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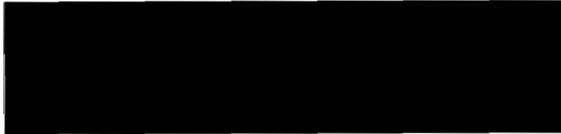
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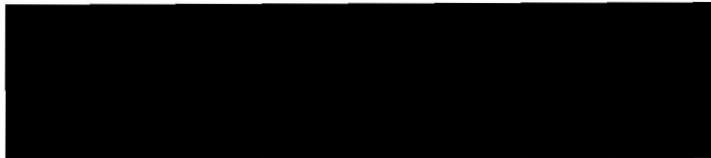
File: LIN 05 102 51418 Office: NEBRASKA SERVICE CENTER Date: **SEP 05 2006**

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 BENEFICIARY:



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 in the position of chief executive officer/general manager to open a new office in the United States 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 limited liability company organized under the laws of the State of Missouri, is in the business of managing **and developing dairy farm operations and alleges that it has a** qualifying relationship as a subsidiary with [REDACTED] a business entity incorporated as a private company under the laws of New Zealand.

The director denied the petition based on the following independent conclusions: (1) that the petitioner did not prove the existence of a qualifying relationship as defined in 8 C.F.R. § 214.2(l)(1)(ii); (2) that the petitioner failed to establish that the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years; and (3) that the petitioner failed to prove that the United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred in denying the petition because (1) the petitioner supplied sufficient evidence supporting its claim to a qualifying relationship as clarified on appeal; and (2) there is ample evidence on the record to establish that the beneficiary had been working in an executive or managerial position overseas and will work in an executive or managerial position for the United States entity within one year of the approval of the petition. In support of its appeal, the petitioner submits a brief and additional evidence.

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.

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, 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 issues in this proceeding are (1) whether the petitioner established the existence of a qualifying relationship as defined in 8 C.F.R. § 214.2(l)(1)(ii); (2) whether the petitioner established that the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years; and (3) whether the petitioner established that the United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The first issue is whether the petitioner has proven the existence of a qualifying relationship as defined in 8 C.F.R. § 214.2(l)(1)(ii).

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

Title 8 C.F.R. § 214.2(l)(1)(ii)(K) defines "subsidiary" as:

[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.

In a letter dated February 16, 2005 appended to the initial petition, the petitioner described itself as a subsidiary of the beneficiary's employer abroad, [REDACTED], a New Zealand private company. As evidence of this qualifying relationship, the petitioner submitted articles of organization for the petitioner, a Missouri limited liability company, and an operating agreement for the petitioner, which identifies [REDACTED] as the sole member of the petitioner. The operating agreement also appoints the beneficiary as the manager of the petitioner. The petitioner also submitted evidence proving the existence and ownership of the foreign employer including a New Zealand certificate of incorporation and a financial statement. The financial statement indicates in both the statement of shareholder accounts and in the company director that the beneficiary (identified as [REDACTED]) is the majority stockholder.

In addition, the petitioner indicated in its February 16, 2005 letter that the beneficiary will provide services to both the petitioner and to an entity called [REDACTED], a Missouri limited partnership. The petitioner asserts that the petitioner is the sole general partner in [REDACTED], that the petitioner "will carry out much of its business through that limited partnership," and that the petitioner and [REDACTED] have each applied for, and each have received, employer identification numbers. The petitioner also provided a copy of a deed evidencing that [REDACTED] (and not the petitioner) acquired a dairy operation in Missouri, and a Missouri Foreign-Owned Agricultural Land Registration describing the relationship between the foreign entity, the petitioner, and [REDACTED] as follows:

[REDACTED] [now known as [REDACTED]] is a Missouri limited liability company which is 100% owned by [REDACTED], a New Zealand company which is 76% owned by [the beneficiary] and [REDACTED], with [the beneficiary] being the Managing Director, and 24% owned by [REDACTED] Trust of which [REDACTED] and [REDACTED] are Trustees. [The beneficiary] is the Manager of Focal [REDACTED] which, as its sole General Partner, controls [REDACTED]. Also, any decisions for [REDACTED] P not to be made by its General Partner require a 75% affirmative vote. Thus, through the combination of [the beneficiary's] position as sole

Manager of the General Partner of [REDACTED] coupled with their 30% interest in the limited partnership, [the beneficiary] and his wife [REDACTED] own the controlling ownership interest in [REDACTED]

The Foreign-Owned Agricultural Land Registration also lists the [REDACTED] and [REDACTED] Trustees) as the owner of a 30% interest in the limited partnership as a limited partner and the petitioner as the owner of a 1% interest as a general partner.

On March 1, 2005, the director requested additional evidence. Specifically, the director requested documentary evidence establishing a qualifying relationship between the foreign entity and [REDACTED] L.P., since the duties of the beneficiary will entail work for both [REDACTED] and the petitioner.

In response, the petitioner referred the director to the Missouri Foreign-Owned Agricultural Land Registration submitted with the initial petition describing the relationship between the foreign entity, the petitioner, and [REDACTED]. The petitioner also provided, *inter alia*, a letter dated March 4, 2005 from the petitioner's Missouri attorneys, Armstrong Teasdale LLP, which explains that the beneficiary will be an employee of the petitioner and/or [REDACTED]

On March 24, 2005, the director denied the petition. The director determined that, since the ownership records for [REDACTED] as submitted by the petitioner contain inconsistencies, he could not determine the exact ownership of [REDACTED], and thus the petitioner failed to prove the existence of a qualifying relationship.

On appeal, the petitioner provided a copy of [REDACTED] Partnership Agreement and sought to clarify the inconsistencies relied upon by the director in denying the petition. The petitioner explained that Focal [REDACTED] P. amended its ownership percentages after the [REDACTED] Business Ownership Structure "organization chart" was written. Therefore, the petitioner previously provided two different, albeit correct, versions of the ownership record for the limited partnership from two different time periods. On appeal the petitioner provided evidence that, as of the date of the petition, the petitioner owned 1% of [REDACTED] as a general partner and the " [REDACTED] owned 30% of [REDACTED]

In addition to explaining this inconsistency, the petitioner provided a copy of the Partnership Agreement which explained the role of the limited partners in the business

Except as otherwise provided by law or in this Agreement, whenever an action is to be taken by the Partnership or whenever this Agreement refers to an action to be taken by the General Partner or the Limited Partners, such action shall be taken with the agreement of the General Partner and/or a vote of at least seventy-five percent (75%) of the Limited Partners, as the case may be.

Also, the Partnership Agreement explained that the limited partnership shall be dissolved only if all the partners consent, or if the general partner withdraws from the partnership unless 75% of the remaining limited partners agree to continue the partnership and agree on terms to admit a new general partner.

Upon review, petitioner's assertions are not persuasive.

As a threshold issue, the petitioner has not clearly established that it will even employ the beneficiary. Even if [REDACTED] could be proven to be a qualifying organization, the beneficiary is prohibited from working for the limited partnership since it has not petitioned to employ the beneficiary in these proceedings. As explained in the letter dated March 4, 2005 from the petitioner's Missouri attorneys, Armstrong Teasdale LLP, "[the beneficiary] will also be an employee of the [petitioner] *and/or* [REDACTED]" (emphasis added). Since the petitioner does not know if it will even employ the petitioner and may apparently choose to permit a different employer to employ the beneficiary, the petition cannot be approved. For this reason alone, the petition will not be approved.

Even assuming [REDACTED] was the petitioner and the employer in this matter, the petitioner has not established that a qualifying relationship exists between [REDACTED] and [REDACTED]. While the petitioner asserts that [REDACTED] is a subsidiary of [REDACTED], since both entities are "controlled" by the same person, the evidence submitted by the petitioner is not consistent with its characterization of the ownership structures of the various entities. For example, the petitioner purports that the beneficiary and his spouse own 76% of the shares of [REDACTED] Ltd. However, the financial statement for the foreign entity indicates in both the statement of shareholders' current accounts and in the company director that the beneficiary (identified as [REDACTED]) is the majority stockholder. This was confirmed in a letter dated March 9, 2005, from the foreign entity's New Zealand law firm, [REDACTED]. [REDACTED] is not mentioned in the financial statement nor in the letter from the New Zealand law firm. [REDACTED] the petitioner purports that the beneficiary and his spouse own a 30% interest in [REDACTED]. However, Schedule A to the Limited Partnership Agreement lists the "[REDACTED] and [REDACTED] Trusts" as the 30% owner (also described in the Foreign-Owned Agricultural Land Registration as the [REDACTED] and [REDACTED] Trustees]). Therefore, it appears the beneficiary alone is the 76% owner of the foreign entity, the foreign entity owns 100% of the petitioner, the petitioner is the general partner of Focal Dairies, L.P., and [REDACTED] and [REDACTED] own 30% of the limited partnership in their capacities as trustees of a trust.

Based on this evidence, the issue is whether the petitioner's role as general partner under the Limited Partnership Agreement coupled with the 30% interest in the limited partnership owned by the beneficiary and his spouse in their trustee capacities under the [REDACTED] (also known as the [REDACTED] and [REDACTED] Trust) is enough to prove that the limited partnership and the foreign entity are sufficiently "controlled" by the same person or entity to establish a "qualifying relationship." It is concluded that the petitioner has not proven that there is sufficient control over both entities by the same persons or entities, directly or indirectly, to establish that there is a qualifying relationship.

As explained above, the Limited Partnership Agreement vests the limited partners, when acting as a block of 75% or more of the ownership interests, with the power to control the limited partnership and to override decisions made by the general partner. Therefore, unless the petitioner can prove that the same person or entity which controls or owns the foreign entity also owns or controls more than 25% of the limited partnership and controls the general partner, the petitioner cannot prove that a qualifying relationship exists. In this case, the owner of the foreign entity is the beneficiary alone. The owner of 30% of the limited

partnership is the beneficiary and his spouse as trustees under a trust, presumably formed under the laws of New Zealand although this was not disclosed by the petitioner. Since the petitioner has not provided a copy of the trust document or any information regarding the trust's beneficiaries, it cannot be determined if the beneficiary and his spouse are permitted, as trustees, to vote the interest in the limited partnership without any restrictions. Moreover, ownership of a limited partnership interest as husband and wife is presumed to be held as tenants by the entirety in Missouri. See *Feinberg v. Feinberg*, 924 S.W.2d 328 (Mo. App. E. D. 1996); *Wehrheim v. Brent*, 894 S.W.2d 227 (Mo. App. E. D. 1995). When property is owned as entirety property in Missouri, the "marital union" owns the property, not the individuals, and each spouse has an interest in the use and enjoyment of the whole. See *Feinberg*, 924 S.W.2d 328. Therefore, even if a trust was not involved in the ownership of the partnership interest, the fact that the beneficiary and his spouse own the interest in [REDACTED] and the beneficiary alone owns the interest in the foreign entity establishes that the same person does not control the entities.

Accordingly, the petitioner has not proven that there is a qualifying relationship between the foreign employer and [REDACTED] as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G), and the petition will be denied for that reason.

The second issue is whether the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

8 C.F.R. § 214.2(l)(3)(v)(B) requires that the petitioner prove that 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."

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, and implies in its appeal that the beneficiary is acting as both. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. However, given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary is acting either in a managerial capacity *or* in an executive capacity and will consider both positions separately as if argued in the alternative.

In the initial Form I-129 petition, the petitioner described the beneficiary's duties with the foreign employer as follows: "Responsible for the management of all aspects of [the foreign employer] including financial management, farm administration, staff management, operations, risk management, asset protection, etc."

The petitioner provided more detail regarding the beneficiary's job duties in a letter dated February 17, 2005. While this description was intended for the United States operation, the petitioner stated that the beneficiary's duties overseas were "very similar to the duties he will have in the U.S." The duties are as follows:

- Finance
  - Prepare annual budget and present to limited partners for review. Upon approval, implement budget.
  - Provide operating cashflows monthly through dairy desk and ensure financial targets are achieved.
  - Oversee the financial performance of all [the petitioner's] operations.
  - Monitor costs to ensure they fall within shareholder expectations as set out in the business plan.

- **Farm Administration**
  - Oversee and approve all expenditures.
  - Review monthly income and expenses, report to limited partners.
  
- **Staff Management**
  - Ensure sufficient employment levels to enable the companies to meet the objectives contained in the business plan.
  - Recruit, hire, train, and discipline staff as needed.
  - Draft standard employee contract.
  - Develop technical staff selection process to ensure high calibre personnel.
  - Liaise with local government and universities to promote job opportunities for U.S. workers.
  
- **Operations**
  - Develop systems and relationships with local experts to effectively manage operations.
  - Seek and engage professional business advice when required.
  - Organize and oversee overall development of dairy farming operations.
  - Supervise each dairy operation to ensure the best on farm practices are used to achieve target production to the highest quality levels.
  
- **Asset Protection**
  - Manage all farm and building construction and maintenance.
  - Responsible for securing insurance policies as needed.
  
- **Risk Management**
  - Ensure that all health and safety regulations are met, and that risks to staff and stock are minimized.
  - Ensure that all environmental and animal control regulations are met.
  
- **Communications**
  - Furnish directors with comprehensive monthly report.
  - Attend bi-annual partner meetings and present outlines summarizing farm operation[']s financial performance and forward-looking strategies.
  - Hold monthly meetings with local stakeholders to discuss accounts for payment and general farm issues.
  - Keep close contact with designated stakeholder liaison to support general management and policy decisions.

Other than credentials, articles about the beneficiary, and proof of employment, the petitioner provided no other documentation explaining the beneficiary's duties with the overseas employer.

On March 1, 2005, the director requested additional evidence. Specifically, the director requested documentary evidence that the beneficiary qualifies as a manager and an executive in the managing of a farm in New Zealand. This request included an organizational chart.

On March 9, 2005, the petitioner responded to the request for evidence. In response, counsel to the petitioner provided a list of employees of the foreign entity. This list, which is not organized as a chart referencing job descriptions or supervisory roles, identifies a "manager" (the beneficiary), one "assistant manager," and seven "dairy workers," with the explanation that two of the dairy workers have resigned. The petitioner also enclosed a job description for the beneficiary's foreign position. This job description contains general references to the beneficiary's responsibility for financial management, farm administration, staff management, operations, communications, asset protection, and risk management.

On March 24, 2005, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary had been acting in a managerial or executive capacity for the foreign employer. Counsel argues that the New Zealand farm is a "highly complex operation" and a "multi-million dollar business" which could not operate successfully without at least one manager or executive. Further, counsel asserts that the beneficiary spends no time performing traditional farm work but, instead, is engaged solely in managing the operation through others. Finally, counsel summarizes his arguments by asserting that the beneficiary manages the foreign entity by supervising the work of others and by managing an essential function of the organization, and that the beneficiary qualifies as an executive of the foreign entity. In support of the appeal, counsel submits materials describing the complex nature of the business and an excerpt from the Department of Labor's Occupational Outlook Handbook describing farm, ranch, and agricultural managers.<sup>1</sup>

Upon review, 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 by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner

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<sup>1</sup>Counsel also included in his brief reproduced excerpts from the beneficiary's personal calendar. However, counsel did not provide a copy of the beneficiary's calendar or any other documentary evidence related to this diary or log. The unsupported assertions of counsel do not constitute evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *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).

cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner has failed to prove that the beneficiary acted in a "managerial" capacity. In support of its application, the petitioner has 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 that the beneficiary's duties include developing systems, managing farm building maintenance, and overseeing financial performance. The petitioner did not, however, define these terms, explain exactly how the beneficiary will perform these duties, or define how much time the beneficiary devotes to each of the duties listed. While counsel to the petitioner repeatedly asserts that the beneficiary "spends 0% of his time performing actual 'farming' duties," it is obvious that there are non-managerial, clerical duties associated with a business of the scope and magnitude described by the petitioner in addition to milking cows and planting crops. While the record may indicate that many of the traditional farm duties are performed by others, the evidence submitted fails to establish who, other than the beneficiary, is performing the additional functions incidental to operating a business. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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).

Moreover, the petitioner has failed to establish that the beneficiary supervised or controlled the work of other supervisory, professional, or managerial employees. The petitioner has failed to provide job descriptions or an organizational chart for the beneficiary's subordinates in New Zealand. While the petitioner provided a list of six other active employees of the foreign entity (one assistant manager and five dairy workers), it is unclear whether the "assistant manager" actually supervises the dairy workers. Also, given the lack of a job description, it is impossible to determine whether the assistant manager is primarily engaged in providing supervisory or managerial services or whether the beneficiary functionally supervises the dairy workers directly. Given the beneficiary's vague job description coupled with the lack of information regarding the duties of the New Zealand subordinate employees, the beneficiary would appear to be a first-line supervisor and/or the provider of actual services. 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 Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology Intl.*, 19 I&N Dec. at 604.<sup>2</sup>

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<sup>2</sup> While the petitioner does not assert that the beneficiary is supervising professional employees, the record is nevertheless devoid of any evidence that the "assistant manager" or the "dairy workers" are professionals. 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.

Finally, the petitioner has not proven that the beneficiary managed an essential function of the organization. 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. 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 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.

The petitioner's vague job description fails to realistically define the beneficiary's duties in a way that would allow one to ascertain which functions are managerial and which functions would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to properly quantify or define the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as drafting employee contracts, preparing budgets and reports, and securing insurance policies, might not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Therefore, the record does not prove that the beneficiary was acting in a managerial capacity.

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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 degrees held by the subordinate employees. 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 established that a bachelor's degree is necessary for any of the positions listed for the foreign entity.

Similarly, the petitioner has failed to prove that the beneficiary acted in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* As indicated above, the petitioner has failed to prove that the beneficiary, who was apparently managing between six and eight people working on a dairy farm, acted primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(B) and for this reason the petition may not be approved.

The third issue is whether the petitioner failed to prove that the United States operation, within one year of the approval of the petitioner, will support an executive or managerial position.

As explained above, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states, in pertinent part, that if a 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, the petitioner shall submit evidence that:

- (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.

Again, as a threshold issue, the petitioner has not clearly established that it will even employ the beneficiary. As explained above, the letter dated March 4, 2005 from the petitioner's Missouri attorneys, Armstrong [REDACTED], explains that "[the beneficiary] will also be an employee of the [petitioner] and/or [Focal [REDACTED]]" (emphasis added). Since the petitioner does not know if it will even employ the petitioner and may apparently choose to permit a different employer to employ the beneficiary, the petitioner has not proven that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. For this reason alone, the petition will not be approved.

Even assuming [REDACTED] was the petitioner and the employer in this matter, the petitioner has not established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In the letter dated February 17, 2005 appended to the initial petition, the petitioner explained that Focal [REDACTED] purchased 1,787 acres in Missouri for \$2,323,100.00 on December 3, 2004 for the purpose of establishing a dairy farm in the United States. The beneficiary will be transferred to the United States to establish the operation of the dairy farm and, ultimately, would become responsible for the management and operation of both this initial farm and all additional farms as they are acquired. His duties in Missouri would be similar to his duties in New Zealand with the foreign entity.

The petitioner indicates in both the letter and in an attached business plan that the petitioner and/or Focal [REDACTED] intend to acquire one additional farm during its first year of operation, that both farms will host collectively approximately 2,000 to 3,000 cows by the end of first year, and that the operation will need one employee for every 165 cows. Therefore, by the end of its first year in operation, the petitioner predicts that it will need between 12 and 20 employees to work on the farms.

While counsel to the petitioner asserts in its brief that the business plan calls for the hiring of a "specialized manager" who will be subordinate to the beneficiary and who will manage the farm workers hired by the United States operation, the business plan is not consistent with this assertion. On page 5, the business plan calls for the hiring of "one senior New Zealand trained manager" to oversee and train Americans for each farm. It is unclear whether this role will be filled by the beneficiary, by fellow investor [REDACTED] (who is identified as the "conversion consultant" in the business plan), or by an unidentified third person. Regardless, the business plan does not explain exactly who, after one year of predicted growth, will manage the 12 to 20 farm workers or provide sufficient details to establish that he or she will be a supervisory, professional, or managerial employee.

Therefore, in view of the initial investment made in the United States operation, the question is whether the above plan for growth is likely to support an executive or managerial position within one year of petition approval.

Upon review, the petitioner's assertions are not persuasive, and it is concluded that the proposed plan will not likely support an executive or managerial position within one year.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In this case, the petitioner has failed to establish that, after one year, the business will be able to support a managerial position. While the business plan calls for the hiring of between 12 and 20 farm laborers, the staffing of the United States operation appears similar to the model used by the foreign entity. The duties of these employees and of the "specialized manager" are not specifically defined in the business plan. Therefore, the record does not establish that the petitioner will require an employee to manage one or more managers, supervisors, or professionals, or an essential function of the operation.

Furthermore, the petitioner has not proven that the United States operation will support an executive position within one year. As explained in the business plan, a New Zealand management company associated with several of the limited partners of [REDACTED] will assist in the management and administration of the United States operation and that it is envisaged that, eventually, the United States operation will become "self-managing." However, the business plan does not explain when, in the future, the petitioner expects to begin making its own management and administrative decisions. Therefore, the record does not establish that the United States entity will support an executive position within one year of petition approval since the management of the organization will be directed by the management company.

Accordingly, the petitioner has not established that the United States operation, within one year of the approval of the petitioner, will support an executive or managerial position, and for this reason the petition will not be approved.

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.