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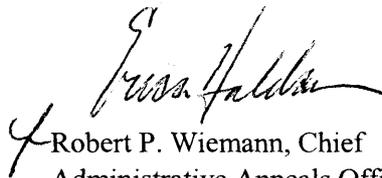
IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Georgia limited liability company, claims to be engaged in the development, management, consulting and operations business. The petitioner states that it is a subsidiary of [REDACTED] located in India. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 was initially granted a one-year period of stay to open a new office and the petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of vice president for a three-year period.

The director denied the petition on February 9, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

On appeal, counsel asserts that the U.S. company is a new business and it is "unrealistic to expect this petitioner to be up and running to the level of sophistication insinuated in the denial." Counsel states that the record provides enough evidence to demonstrate that the U.S. company will expand and grow. Counsel further states that the beneficiary supervises professional employees such as the human resources/marketing manager, and independent contractors or "leased employees" such as a lawyer and an accountant. Counsel cites two unpublished decisions to support his claims. Finally, counsel for the petitioner asserts that the beneficiary is a function manager. In support of the appeal, counsel submits a brief and resubmits documentation previously filed.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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 nonimmigrant petition was filed on October 18, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of vice president for the petitioner, which claimed to have two employees. In a support letter dated November 20, 2003, the beneficiary's proposed duties in the U.S. are described as the following:

As Vice President, the beneficiary has begun developing, supervising and controlling the USA operations. He is beginning to evolve new strategies and programs to develop our business and thus expand our business in the United States. He will work closely with the company's senior management in the development and growth of this business in the US marketplace. He will evaluate and review the current real estate deals.

- 1) He is supervising a team of project managers and technical support and service managers who provide technical support to development projects and consulting services and related operations.
- 2) He is charged with complete responsibility for all major operations in the United States including the following:
 - a) supervising a team of top management personnel who run the day-to-day operations at Corp. in the United States;

- b) providing key strategic technology and project management directives to stay ahead in the real estate development business;
- c) manage finance operations, personnel and human resources development policies;
- d) set guidelines for quality management, technical support management, and attend trade shows;
- e) continuously refining business objectives, organizational policies, as well as formulating financial strategies to provide funding for continuing or expanding new operations so as to maximize return on investments, and increase productivity;
- f) continuously establish and assign responsibilities and procedures for attaining objectives and goals and evaluating performance for compliance with established policies and objectives of the corporation and contributions in attaining objectives;
- g) developing and forming alliances with a variety of national and multinational corporations to provide services and thus facilitate contracts in the US;
- h) identify potential trading deals;
- i) report to the parent company in India.

As you would expect, these responsibilities are intertwined but can be grouped thus:

Management decisions including financial decisions (50%)
Supervision of day-to-day operations (25%)
Contract negotiations & business development (15%)
Company representation and public relations (10%)

In addition, the petitioner submitted a brochure for the U.S. company describing the services the U.S. company provides. For example, the U.S. company provides “real estate property development and consulting and interior design.” The company “assists investors and other businesses in developing properties.” The brochure states that the U.S. company will “secure loans”, “do market study,” and “handle all interior design.” The company also has the ability to provide yoga workshops, ayurveda seminars, and traditional Indian style weddings. The petitioner also submitted several invoices for services provided by the petitioner to three companies since March 2005. The services are described as “management and professional fee.” In addition, the petitioner submitted pay stubs for both employees of the U.S. company, the beneficiary as the vice president and the petitioner’s other employee.

On November 2, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested that the petitioner submit: (1) the organizational chart of the U.S. company, including the names, job titles and a detailed job description for each employee; (2) a copy of the U.S. company's federal income tax return for the prior year; (3) copies of the petitioner's Georgia employer's quarterly wage reports for the last four quarters; and, (4) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for all employees.

In a response to the director's request, dated January 28, 2006, the petitioner reiterated the beneficiary's proposed job duties as stated in the initial filing. In addition, the petitioner submitted the job duties performed by the petitioner's other employee, who was identified as a human resources/marketing manager, who works under the beneficiary's supervision. The petitioner stated that the human resources/marketing manager manages the human resources functions, and assists with business development, marketing functions and customer service.

The petitioner also submitted the U.S. company's Georgia State Employer's Quarterly Tax and Wage Report for the quarters ended in June 2005 and September 2005, which confirm the employment of the beneficiary and the human resources/marketing manager. In addition, the petitioner submitted Form 941, Employer's Quarterly Federal Tax Return, for the quarters ended in June 2005 and September 2005, which also confirm the employment of the beneficiary and the human resources/marketing manager.

The petitioner also submitted two consulting agreements between the United States company and two separate companies. Both agreements were entered into in June 2005. The agreements state that the petitioning company agrees to provide all of the "man-power" and "financial, accounting and marketing consulting" to the company.

The director denied the petition on February 9, 2005 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that the beneficiary "is not managing other professionals or managers." The director also noted that the petitioner did not submit sufficient evidence to demonstrate that the beneficiary will be a function manager, or that the beneficiary will be employed in a primarily managerial or executive capacity with the U.S. entity.

The petitioner filed an appeal on February 9, 2006. On appeal, counsel for the petitioner asserts that it is "unrealistic to expect this petitioner to be up and running to the level of sophistication insinuated in the denial. The beneficiary entered the United States on L-1A only on April 2005." Counsel urges that the CIS consider the fact that this is a new company and the "absence of other more managerial employees on the petitioner's direct payroll is a normal characteristic of a new business." Counsel also states that the beneficiary supervises individuals employed by the petitioner and independent contractors, as well as leased employees such as a law firm and an accounting firm. Counsel also cites unpublished decisions in support of the assertion that the number of staff is not a basis for denial where the beneficiary is a top manager. Finally, counsel states that the beneficiary is a function manager.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of

the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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).

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. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Here, while the beneficiary evidently exercises some discretion over the day-to-day operations of the business, the petitioner's description of his proposed duties suggest that the beneficiary's actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description includes vague duties such as the beneficiary is "charged with complete responsibility for all major operations in the United States"; and will be responsible for "providing key strategic technology and project management directives to stay ahead in the real estate development business"; "manage finance operations, personnel and human resources development policies"; "set guidelines for quality management, technical support management, and attend trade shows"; and "continuously refining business objectives, organizational policies, as well as formulating financial strategies to provide funding for continuing or expanding new operations so as to maximize return on investments, and increase productivity." 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).

In reviewing the record, the petitioner did not clearly describe the U.S. entity's business activities and thus the AAO cannot determine if the beneficiary's vague duties, as mentioned above, qualify as primarily managerial or executive duties. Without additional clarification from the petitioner regarding the scope of the business activities performed by the U.S. company, the AAO cannot distinguish these vague responsibilities from routine administrative or operational tasks. If the beneficiary is in fact attending trade shows, provides technical support and sets guidelines for management, these duties have not been shown to be managerial or executive in nature. 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)).

In addition, the beneficiary will be the vice president of the company. According to the organizational chart submitted for the U.S. company, the chart indicates that the beneficiary will be supervised by the president. The petitioner failed to provide any information or documentation regarding the duties the president will perform, therefore, the beneficiary's actual level of authority is unclear. 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).

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will be responsible for "developing and forming alliances with a variety of national and multinational corporations to provide services and thus facilitate contracts in the US"; "identify potential trading deals"; and will be responsible for "contract negotiations and business development"; and "company representation and public relations." 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. 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 the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how his time will be divided among managerial and non-managerial duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicates that the beneficiary will spend 50 percent of his time to "management decisions including financial decisions." The record does not indicate that the U.S. company employed a financial manager and staff. The lack of a financial manager for the beneficiary to supervise raises questions as to whether the beneficiary is managing these activities or actually performing the petitioner's sales and marketing duties.

The petitioner further states that the beneficiary will spend 25 percent of his time to "supervision of day-to-day operations." Without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine administrative tasks. As noted above, the petitioner has not clearly described the U.S. company's business activities and therefore it is impossible to determine if the day-to-day activities managed by the beneficiary are managerial or executive in nature. 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 at 165.

In addition, the petitioner states that the beneficiary will spend in total 15 percent of his time to “contract negotiations and business development.” These duties require market research, administrative and finance functions in order to obtain the required capital and funding, and include negotiating contracts, duties which have not been shown to be managerial or executive in nature. Further, the petitioner has not further described the U.S. company's expansion or investment plans, or provided evidence associated with these activities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

The petitioner also states that the beneficiary will spend 10 percent of his time to “company representation and public relations.” The record does not resolve whether the beneficiary will perform the day-to-day tasks to develop and implement the marketing programs and policies, and customer relation policies, or whether he will direct others to do so. The petitioner indicated a vague description of the duties performed by the human resources/marketing manager who is supervised by the beneficiary, however, the duties of the human resources/marketing manager do not appear to include managing the public relations operations for the U.S. company. The lack of employees for the beneficiary to “direct and coordinate” raises questions as to whether the beneficiary is managing these activities or actually performing the petitioner’s public relations duties.

As noted above, according to the petitioner’s statement on Form I-129, the U.S. company has two employees, the beneficiary as vice president and one human resources/marketing manager. Counsel correctly observes that a company's size alone, may not be the determining factor in denying a visa to a multinational manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Furthermore, 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.*

At the time of filing, it appears that the U.S. company was providing consulting services to three companies. On appeal, the petitioner submitted letters from the three companies in which the U.S. company had established a consulting agreement. The letters specified the services the U.S. company would provide to their companies. The services included: "management of our operational activities and

various organizational departments including finance, sales, marketing and HRD," "responsible for supervision and controlling the works of other departmental heads," "authorized to study the hotel market for future acquisition purposes; prepare feasibility reports and make his recommendation;" and is responsible for "establishing the goals and policies of the organization." The letters of reference indicate that the beneficiary himself is responsible in performing these duties. Thus, if the beneficiary will be the only employee providing the services offered by the U.S. entity by providing the consulting services to its clients, 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 Soffici*, 22 I & N Dec. at 165. Furthermore, in reviewing the above mentioned letters, it appears that the three letters are all signed by the same individual. It is not clear why three separate companies would have the same individual as signatory. 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).

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employee relieves the beneficiary from performing non-qualifying duties. As noted, the U.S. company employed the beneficiary as vice president and one human resources/marketing manager. In reviewing the brief job descriptions of the employees at the U.S. entity, submitted by the petitioner in a letter dated January 12, 2006, it appears that the beneficiary and the human resources/marketing manager are engaged in the operational and administrative tasks in running the business. However, it appears that the human resources/marketing manager spends most of his time dealing with the administrative tasks, market research and human resources policies. Based on the evidence submitted, it appears that the beneficiary will be performing all or many of the various operational tasks inherent in operating the business on a daily basis, such as acquiring clients, negotiating contracts, budgeting, and providing the consulting services to its clients. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and two managerial employees. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

As noted above, counsel on appeal asserts that it is "unrealistic to expect this petitioner to be up and running to the level of sophistication insinuated in the denial." In addition, the petitioner stated that the United States company did not commence business until April 2005 since the beneficiary was delayed in entering the U.S. However, the petitioner did not explain why the beneficiary delayed his entry into the United States. The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. The

petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that his 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 record establish that the beneficiary will supervise a human resources/marketing manager.

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 administrative tasks and market research of the human resources/marketing manager, the only subordinate supervised by the beneficiary. In addition, notwithstanding the employee's job title, the petitioner has not established that the beneficiary's subordinate supervises other employees or manages a function, such that he/she could be deemed a managerial or supervisory employee.

Furthermore, on appeal, counsel asserts that the position offered to the beneficiary is 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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial 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-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.* 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. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the beneficiary supervises one human resources/marketing manager, the U.S. company has not

established a complex organizational structure which would elevate the beneficiary beyond a first-line supervisor. In the instant matter, the petitioner has not established evidence that the beneficiary is employed in an executive capacity with the U.S. entity.

Finally, the AAO acknowledges counsel's contention that the service further erred in not identifying the position as an essential function within the petitioner's 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, 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.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner has not described the beneficiary's actual duties or the nature of its business in any detail, nor has the petitioner identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

Other than stating that the proposed position will be responsible for managing an unidentified essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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. It is the petitioner's obligation to establish however, through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although, as correctly noted by counsel, these employees need not be professionals. Here, the petitioner has not met this burden.

Furthermore, counsel for the petitioner discusses prior cases approved by the AAO where the AAO held that a small staff does not justify a denial where the beneficiary holds wide decision-making discretion. Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, counsel asserts on appeal that the beneficiary manages "independent contractors and leased employees" such as a lawyer to handle the legal issues of the U.S. company, and an accounting firm to handle the company's accounting needs. Although counsel states on appeal that the petitioner has contractual employees in the areas of accounting and legal services, the petitioner has neither presented evidence to document the existence of these employees nor identified in detail the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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. at 165.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. As noted above, the petitioner submitted three consulting agreements between the United States company and three separate companies. In addition, on appeal, the petitioner submitted letters from the three companies in which the U.S. company established a consulting agreement. In reviewing the letters, all three letters have the same signature. In addition, two of the companies are international hotel companies and the letterheads do not match the trademark logo of these companies. 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).

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. *See*

e.g., 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. at 591. Based on the foregoing discussion, the petitioner has not established that the petitioner has been doing business in the United States for the year preceding the filing of the petition. For this reason, the appeal will be dismissed.

Furthermore, beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish the existence of a qualifying relationship between the United States entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). 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.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner claims to be a subsidiary of the foreign company, [REDACTED]. The petitioner stated that the foreign parent company owns 51% of the U.S. company. The petitioner submitted the U.S. company's stock ledger with the initial petition which verified that the foreign company owns 51% of the U.S. company. However, in response to the director's request for evidence, the petitioner submitted a completely different stock ledger for the U.S. company as previously submitted. The information in the subsequent stock ledger is not the same as the first stock ledger. 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). 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. at 591. For this additional reason, the petition cannot be approved.

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

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

ORDER: The appeal is dismissed.