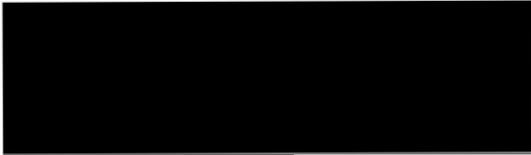




U.S. Citizenship
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Services

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File: EAC 05 228 52137 Office: VERMONT SERVICE CENTER Date: FEB 01 2007

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

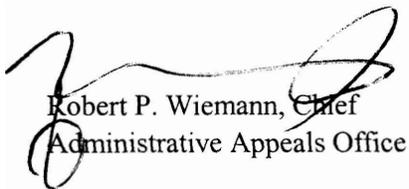
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF 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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New Jersey corporation, provides transcription and information technology services for hospitals and other medical practitioners. The petitioner states that it is a subsidiary of [REDACTED] Ltd., located in New Delhi, India. The petitioner seeks to employ the beneficiary as its vice president for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. entity 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 disputes the director's decision and asserts that the beneficiary will be employed in a qualifying managerial or executive capacity. Counsel suggests that the director misinterpreted the evidence submitted in support of the petition, and attempts to clarify the nature of the petitioner's business and the beneficiary's proposed role within it. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in this matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

The nonimmigrant petition was filed on August 16, 2005. In a supporting letter dated August 1, 2005, the petitioner stated that the beneficiary would perform the following duties in the offered position of vice president for the U.S. company:

His overall responsibilities shall include planning and managing future growth for the company. He shall be directing the Indian entity as well as the United States entity. All employees shall work under his direct or indirect supervision. The Indian managers shall report to him and shall be accountable for their actions to [the beneficiary]. He shall have authority to hire and fire, to sanction and approve fund allocation for various business activities, make all decisions regarding target acquisitions, shall travel between India and the United States frequently and shall work with the higher client management to address client business issues. He shall be leading the technical and management team for client presentations and shall be interacting with prospective client decision makers. A critical part of his responsibilities shall be overseeing the work flow integration and elimination of roadblocks in work process flow to ensure high quality of work in shortest possible time. [The petitioner] promises its client a turn around time of less than 24 hours. Most of the work is done in its facilities located in India. To ensure that [the petitioner] can deliver within the time frame it has committed to its client, it constantly has to monitor the system which it has implemented. This system further requires constant improvement to ensure competitiveness, efficiency and perfection. All of this requires very tight management regulating the conduct of its subordinates.

The petitioner stated that the company has four employees on its payroll and "several independent contractors" who are responsible for providing marketing services. The petitioner also emphasized that the foreign entity employs 67 full-time and 42 part-time transcriptionists "who work in India exclusively to provide cutting edge transcription services to [the petitioner]."

The director issued a request for additional evidence on August 22, 2005, instructing the petitioner to submit additional evidence to establish that the beneficiary will be employed in an executive or managerial capacity with the U.S. company. Specifically, the director requested: (1) a complete position description for all employees in the United States, including one for the beneficiary's position, along with a breakdown detailing the number of hours devoted to each of the employees' job duties on a weekly basis; (2) a copy of the petitioner's IRS Forms W-2, Wage and Tax Statement, for 2004; (3) a copy of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first and second quarters of 2005; (4) if applicable, evidence documenting the petitioner's use of contractors and the duties performed by those contractors; and (5) an organizational chart for the U.S. company.

In a response dated September 19, 2005, counsel for the petitioner emphasized the petitioner's need for a manager to coordinate the Indian and United States operations. Counsel noted that the petitioner employs four people, is in the process of hiring additional workers, and already has "more than sufficient personnel to take care of the day to day mundane and administrative tasks." Counsel indicated that the petitioner is in the process of expanding and looking to acquire other businesses, and noted that the beneficiary would be

responsible for "new expanded business management" on a day-to-day basis, and would ensure coordination between the "junior management" in the United States and Indian offices.

With respect to the beneficiary's employment in a managerial capacity, counsel stated "[t]here are no exact words to define a management position." Counsel attached job descriptions for vice president positions with other companies, obtained from a job search web site, presumably to establish that the position offered to the beneficiary is comparable and therefore can be considered to be in a qualifying managerial or executive capacity.

In response to the director's request for a detailed job description for all employees of the U.S. company, the petitioner submitted the following information:

At present, the petitioner employs [REDACTED] in administration and clerical work, [REDACTED] in sales and customer follow up, [REDACTED] after the finance and overall functioning. Upon arrival of [the beneficiary], Mr. [REDACTED] handle only the financial activities that have already become very complex and cumbersome. [REDACTED] looks after the technical aspects of the business. He devotes his time to handle all software, hardware, Internet connectivity and smooth technical functioning of the data transfer from the Indian office to the United States. He specializes in medical software and has extensive technical experience dealing with this industry. . . . [REDACTED] looks after client accounts and customer support. She ensures that the client needs are taken care of and all complaints are resolved in an effective manner.

The petitioner attached its Forms W-2, Wage and Tax Statement, which confirmed the employment of the five employees named in the petitioner's letter during the 2004 tax year. However, the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, showed only three employees for the first two quarters of 2005. Counsel indicated that the petitioner was submitting an organizational chart for the United States company, as well as a letter of intent related to the petitioner's potential acquisition of a business offering similar services in the United States, but upon careful review, neither document can be found in the record of proceeding.

The director denied the petition on September 28, 2005, concluding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director found insufficient evidence to support counsel's assertion that the company's current staff would relieve the beneficiary from performing the "mundane and administrative" tasks of the company. Upon reviewing the salaries of the petitioner's employees in 2004, the director noted that one of the beneficiary's claimed subordinates earned a salary that is significantly higher than that offered to the beneficiary. The director concluded that the beneficiary would only supervise two employees, and that these employees had not been shown to be employed in managerial, supervisory or professional positions.

The director further observed that the petitioner submitted insufficient evidence to establish that the beneficiary would be employed in a senior position, wherein he would actually be primarily "making all decisions and planning and managing the company," as claimed by the petitioner. The director also noted that

"it is not evident that the beneficiary would easily be able to supervise and control the overseas company while he is located in the United States office." The director further determined that the petitioner had failed to establish that the beneficiary would be managing, rather than performing, an essential function of the organization.

On appeal, counsel for the petitioner acknowledges the director's concerns regarding the small size of the petitioning company's staff, but suggests that the decision seemed to reveal a misperception of the nature of the petitioner's business. Counsel emphasizes that the "real work" of the U.S. company, providing medical transcription services for U.S. hospitals and medical centers, is assigned to and performed by the employees and management staff of the Indian office. Counsel emphasizes that the U.S. office requires few employees, although the responsibility of the U.S. management "invariably shall include supervision of the Indian management and staff" of close to 100 employees. Counsel explains that most of the activities assigned to the foreign entity are performed, reported and managed via the Internet, which enables a U.S.-based employee to supervise the operations of the foreign entity.

Counsel asserts that the job description submitted for the beneficiary's proposed position "very clearly states that he shall manage some of the back office activities as well as the activities here in the United States," and that accordingly, the staff of the Indian office would be working under his "general and somewhat indirect supervision." Counsel emphasizes that the petitioner has the resources to hire additional staff members as necessary, but currently has an immediate need for the services of a manager as opposed to a lower-level staff member. Counsel notes the petitioner's impressive financial performance and stresses that the petitioner is planning a significant expansion and is engaged in serious negotiations to acquire other businesses, thus necessitating the addition of a managerial employee who understands the petitioner's business. Counsel states that due to the international nature of the position, the beneficiary will receive a salary of \$50,000 in the United States, and an additional \$30,000 in India, thus mitigating the perceived disparity in the beneficiary's salary compared to that of the petitioner's other employees.

Counsel further contends that the beneficiary is "badly needed to structure and manage the proposed acquisitions, create strategy for consolidation and future management of the consolidated business entities" and for the "critical integration process which shall follow once the acquisitions materialize." Counsel asserts that "a conclusion that this business does not need a management executive or cannot sustain a management executive shall render the L-1A provisions of the law meaningless as this is the kind of situation which is supposed to be benefited by the L1-A laws." Counsel suggests that the director placed undue emphasis on the size of the petitioning company, noting that in the case of a smaller business, a manager will not necessarily supervise a large managerial or professional staff, and may be required to participate in some administrative or operational activities. Counsel contends that the petitioner has sufficient employees to allow the beneficiary to "shoulder his management responsibility," and should not be required to increase the size of its staff in order to demonstrate that the beneficiary is qualified for classification as a managerial employee.

In support of these assertions the petitioner submits: evidence of the beneficiary's salary in India and a letter from the foreign entity indicating that the beneficiary will continue to receive a salary from the parent entity; evidence that the petitioner has obtained a line of credit in the amount of \$5 million in order to pursue its expansion efforts; documentation related to the petitioner's proposed acquisitions of other businesses; and

evidence that the petitioner has advertised for the position of software development manager. The petitioner also submits a proposed organizational chart for the U.S. company, in which the beneficiary is depicted as the vice president and chief operating officer, supervising an employee responsible for "software marketing," a finance manager, and a "technology manager & client development" employee. Two of the employees identified previously in the petitioners' response to the director's request for evidence, the employees responsible for clerical and administrative duties, sales and customer follow up, do not appear on the organizational chart. The chart shows that the beneficiary will report to the chairman of the board and managing director. Finally the petitioner submits "additional print outs from the internet evidencing that the Management positions cannot be defined in any other manner than we have."

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. 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.*

Furthermore, 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). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position.

Here, the petitioner's initial description of the beneficiary's duties was insufficient to establish his employment in a primarily managerial or executive capacity. The petitioner's statements that the beneficiary will be "planning and managing the future growth of the company," "overseeing work flow integration," "approving fund allocations for "various business activities," making decisions regarding "target acquisitions," "leading the technical and management team for client presentations," and "interacting with prospective client decision makers" are too vague to establish that the beneficiary's actual day-to-day duties would be primarily managerial or executive in nature. The petitioner did not elaborate as to what tasks the beneficiary will perform to manage the company's future expansion, explain the beneficiary's specific role in overseeing workflow, fund allocations or target acquisitions or the managerial duties involved, or provide evidence that it employs a technical or management team who would actually relieve the beneficiary from delivering client presentations and other marketing activities. 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 his 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).

Accordingly, the director reasonably requested a complete description for all employees in the United States, including one for the beneficiary's position, and instructed the petitioner to provide a breakdown detailing the number of hours devoted to each of the employee's job duties on a weekly basis. In response, the petitioner reiterated the job description submitted with the initial petition and already found by the director to be inadequate to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Further, the petitioner stated "there are no exact words to define a management position" and submitted other companies' job descriptions for their vice president positions "to substantiate [its] position that the job offered is of management level." The AAO notes that job descriptions utilized by unrelated companies to recruit for position openings have no bearing on an assessment of this beneficiary's duties within the context of the petitioner's business, and the petitioner cannot satisfy its burden of proof by comparing its vague job description to those utilized by other companies; the regulations require the petitioner to submit a detailed description of the beneficiary's duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Further, 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). Here, the requested evidence was critical, as it is not possible to determine whether the beneficiary will serve in a primarily managerial or executive capacity if the petitioner does not provide a detailed description of the duties he will perform on a day-to-day basis and an estimate as to how the beneficiary's time will be allocated between managerial and non-managerial tasks. 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 petitioner's failure to describe the beneficiary's actual duties, and his role within the context of the petitioner's business, cannot be excused. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

In addition, rather than providing a detailed account of the duties performed by the petitioner's current employees as requested by the director, the petitioner providing conflicting information regarding its staffing levels, and only brief, ambiguous descriptions of the duties performed by the company's current employees, without providing the employees' job titles, or the requested organizational chart. The petitioner initially claimed to employ four employees as of the date of filing. In response to the director's request for evidence, the petitioner identified five employees, and indicated that they are responsible for "administration and clerical," "sales and customer follow up," "finance and overall functioning," "technical aspects," and "client accounts and customer support." Although it appears that the petitioner did employ a total of five employees in 2004, the petitioner's Forms 941 quarterly tax returns for the first two quarters of 2005 confirm the employment of only three individuals. 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).

On appeal, the petitioner submits an organizational chart identifying only three current employees; however, the record contains inconsistent information regarding the responsibilities of the company's existing staff. For example, many company documents in the record, including the Form I-129, the petitioner's supporting letter, and the petitioner's tax documents, were signed by ██████████ in the capacity of chief executive officer of the company. However, the petitioner identifies this employee on its organizational chart as a "finance manager" who will work under the beneficiary's supervision. The AAO is not persuaded that the beneficiary will in fact supervise the company's current chief executive officer in his proposed role as vice president. The petitioner initially indicated that ██████████ handles "technical aspects," "devotes his time to handle all software, hardware, Internet connectivity and smooth technical functioning of the data transfer from the Indian office," and noted that "his focus shall remain on technical aspects of the business." On appeal, the petitioner identifies this employee's position on its organizational chart as "software marketing," without further explanation. The petitioner initially stated that ██████████ is responsible for looking after client accounts, customer support, and resolution of customer complaints. On appeal, the petitioner refers to this employee as its "technology manager and client development." The petitioner has provided no explanation regarding the administrative, clerical, sales and customer follow up duties initially attributed to employees who were apparently no longer employed by the petitioning company as of the date of filing. Again, the petitioner is required 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. at 591-92. The record as presently constituted contains too many inconsistencies for the AAO to ascertain what positions are actually filled, how work is currently allocated among the petitioner's three-person staff, or how the beneficiary's proposed role would fit within the company's organizational hierarchy.

Furthermore, the petitioner has been given ample opportunity to clarify the roles of the petitioner's existing employees and was specifically instructed to provide a detailed description of each employee's duties, including a breakdown of how the employees' time is allocated on a day-to-day basis. The petitioner failed to provide the requested evidence in response. Again, the petitioner's 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).

Although the petitioner initially stated that the U.S. company utilizes "several independent contractors" to provide marketing services for the business, the petitioner has neither presented evidence to document the existence of these employees nor identified the specific nature and scope of the services these claimed contractors provide. Furthermore, the petitioner submitted no additional information when specifically requested by the director to provide documentary evidence of its use of contracted employees. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Similarly, although the petitioner indicates that the beneficiary will oversee up to 100 employees working in India by monitoring their work via the Internet, the record is devoid of any evidence regarding the organizational structure of the foreign entity or the specific nature of the beneficiary's proposed supervisory duties. While the AAO acknowledges the petitioner's need to closely monitor deadlines and remain in constant communication with the foreign entity regarding the company's services, the record does not persuasively demonstrate that the beneficiary would be overseeing the day-to-day duties of the foreign entity's

employees, which would necessarily remain under the charge of local management in India. Again, without information regarding the specific reporting structure and the types of positions claimed to be supervised by the beneficiary, the AAO cannot conclude that he would perform primarily managerial duties associated with the petitioner's foreign "back office" operations in his proposed role as vice president with the U.S. company. As discussed above, the petitioner has not provided a detailed description of the beneficiary's duties and the petitioner has not elaborated beyond referencing the beneficiary's general responsibility for coordinating operations between the foreign and U.S. entities. 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.

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary will be employed in a managerial capacity based on his supervisory duties, his duties must involve supervising employees, and the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

Though requested by the director, as discussed above, the petitioner has not provided consistent evidence regarding its number of employees or their position titles, nor did it provide the requested detailed descriptions of its employees' duties. At most, it appears that the beneficiary may directly supervise two employees, as the AAO is not persuaded that the company's current chief executive officer would in fact work under the beneficiary's supervision. However, the minimal evidence in the record regarding these employees' duties, and the conflicting position titles provided, prevents a determination that either of the employees would be employed in a professional, managerial or supervisory capacity. Similarly, while it appears that the beneficiary will coordinate operations with the foreign entity, his actual supervisory duties with respect to the foreign entity's employees, and the foreign entity's staffing structure, have not been adequately detailed. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner has not shown that the beneficiary's subordinate employees would be employed in supervisory, professional, or managerial positions, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, counsel places additional emphasis on the petitioner's need for the beneficiary's services to oversee acquisition activities in the United States, activities that were mentioned only in passing in both the initial petition and the petitioner's response to the director's request for evidence. Counsel states that the beneficiary is needed "to structure and manage the proposed acquisitions, create strategy for consolidation and future management of the consolidated business entities," and "for the critical integration which shall follow once the acquisitions materialize." Although the petitioner has submitted evidence confirming that the petitioner is in fact engaged in identifying potential acquisitions of small businesses providing similar services, there is no evidence that such an acquisition had been completed as of the date the petition was filed. The AAO notes that a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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 beneficiary's proposed responsibility for managing operations or staff resulting from a potential future acquisition is speculative in nature and will not be considered.

Counsel also places great emphasis on the petitioner's financial success as evidence that the company will support the beneficiary in a managerial or executive capacity. The fact that the company has achieved strong gross and net sales figures in the years preceding the filing of the petition, while impressive, does not exempt the petitioner from establishing that the beneficiary's actual duties will be primarily managerial or executive in nature, and that its current staffing levels are sufficient to ensure that the beneficiary would not engage in operational, administrative or other non-managerial or non-executive duties associated with the business. Regardless of the size of the petitioning organization or its level of success in the marketplace, CIS must determine that the beneficiary is primarily engaged in a managerial or executive capacity. To make such a determination it is necessary to require a detailed description of the beneficiary's duties and the time the beneficiary devotes to these duties. As discussed above, the petitioner has not met its burden to provide a comprehensive description of the beneficiary's duties. Counsel's statement that "management positions cannot be defined" any more precisely than the general and unsupported assertions made by the petitioner is not persuasive.

Counsel further suggests on appeal that the director placed undue emphasis on the size of the petitioning entity in determining whether the beneficiary would be employed in a primarily managerial or executive capacity. Counsel notes that the petitioner is a "small growing business" and that such businesses require their managers to perform duties which would not be performed by managerial personnel within large, publicly traded corporations. Counsel also suggests that the standard applied by the director would exclude smaller companies from sponsoring managerial personnel for L-1A visas.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his

duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

At the time of filing, the petitioner is a four-year-old company engaged in providing medical transcription services to U.S. hospitals and medical centers. At the time of filing, it appears to have employed a chief executive officer (who was later identified as a finance manager), a technical specialist (who was later described as "software marketing") and a client account and customer support employee (who was later described as "technology manager and client development.") As discussed above, the petitioner's failure to provide consistent job titles and the requested detailed job descriptions for its employees undermines the petitioner's claims that the company's existing staff is sufficient to perform the majority of the company's routine operational and administrative tasks. The AAO is satisfied that the financial activities and information technology-related requirements of the company would likely be fulfilled by the company's existing staff, and the AAO acknowledges that the actual transcription services are provided by the foreign entity. However, the petitioner has not sufficiently accounted for staff to perform the company's sales, marketing, new business development, administrative, clerical, customer service and support, and routine tasks related to coordinating operations with the foreign entity to ensure timely delivery of services. It is reasonable to assume, and has not been shown otherwise, that the petitioner would have a reasonable need for the beneficiary to participate in some of these non-managerial tasks, and the job description submitted suggests that he would be actively engaged in marketing duties and other client-related tasks. 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). While performing non-qualifying duties will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary will "primarily" perform managerial or executive duties.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. The record does not demonstrate that the petitioner has a sufficient number of employees in the United States who would relieve the beneficiary from devoting a substantial portion of his time to non-qualifying operational and administrative tasks. Here, the petitioner's general description of the beneficiary's duties, the petitioner's inconsistent and incomplete evidence regarding its current staffing structure, and the petitioner's failure to provide evidence specifically requested by the director, prevent the AAO from concluding that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue in this matter is whether the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for at least one continuous year within the three years preceding the filing of the petition, as required by 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

In its supporting letter dated August 1, 2005, the petitioner stated that the beneficiary has been employed by the foreign entity since June 1, 2001, and stated:

He has been working in management capacity in the Indian office for more than one year now. He was a key person in laying a solid foundation for the company. He worked very hard to create an efficient and state of the art infrastructure in India and has successfully managed a team of more than 100 employees who work under his supervision and direction in India.

The petitioner did not provide the beneficiary's position title with the foreign entity, nor provide additional details regarding his claimed "management capacity" in India, or his specific job duties. 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 has not submitted an organizational chart for the foreign entity or other evidence to support its claim that the beneficiary supervises 100 employees in his current role. 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. The record contains insufficient evidence to establish that the beneficiary has been employed in a qualifying managerial or executive capacity with the foreign entity. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.