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File: EAC 03 149 53776 Office: VERMONT SERVICE CENTER

Date: NOV 03 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)

IN 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, Vermont 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 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 corporation organized in the State of New York that claims to be engaged in the wholesale import and sale of diamonds. The petitioner claims that it is the affiliate of Kanani Gems, located in Surat, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that (1) the petitioner and the organization which employed the beneficiary in India were qualifying organizations, or (2) 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, counsel for the petitioner asserts that the director's conclusions are contrary to the weight of the evidence submitted. In support of this assertion, counsel for the petitioner submits a brief.

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 first issue in this matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- (J) "Branch" means an operating division or office of the same organization housed in a different location.

- (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.
- (L) "Affiliate" means
- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or
 - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claims that the Indian entity and the U.S. entity are affiliates. Specifically, the petitioner asserts that both entities are equally owned and controlled by the same three individuals, namely, the beneficiary, [REDACTED] and [REDACTED]

With the initial petition, the petitioner indicated that the foreign entity was a partnership created in 1998 and owned by the beneficiary, [REDACTED] and [REDACTED]. No evidence of their ownership of the foreign partnership was submitted. The petitioner stated that the U.S. petitioner was a corporation organized under the laws of the State of New York, but likewise did not submit any corporate documentation establishing its ownership. Although no evidence was submitted in this regard, the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2002, indicated on both Schedules E and K that the beneficiary was the 100% owner of the corporation. This return was dated February 28, 2003

Noting that this claim on Form 1120 directly contradicted the petitioner's claim that both entities were equally owned and controlled by the same three individuals, the director issued a request for additional evidence on April 23, 2003. In the request, the director specifically required the petitioner to submit evidence that definitively established its qualifying relationship with the Indian company. On July 9, 2003, the petitioner submitted a detailed response to the director's request which was accompanied by numerous corporate

documents for the U.S. and Indian entities, as well as additional documentary evidence in support of the claimed affiliation.

Specifically, with regard to the U.S. entity, the petitioner submitted its Articles of Incorporation, stock certificates dated January 9, 2002 evidencing the ownership of shares by the three named individuals, meeting minutes, with Appendix A evidencing the equal distribution of shares among the three individuals, and the petitioner's stock ledger evidencing the distribution of shares as set forth in the meeting minutes and on the share certificates. Additionally, a copy of the petitioner's Form 1120X, Amended U.S. Corporation Income Tax Return for 2002, signed and dated on May 8, 2003 and received by the Internal Revenue Service on June 16, 2003, amended Schedules E and K to reflect that the U.S. entity was in fact owned by three individuals instead of one. With regard to the foreign entity, the partnership deed, dated January 7, 1998, was submitted, which demonstrated the equal distribution of shares among the same three individuals.

Upon review of the evidence submitted, the director concluded that the petitioner had failed to establish that the owners of the Indian entity are the same group of individuals that own the U.S. entity, each owning and controlling the same approximate share or proportion of both entities as required by the regulations. Specifically, the director noted a sentence in the meeting minutes which indicated that "a certificate representing 200 shares of the Corporation" would be issued. The director further noted that the use of the term "shareholder," as opposed to "shareholders," indicated that one individual owned all outstanding shares of the U.S. entity. The AAO disagrees.

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, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

In this matter, the petitioner provided all necessary documentation to establish the ownership of both entities. The petitioner submitted three stock certificates dated January 9, 2002, which issued equal shares to each of

the three named individuals. The petitioner's corporate stock ledger and meeting minutes corroborate these claims of ownership. In addition, the petitioner submitted a copy of its amended income tax return, noting that this ownership discrepancy had been based on an error in the initial return.

It appears, therefore, that the petitioner did in fact establish that a qualifying relationship existed between the parties. Consequently, the director's decision pertaining to this issue is hereby withdrawn.

The second issue in the present matter is whether 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.

In a letter from the petitioner dated April 3, 2003, the beneficiary's duties were described as follows:

[The beneficiary] has used and will continue to utilize his extensive managerial/executive experience and his in-depth knowledge in [the petitioner's] [p]olicies and procedures to oversee our growing staff. [The beneficiary] would continue to be primarily responsible for planning, coordinating and directing the activities of [the petitioner] in the United States. He would also continue to set the policies and goals of the business, following head office policies, procedures, and guidelines. [The beneficiary] will report directly to his partners [in India].

Specifically, [the beneficiary] would maintain the following managerial and executive duties:

1. Manage the operations of our New York, Los Angeles and Atlanta offices;
2. Be responsible for the fiscal integrity of all offices in the United States;
3. Review budgets submitted by officers and oversee the managerial staff of all American offices;
4. Oversee the training and supervision of subordinate staff;
5. Review production of each office to be sure it meets established company's daily and monthly business goals;
6. Oversee the preparation of reports for [the foreign entity] as to company's operations progress and plan modifications and new policies to be implemented by the company;
7. Oversee all operational procedures and implementation of changes following Head office guidelines;
8. Articulate and formulate all business goals and plans for the company in reference to his constant review of operations in our three offices in the United States;
9. Articulate and establish and coordinate control policies regarding company's business operations for each of our offices in the United States as it extends to credit advances, purchases, and staffing;
10. Manage, create and develop internal controls in compliance with Head office controls for each of our offices in the United States; and,
11. Manage and develop management/business plan for [the petitioner] in the United States in reference to its expansion of operations and client base.

Additionally, the petitioner submitted an organizational chart, which indicated that the beneficiary was responsible for overseeing the head office in New York, as well as the branch offices located in Los Angeles and Atlanta. The petitioner's quarterly tax return for the quarter ending December 31, 2002 indicated that the petitioner employed the beneficiary [REDACTED] and [REDACTED] during that period. According to the organizational chart [REDACTED] was employed as the banking and accounting secretary, whereas [REDACTED] was employed under the title of "sales and administrator."

On April 23, 2003, the director requested additional evidence. Specifically, the director requested a definitive statement regarding the employment of the beneficiary, including a more detailed description of his duties, the percentage of time he devoted to each duty, the level of authority held by the beneficiary, and his position in the petitioner's organizational hierarchy. The director also requested a similar overview of the duties of all other employees and/or contractors along with their titles, ranks, and educational background within the petitioner's organization. The director also noted discrepancies with regard to the petitioner's staff, specifically in that 8 employees were claimed, but there were only two W-2 forms submitted for 2002. The director also requested clarification with regard to the retention of contractual employees.

In response, counsel for the petitioner submitted a letter dated July 3, 2003. Counsel stated that there were currently six persons employed on a full-time basis by the petitioner, five of which were listed on the petitioner's quarterly tax return for the first quarter of 2003 ending on March 31, 2003. The petitioner indicated that since the first quarter, a sixth employee [REDACTED] had been hired. The petitioner further indicated that it retained three independent sales representatives in the New York office, and in support thereof, copies of their paychecks were submitted.

The petitioner also submitted an updated description of the beneficiary's duties, which included the percentage of time he devoted to each duty. The petitioner stated:

Approximately 20% of [the beneficiary's] week is spent reviewing the voluminous financial records and data of the company's performance. This includes sales, bank documents, accounts payable and accounts receivable data, inventory data, and expenses. This review will be used to generate the [numbers] for the company budget, establish sales quotas and to ensure payrolls.

[The beneficiary] is the main liaison between [the petitioner] and [the foreign entity], supplying the parent company with financial reports on sales activities and operations. About 15% of [the beneficiary's] time is spent corresponding and communicating with the Indian company on a daily basis to discuss operations and trends. He is responsible for the business goals of the American Company, ensuring all goals are met.

An additional 25% of the work week is spent reviewing and endorsing diamond orders, including pricing, terms of payment, credit, and delivery issues, and communicating with customers for feedback on our services; demonstrating our customer service and attempting to improve it, as well.

Human resources are only a small role in [the beneficiary's] day-to-day work. He probably spends less than 5% of his week on this function. However, he will make decisions whether to increase, terminate and promote staff and decisions concerning salary evaluation. The personnel hiring or discharge decisions are based on financial reports after financial records, purchase orders, marketing information and other operating factors are reviewed and considered.

On average, [the beneficiary] spends 20% of the week devising marketing strategies for securing new accounts throughout the Americas (particularly the United States), company creditworthiness, reviewing trade publications and reports on rating changes. For example, the beneficiary reviews the "Red Book," which contains the weekly New Names Bulletin of diamond and jewelry companies. The book is published by the Jewelers Board of Trade (JBT). The Red Book also contains credit rating information that is used by [the beneficiary] to make decisions on credit. The credit rating information specifies, among other things, the size of the company and its paying habits. JBT's "Frequent Inquiry Service" is also reviewed by [the beneficiary]. [The beneficiary] also is instrumental in developing clientele by going to trade shows, which are held periodically but each show normally lasts two to three days.

[The beneficiary] typically spends less than 10% of the workweek making decisions on complex sales transactions. This typically happens when the purchasing manager is speaking to a sales agent and asks to speak to the person "who makes the final decision." Rather than waste valuable time, the sales representative will refer the matter to [the beneficiary]. When possible, [the beneficiary] will then converse with the purchasing manager directly in front of the sales agent so that s/he can better handle a situation of this nature should it come up on the future, leaving only the final decision whether to close the sale or not with the president.

[The beneficiary] is not involved with the usual day-to-day sale of our diamond products. It is [the beneficiary's] discretionary decision-making with respect to such issues as setting product prices, decisions on personnel, decisions on whether to make third party purchases, decisions on marketing strategy and decisions on general company directions, all of which affects our day-to-day operations, that qualifies him as a manager/executive.

Finally, the updated organizational chart indicated that in the New York office, the beneficiary oversaw the following:

Banking and Accounting Secretary
Sales and Marketing Manager
Sales Agents (3)

With regard to the proposed Atlanta office, an employee with the title "sales and administration" was listed. Finally, the Los Angeles office identified an employee with the title "accounting and banking administration" and sales, who was not hired by the petitioner until after the filing of the extension request.

On July 21, 2003, the director denied the petition. The director determined that the beneficiary had not acted in a primarily managerial or executive capacity during the previous year, and that the petitioner had not yet reached the point where it could support the beneficiary in such a capacity. Specifically, despite the numerous employees and contractors under the beneficiary's supervision, the director concluded that based on the nature of the beneficiary's duties and the duties of his subordinates, it appeared that he was largely involved in the sales and marketing aspects of the petitioner as opposed to primarily managerial or executive duties.

On appeal, newly-retained counsel for the petitioner submits additional arguments addressing the director's basis for the denial. No additional documentation was submitted in support of the appeal.

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.* In this case, the initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties. As previously stated, the initial evidence submitted was insufficient to warrant approval, and consequently, the director requested more specific information, including a more specific description of the beneficiary's duties. The petitioner responded to this request with a breakdown of the percentage of time devoted to each duty.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The description of duties provided in response to the request for evidence also provided the percentages of time the beneficiary spent on each identified task in an average workweek. 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 documents the proportion of the beneficiary's duties that are devoted to hands-on sales and marketing tasks, and upon review of the description of these duties and the duties of the subordinate salespersons, it appears that the beneficiary's primary obligations are performing the sales and marketing functions of the petitioner. While it is evident that the beneficiary has a subordinate staff of employees, the current employment of the three sales representatives is not established, as the last evidence of wages paid to these persons was in 2002. In the New York office, therefore, the evidence shows that only a sales and marketing manager and a secretary are verifiable on staff. Similarly, the Los Angeles office employed only the accounting and banking administrator at the time of filing, and finally, although the Atlanta office

indicates the employment of a sales and administration staff member, that office has yet to commence business.¹

The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, and indicates, for example, that 25% of his week is spent reviewing orders, 20% of his week is spent handling payroll and budget issues, and another 20% is spent devising marketing strategies. Finally, although less than 10% of his workweek is spent making decisions on complex sales transactions and personally attending trade shows, this figure, when added with the other percentages, totals approximately three-quarters of the beneficiary's week. These identified duties are not by definition managerial. Instead, they are duties that would normally be delegated to subordinate employees. For example, the beneficiary appears to be responsible for all financial aspects of the petitioner, from managing payroll and budget issues to overseeing accounts receivable and expenses. Generally, tasks like these are delegated to an accountant or a dedicated financial department. Furthermore, marketing strategies, while essential to a business, normally are delegated to marketing managers or employees. In this matter, despite the presence of a marketing manager and the alleged existence of three sales representatives, the beneficiary appears to be primarily responsible for devising a business plan in this area.

When examining the managerial or executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates, along with the beneficiary, work together to perform the actual day-to-day tasks of operating the company. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a primarily supervisory or managerial position that is higher than a first-line supervisor of non-

¹ It is noted for the record that the petitioner's New York quarterly wage report for the second quarter of 2003 shows that the petitioner only employed four people in April 2003, while the attachment to the Federal quarterly wage report for the same quarter indicates that five people were paid wages in April 2003. 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). Regardless, this evidence indicates that at the time the petition was filed the petitioner employed no more than four other persons besides the beneficiary.

professional employees. Pursuant to sections 101(a)(44)(A)(ii) and (iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions. For the reasons given above, the petitioner has also failed to establish that it has reached the point where the beneficiary is sufficiently relieved from engaging in non-qualifying duties, such that he could be found to be employed in a primarily executive capacity.

On appeal, counsel provides a three-paragraph overview of why the director's decision was erroneous. Counsel merely concludes that the director was wrong and that the petitioner's assertions regarding the beneficiary's capacity were unfairly overlooked. Counsel, however, fails to address the specific points made by the director, such as the failure of documentation to show that a solid sales staff, working subordinate to the beneficiary's alleged subordinates, exists to relieve the other staff members from performing such functions. As a result of this lack of rebuttal evidence, the director's conclusion that the organizational structure of the petitioner is not yet complex enough to warrant the employment of the beneficiary in a primarily managerial capacity stands unchallenged. 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.). Here, counsel merely asserts that the beneficiary is qualified, yet fails to provide independent evidence or examples to corroborate these claims. The exact basis for the challenges to the director's finding are not clearly stated on appeal; rather, counsel merely concludes that the beneficiary is "fully qualified." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner simultaneously claims that the beneficiary is engaged primarily in managerial duties, and alleges for the first time on appeal that the beneficiary manages an essential function of the petitioner, namely, the catering department. 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 furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish 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 employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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 is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. Based on the evidence submitted, it appears that absent evidence to show that the petitioner had hired sufficient subordinate staff to relieve the beneficiary from performing non-qualifying duties, such as sales, marketing, and financial management at the time of filing, it cannot be determined that she functions in a primarily managerial or executive capacity. As previously stated, 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. at 604. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

While not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. Although the petitioner submitted documentation demonstrating the foreign entity's business activities for the previous year, it failed to submit any evidence pertaining to the nature of the petitioner's business in the United States during this same period.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not demonstrated that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position. For this additional reason, the petition may not 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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.