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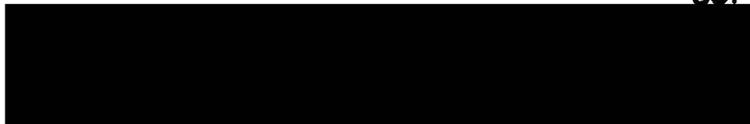
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File: SRC 05 800 23683 Office: TEXAS SERVICE CENTER Date: OCT 19 2006

IN RE: Petitioner:
Beneficiary:



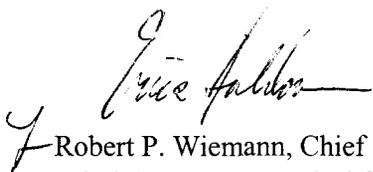
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

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 employ the beneficiary in the position of assistant general manager 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, states that it is engaged in counseling and therapy services. The petitioner claims to be a subsidiary of the parent company, Multimedia LTD T/A Chameleon, located in the United Kingdom. The petitioner seeks to employ the beneficiary for a period of one year to open a new office in the United States.

The director denied the petition, concluding that the record contains insufficient evidence to demonstrate: (1) that sufficient funding or capitalization was provided to the U.S. entity from the foreign entity; (2) that a qualifying relationship exists between the foreign company and the United States entity; (3) that the beneficiary was employed by the foreign company in a primarily executive or managerial capacity; and, (4) that the foreign parent company is doing business.

On appeal, the petitioner asserts that “all items were presented, attached are documents in question which was sent either in first [sic], with application, or with request for evidence.” The petitioner asserts that the petitioner submitted sufficient documentation to establish the ownership and control of both the foreign and United States entities. In addition, the petitioner explains that the funding transferred from the foreign company to the U.S. entity's president was not deposited to a business account because a business account cannot be opened without a social security number. The petitioner also indicated that the beneficiary was employed in a managerial capacity with the foreign corporation as she supervised the essential functions within the company. Finally, the petitioner indicated that the record contained payroll documents, product brochures and invoices for the first quarter of 2005 establishing that the foreign entity is currently doing business. The petitioner submits a brief and copies of previously submitted documents in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether sufficient funding or capitalization was provided to the U.S. entity from the foreign entity.

As noted by the director, the petitioner submitted a bank statement in the name of _____ and _____ rather than the U.S. entity. The bank statement was for the period between December 24, 2004 through January 21, 2005. The bank statement indicates that two wire transfers in the

amounts of \$88,936.75 and \$74,304.00 were deposited into [REDACTED] bank account. All of the wire transfers were sent from a [REDACTED]. The petitioner submitted additional bank statements for the same personal checking account for the periods ended on April 21, 2005, March 23, 2005, and February 17, 2005, which indicated account balances of \$17,380.33, \$69,416.16, and \$82,627.68 respectively. In addition, the petitioner submitted a letter from the Bank of America confirming that [REDACTED] has an account with the bank.

The director denied the petition and asserted that the petitioner failed to provide sufficient evidence that the funding or capitalization of the United States company has been provided by the foreign company since the bank statements were deposited to an individual's personal bank account.

On appeal, the petitioner explains that the bank statements are under the name of [REDACTED] the company's president, because [REDACTED] has a case pending awaiting a social security number in order to open a corporate business account. A corporate bank account does not exist for [the U.S. entity] because pursuant to Florida laws, a social security number is required in order to open a corporate bank account even though it is a legal corporation in Florida."

Upon review, the documentation submitted by the petitioner is insufficient to establish funding to the U.S. entity from the foreign company since the wire transfers originated from [REDACTED] rather than from the foreign company, Mobile and Multimedia LTD T/A Chamelon. Without further documentation, the information provided indicates funding from [REDACTED] and does not indicate the required funding from the foreign company. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient funding or capitalization from the foreign company. Furthermore, the petitioner has not submitted a business plan or other documentation to establish the U.S. company's anticipated start-up expenses and its it therefore not possible to determine what investment amount would be sufficient. Therefore, even assuming, arguendo, that the approximately \$17,000 in Mr. and [REDACTED] account as of April 2005 was intended to be used as capitalization for the new U.S. company, the AAO could not conclude that this amount is adequate for the U.S. company to commence doing business in the U.S. The petitioner has not disclosed the size of the U.S. investment, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). 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)). For the foregoing reasons, the appeal will be dismissed.

The second issue in this proceeding is whether a qualifying relationship exists between the foreign company and the United States entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer is 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 a wholly-owned subsidiary of the beneficiary's foreign employer, Mobile and Multimedia Ltd. In support of this claim, the petitioner submitted a stock certificate indicating that Mobile and Multimedia Ltd. is the owner of 500 shares of the U.S. entity.

As noted by the director, the petitioner failed to provide sufficient evidence to establish that a qualifying relationship exists between the foreign company and the petitioner. In addition, the director noted that the petitioner failed to submit the requested evidence of proof of payment of the stock for the U.S. entity.

On appeal, the petitioner asserts that “proof of payment for stock was not requested. Evidence requested clearly stated that this may be in the form of stock certificates which was provided.” In reviewing the request for evidence dated May 2, 2005, the director specifically requested, “proof of payment for the stock of the United States entity, which could include a copy of the stock certificate ledger and/or stock certificate registry.” The petitioner failed to submit this document in response. The purpose of the request for evidence is to establish the claimed qualifying relationship between the petition and the foreign company. Further, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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, CIS is unable to determine the elements of ownership and control.

On appeal, the petitioner acknowledges the specific deficiency noted by the director, yet still fails to provide evidence that the foreign entity in fact paid for its claimed interest in the U.S. entity. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

The third issue to address is whether the beneficiary has been employed in a primarily managerial or executive capacity for the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(15)(L), provides:

The term “managerial capacity” means 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), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily-

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

The petitioner submitted a "Labor Certification" from the foreign entity with the I-129 petition indicating that the beneficiary has been employed with the foreign company from December 2000 until April 2005 in the position of Assistant General Manager. The foreign entity described the duties performed by the beneficiary in this position as the following:

- Assistant Managed and monitored daily store operations, including customer service, staff, inventory, shipping and receiving, and recordkeeping
- Assist the monitored [sic] financial, marketing and all related managerial activities
- Assist oversaw [sic] all the employees, including supervision, training and scheduling
- Created a synergistic work environment maximizing productivity of personnel

The petitioner also submitted a support letter further describing the duties performed by the beneficiary in the foreign company as the following:

Her duties included but were not limited to assist the daily store operations, including customer service, administrative duties, inside and outside staff, inventory, shipping and receiving, and bookkeeping. Directed and monitored financial, marketing and all related managerial activities. Assisted to oversee all the employees, including supervision, training and scheduling.

On May 2, 2005, the director issued a notice requesting additional information of the beneficiary's employment abroad with the parent company. Specifically, the director requested a definitive statement of the beneficiary's foreign employment including position title, a list of all duties, and percentage of time spent on each duty; the number of subordinate managers/supervisors or other employees who report directly to the beneficiary and a brief description of their job titles, educational background, duties and dates of employment; qualifications required for each position; a statement as to whether the beneficiary functions at a senior-level within the corporation; an organizational chart of the foreign company; and a statement as to who provides the product sales/service or produces the product of the business.

In the response, the petitioner reiterated the job duties previously indicated on the I-129 petition. The petitioner did not submit a detailed job description for the position held by the beneficiary with the foreign entity as requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Further, the petitioner submitted a "Labor Certification" from the foreign entity for Marguerite Vella, indicating that she was employed as the director and general manager of the company from October 2000 through April 2005, performing essentially the same responsibilities as those described for the beneficiary.

In addition, the petitioner stated that the beneficiary supervised three employees. One employee is in administration and his duties include "payroll and business accounting." The second employee is responsible for "keeping and monitoring retail stock, purchasing, ordering and ensuring business has ample stock for daily operations." The third employee is "responsible for daily retail/customer operations, cash register, sales, incoming sales calls." The petitioner further states that the beneficiary has been in a senior-level position with the corporation and "will directly oversee administration, wholesale/stock, and retail operations." In addition, the petitioner states "that there was no specific time spent on each duty because in retail environment the tasks must be divided to ensure customer satisfaction, however 100% of the tasks were completed on a daily basis." Finally, the petitioner stated that "all products are purchased by wholesalers or other retailers and resold in a retail environment."

The director denied the petition and stated that the petitioner has not established that the beneficiary “manages the organization, department, subdivision, function or component of the foreign organization.” In addition, the director noted that it appears that the beneficiary does not supervise and control the work of other supervisory, professional or managerial employees.

On appeal, the petitioner asserts the following:

[The beneficiary] has worked for the foreign corporation as the Assistant General Manager since December 30, 2000 until August 2005 supervising the essential functions within the company with only general supervision from higher level Managers including establishing goals and policies of the company and the authority to hire and fire personnel while overseeing the day-to-day operations.

* * *

[The beneficiary] reports directly the [sic] General Manager of the company. The organization chart shows that she is above all departments and all departments report directly to her. [REDACTED] and [REDACTED] are professionals with college degrees and [the beneficiary] supervises these positions as stated in our initial response.

On review, the petitioner's assertions are not persuasive. 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 and indicate whether such duties are in a managerial or executive 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

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).

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary “directed and monitored financial, marketing and all related managerial activities,” and “assisted to oversee [sic] all the employees, including supervision, training and scheduling. The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the marketing, operational, and personnel functions that the beneficiary will supervise. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to

provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary "assistant Managed [sic] and monitored daily store operations, including customer service, staff, inventory, shipping and receiving, and recordkeeping," and "assist the monitored [sic] financial, marketing and all related managerial activities." It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. 593, 604 (Comm. 1988).

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 at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

As noted above, in the request for evidence, the director requested that the petitioner submit a definitive statement describing the foreign employment of the beneficiary. The petitioner failed to submit this document in its response. This evidence is critical, as it would have established if the beneficiary held a position of managerial or executive capacity by the foreign company. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the petitioner did not submit a detailed job description of the duties performed by the beneficiary at the foreign company and thus AAO cannot determine if the beneficiary was employed by the foreign entity in a managerial or executive capacity. 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.

Finally, as noted above, the petitioner has indicated that the beneficiary and the foreign entity's general manager perform essentially identical responsibilities, but has not explained the need for two employees to share the claimed managerial/executive responsibilities in an organization that employs a total of five people and operates a single retail store. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based upon the lack of a comprehensive job description, the lack of evidence of the company's staffing levels, and the minimal evidence submitted regarding the business activities of the foreign entity, it

cannot be concluded that the beneficiary has been employed by the foreign entity in a managerial or executive capacity.

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner claims that the beneficiary supervises one employee in administration, one employee in wholesale/stock and one employee in retail.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the payroll, inventory and cash register functions of the subordinates supervised by the beneficiary.

On appeal, the petitioner asserts that the beneficiary is responsible for supervising "the essential functions within the company." 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 in managing the essential function, 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. See 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)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function, or that she functions at a senior-level in the company's organizational hierarchy as assistant general manager. The petitioner's unsupported assertion that the beneficiary manages all the essential functions of the corporation is insufficient to meet the petitioner's burden of proof. The fact that the beneficiary manages

a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meanings of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738.5739 (Feb. 27, 1987). The record must establish that the majority of the beneficiary's actual duties are managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. v. Sava*, 724 F. Supp. at 1108.

As discussed above, the beneficiary's job description included non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has sufficient identified how the sales associate would relieve the beneficiary from performing routine duties inherent to this function. The fact that the beneficiary has been given a managerial job title is insufficient to elevate her position to that of a "function manager" as contemplated by the governing statute and regulations. Based on the foregoing discussion, the petitioner has not established that the beneficiary has been employed in a managerial or executive capacity by the foreign entity. For this reason, the appeal will be dismissed.

The fourth issue to be addressed in this proceeding is whether the foreign company is a qualifying organization currently doing business as required by 8 C.F.R. § 214.2(l)(3).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

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

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The director in the decision stated that the petitioner submitted bank statements and invoices from 2003 and 2004 and thus did not provide sufficient evidence to establish that the foreign entity is currently doing

business. On appeal, the petitioner asserts that the petition included payroll documentation, product brochures and invoices for the first quarter of 2005.

Upon review of the record, the petitioner submitted bank statements, invoices and receipts for the foreign company for 2003 and 2004. The petitioner did not submit any documentation of the foreign company "doing business" in the first quarter of 2005, the quarter in which the current petition was filed. Instead, the bank statements, invoices and receipts are all for 2003 and from January 2004 until April 2004.

In May 2, 2005, the director specifically requested for "evidence that the foreign entity is currently doing business, such as current financial records, tax records, employee rosters, annual reports, and evidence of business conducted, such as invoices, bills of sale, product brochures of goods and services sold or produced by the company." As indicated above, the petitioner responded by submitting bank statements, invoices, and receipts for most of 2003 and for the months of January through April of 2004. In addition, the petitioner submitted the corporation's financial statements for 2002 and 2003.

Now on appeal, the petitioner submits invoices for the first quarter of 2005. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Furthermore, the majority of the invoices and receipts submitted with the petition are addressed to Mr. [REDACTED] rather than to the foreign company. The petitioner has not explained why the invoices have been issued by [REDACTED], one of the owners of the foreign entity, and not by the foreign 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).

Moreover, in reviewing the invoices and receipts for 2005 submitted by the petitioner, it appears that the invoices are identical to invoices submitted for the year 2003. The petitioner has altered the invoice numbers and dates in an attempt to comply with the requirement that the petitioner establish the ongoing business activities of the qualifying foreign organization. For example, the invoices dated March 3, 2005 and March 6, 2005 are identical (except for the date and invoice number) to the invoices dated June 18, 2003 and June 22, 2003, respectively. The AAO notes that willful misrepresentation in these proceedings may render the beneficiary inadmissible to the United States. *See* Section 212(a)(6)(C).

Accordingly, the evidence submitted on appeal is not credible and will not be given any weight in this proceeding. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Moreover, the petitioner's submission of altered documents brings into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Based on the foregoing discussion, the petitioner has not established the existence of a qualifying organization abroad. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to demonstrate that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position. Specifically, the petitioner has not adequately defined the proposed nature of the office, and had not realistically described the scope of the entity, its organizational structure and its financial goals.

If a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation 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" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.*

Furthermore, as contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It

should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner submitted a brochure for the services that will be provided by the U.S. entity. The petitioner did not submit a business plan that outlines how the U.S. entity will reach the listed goals and plans and if it is financially feasible to do so. 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. Although the petitioner has submitted a one-page document labeled "projected cash flow," this document shows that the company intends to derive its income from construction, "dig up of land," "drain server" and "electricity power." Given the petitioner's statements that the company intends to operate as a provider of counseling and therapy services, the projected cash flow is not credible. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. The petitioner indicated that the beneficiary will be the "assistant senior level position," and that the minimal staffing level for the U.S. entity will be three employees. In addition, the petitioner indicated that the beneficiary will actually provide the counseling and therapy services offered by the U.S. entity. In addition, the brochure regarding the services of the U.S. entity suggest that the beneficiary alone is responsible for these services, as she possesses various certifications in the field. Thus, if the beneficiary will be the only employee providing the services offered by the U.S. entity by running the therapy and counseling sessions, it is reasonable to assume that the beneficiary will be performing the day-to-day operations and directly providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or 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 International* 19 I & N Dec. at 604. Since the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity within one year, 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 petitioner 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.