers two through nine for the U.S. company, all dated December 31, 2001. The stock certificates show ownership of each company by the same eight individuals in the same proportions. The petitioner did not provide a copy of its stock certificate number one or its stock ledger.

In his August 7, 2003 request for evidence, the director requested "the actual legally binding documents or contracts showing that petitioner is controlled and owned by the same individuals as the foreign entity. Provide credible legal evidence." The director noted that the evidence submitted was insufficient to substantiate that the legally required business relationship, ownership and/or control exists between the two entities.

In response, the petitioner submitted color photocopies of both sides of its stock certificates numbers two through nine and a notarized certificate from its president stating that the stock certificates represented the holders of record of all of the company's issued and outstanding stock. The petitioner also submitted color photocopies of the foreign entity's stock certificates and a similar notarized certification from the company president. The petitioner's response to the request for evidence also included the company's IRS Forms 1120, U.S. Corporation Income Tax Return, for the 2001 and 2002 years, both of which indicate at Schedule K that the U.S. company has a single shareholder, the company president.

The evidence does not establish that the petitioner has a qualifying relationship with the foreign entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (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 or member 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, or equivalent documents, must also be examined to determine the total number of shares or membership units issued, the exact number issued to each shareholder or member, and the subsequent percentage ownership and its effect on control of the company. Additionally, a petitioning company must disclose all agreements relating to 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.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

In this matter, the petitioner's stock certificates are insufficient to establish the claimed affiliate relationship. First, the petitioner's Forms 1120 indicate the petitioner is wholly owned by the petitioner's president, thus directly contradicting the claim that the company is owned by the same eight shareholders who own the foreign entity. 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). Further, the petitioner has not provided a copy of its stock certificate number one nor provided any evidence that the certificate has in fact been canceled. This evidence is critical, because if the certificate is still valid, the president would remain the majority owner of the company and there would be no qualifying affiliate relationship between the two companies. 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. Absent additional evidence, including, but not limited to, the missing stock certificate, the petitioner's stock transfer ledger, the minutes of board meetings addressing the claimed re-distribution of the petitioner's stock, or other documents relating to the acquisition of stock by the claimed shareholders, the AAO cannot conclude that the petitioner and the foreign entity are affiliates as defined in the regulations. For this additional reason, the petition cannot be approved.

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 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.