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File: SRC 03 105 52665 Office: TEXAS SERVICE CENTER Date: JUN 13 2007

IN RE: Petitioner:
Beneficiary



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of finance director 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 corporation organized under the laws of the State of Texas, claims to be a retailer of jewelry, mobile telephones, and gifts.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition. Specifically, the director determined that, since the beneficiary has been present in the United States since May 22, 1999, the beneficiary's claimed one year of employment abroad in an executive or managerial capacity occurred more than three years prior to the filing of the petition on March 3, 2003.

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 to the petitioner asserts that, because the beneficiary's presence in the United States, first in B-1 status and then in F-1 status, was on behalf of the foreign employer, this presence was not interruptive of the one year of continuous employment abroad. Counsel further asserts that the beneficiary has been continuously employed by the foreign entity even though the beneficiary has been present in the United States for almost four years. In support of the appeal, counsel submitted a brief.

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

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

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

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

"Intracompany transferee" is defined in 8 C.F.R. § 214.2(l)(1)(ii)(A) as follows:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted towards fulfillment of that requirement.

The primary issue in this proceeding is whether the petitioner has established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition.

The instant petition was filed on March 3, 2003. The petitioner asserts that the beneficiary was employed abroad by a qualifying organization as an "operations manager" beginning in 1997. In March 1999, the beneficiary's position title was changed to "overseas manager/director." On May 22, 1999, the beneficiary traveled to the United States. He applied to change status to F-1 (student) on October 21, 1999, and Citizenship and Immigration Services (CIS) approved this change on March 6, 2000. The petitioner submitted a copy of the beneficiary's Form I-20 which indicates that the beneficiary studied computer and information science at Houston Community College. The Form I-20 further indicates that the beneficiary's aunt would be paying for his tuition and living expenses and that the program would begin on August 28, 1999 and end no later than December 31, 2002. However, the petitioner also submitted the foreign employer's payroll records which indicate that the beneficiary was periodically paid a salary as the "overseas manager" after leaving India through the filing date of this petition, even though he was apparently studying full time in the United States and did not travel back to India after his initial admission to the United States on May 22, 1999.

The director denied the petition concluding that, because the beneficiary was studying or otherwise present in the United States for more than three years prior to the filing of the petition, the petitioner failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition.

On appeal, counsel to the petitioner asserts that, because the beneficiary's presence in the United States, first in B-1 status and then in F-1 status, was on behalf of the foreign employer, this presence was not interruptive of the one year of continuous employment abroad. Counsel further asserts that the beneficiary has been continuously employed by the foreign entity even though the beneficiary has been present in the United States for almost four years.

Upon review, counsel's assertions are not persuasive.

In this matter, the petitioner has not established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition. 8 C.F.R. § 214.2(l)(3)(iii). The record indicates that the beneficiary's employment abroad with the foreign entity ended for all practical purposes more than three years prior to the filing of the instant petition. The beneficiary apparently traveled to the United States on May 22, 1999, changed status to F-1 (student) status, pursued a full-time course of study in Houston, Texas, and did not leave the United States between the date of his initial admission and date of the filing of the instant petition. Therefore, the petition may not be approved for this reason.

Furthermore, counsel's assertion that the beneficiary's presence in the United States was not interruptive of his foreign employment because he was in the United States on behalf of the foreign employer and/or a qualifying organization is not persuasive. Specifically, counsel argues the following in the appeal brief:

As our response to the request for evidence stated: "The Beneficiary began employment with [the foreign entity] in 1997 in the position of [operations manager]. In 1999 he expressed a desire to pursue further studies abroad and assist in the establishment of a subsidiary in the United States. Accordingly, he was appointed Overseas Manager/Director in March 1999. He remained on the [foreign entity's] payroll, since he continued to contribute his services to [the foreign entity]." As such, it is clear that the period from May 22, 1999 through the time of application was lawful (first in B-1 and then in F status) and on behalf of the company, since it was the foreign employer who wanted the Beneficiary's presence in the United States. The foreign employer wanted the Beneficiary's edification and assistance in establishment of the family's business investments in the United States. Being in lawful status and being here on behalf of the company makes the Beneficiary's time in the United States non-interruptive of his one year of continuous employment abroad that immediately preceded the point of L-1A application.

Counsel's argument is not persuasive. First, the petitioner did not establish that the beneficiary's presence in the United States at any time from May 22, 1999 until the filing of the instant petition was on behalf of the foreign entity or the petitioner. The record is devoid of any evidence establishing what, exactly, the beneficiary was doing to "assist in the establishment" of the petitioner. 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)). To the contrary, the record indicates that the beneficiary traveled to the United States on May 22, 1999; that he commenced studying full-time soon thereafter and changed status to

F-1 (student); and that the beneficiary's aunt (and not the foreign entity) funded his education and living expenses. The record is devoid of any evidence establishing that the beneficiary was sent or transferred to the United States or that his presence in the United States was related to his employment abroad.¹

Second, the petitioner did not establish that the beneficiary was continually employed by the foreign entity from 1997 until the date of the filing of the instant petition on March 3, 2003. As indicated above, the beneficiary traveled to the United States on May 22, 1999 and thereafter apparently pursued a full-time course of study at Houston Community College. While the petitioner submitted evidence that the beneficiary continued to periodically receive a salary from the foreign entity for almost four years after his admission to the United States, the record is devoid of any evidence that the beneficiary actually rendered services to the foreign entity during that time. Once 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.

Accordingly, the petitioner has not established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition, and the petition may not be approved for that reason. 8 C.F.R. § 214.2(l)(3)(iii). Furthermore, the petitioner failed to establish that the beneficiary's presence in the United States was not interruptive of his employment abroad.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary had been employed abroad in a primarily managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(iv).

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

¹It must be noted that, had the petitioner established that the beneficiary was truly rendering services to the United States operation during his period of admission to the United States in B-1 or F-1 visa status, this would likely have been inconsistent with those visa classifications and would have undermined the petitioner's claim that the beneficiary was in "lawful status" while rendering those services.

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 in the initial petition whether the beneficiary had been 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. A petitioner may not claim that a beneficiary had been 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.

The foreign entity asserts in a letter dated October 1, 2003 that the beneficiary was employed abroad as an "operations manager" beginning in 1997. In March 1999, the beneficiary's position title was changed to "overseas manager/director." The petitioner did not describe the beneficiary's duties as an operations manager even though the director requested job descriptions in the Request for Evidence. The petitioner did provide a job description for the beneficiary's position as "overseas manager/director," a position held by the beneficiary for approximately two months before traveling to the United States. The petitioner stated that the beneficiary devoted 60% of his time to the following duties:

Directs and coordinates promotion of products to develop new markets, increase share of market, and obtain competitive position in the industry. Reviews activity, operating, and sales reports to determine changes in programs or operations. Reviews and analyzes activities, costs, operations, and forecasts data to determine progress toward stated goals and objectives. Discusses with management and employees to review achievements and discuss required changes in goals or objectives of the company.

The petitioner also submitted an organizational chart for the foreign entity, which indicates that the beneficiary supervised no employees abroad.

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) and (iv). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary was primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to have been employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

As a threshold matter, the petitioner failed to describe the beneficiary's duties as "operations manager" even though this information was requested by the director. The petitioner also failed to include the "operations manager" position in the organizational chart. As the beneficiary allegedly worked as the "operations manager" from 1997 until March 1999 (about two months before traveling to the United States), the petitioner must establish that the beneficiary was primarily employed in an executive or managerial capacity during that time frame. 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). 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.

Also, the duties related to the beneficiary's position as "overseas manager/director," a position allegedly filled by the beneficiary in March 1999, may not be used to establish that the beneficiary was performing qualifying duties abroad even if these duties were established to be managerial or executive in nature. As explained above, the beneficiary only worked in this position for two months before traveling to the United States, and the record is not persuasive in establishing that the beneficiary rendered services to the foreign entity after he traveled to the United States in May 1999 and began pursuing a full-time course of study in Texas. Therefore, the position relevant to ascertaining whether the beneficiary was employed abroad in an executive or managerial capacity was the "operations manager" position, and the petitioner has chosen not to provide a specific description related to this position.

Regardless, even if the duties related to the beneficiary's position as "overseas manager/director" could be extended to his role with the foreign entity before March 1999, the petitioner's description of the beneficiary's job duties as "overseas manager/director" has failed to establish that the beneficiary acted in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner states that the beneficiary spent most of his time directing and coordinating promotion of products and reviewing reports and data to determine progress toward "goals and objectives." However, the petitioner does not identify these goals or objectives to explain how, exactly, the beneficiary "directs" or "coordinates" when he did not appear to have supervised any subordinate employees. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary actually performed managerial 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).

Likewise, most of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner indicates that the beneficiary was primarily engaged in product promotion and sales matters. However, promotions and sales duties constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the organizational chart fail to identify any employees or contractors who relieved the beneficiary of the need to perform the non-qualifying tasks inherent to these duties, it must be concluded that he performed these tasks. As the petitioner has not established how much time the beneficiary devoted to such non-qualifying tasks, it cannot be confirmed that he was "primarily" employed as a manager. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As explained in the organizational chart, the beneficiary did not supervise any employees abroad. Moreover, the petitioner did not establish 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. In this matter, the petitioner's vague job description fails to document what proportion of the beneficiary's duties was managerial, if any, and what proportion was non-managerial. Also, as explained above, the record establishes that the beneficiary performed the duties related to the function. 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 were managerial, nor can it deduce whether the beneficiary was 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). Therefore, the petitioner has not established that the beneficiary was primarily employed in a managerial capacity.

Similarly, the petitioner has failed to establish 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, the beneficiary appears to have been primarily performing tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner asserts that the beneficiary will be employed in the United States as its "finance director." In support, the petitioner submitted an organizational chart showing the beneficiary reporting to the president and supervising a "finance manager." The petitioner also submitted the following job description for the beneficiary as director – finance and systems:

- Establishes procedures for custody and control of assets, records and loan collateral to ensure safekeeping (10% of the time)
- Prepares financial and regulatory reports required by law and regulations (10% of the time)
- Evaluates data pertaining to costs to plan budgets for each store (10% of the time)
- Oversees, directs and coordinates work of Finance Manager (10% of the time)
- Devises and installs special accounting systems and related procedures in establishment which cannot use standardized systems (10% of the time)
- Plans and develops methods and procedures for carrying out financial activities of the corporation (15% of the time)
- Sets up classification of accounts and organizes accounting procedures and machine methods supports (10% of the time)
- Directs and coordinates activities to implement accounting and financial policies, procedures, and practices (20% of the time)
- Devises forms and prepares manuals required to guide activities of bookkeeping and clerical personnel who post date and keep records (5% of the time)

The petitioner also submitted wage reports. None of these reports includes the "finance manager." Therefore, it does not appear that the "finance manager," the only worker that the beneficiary will supposedly supervise, is actually an employee of the petitioner.

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

In this matter, the petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has vaguely described the beneficiary as primarily performing non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will establish procedures, prepare financial reports, evaluate data, devise and install systems, plan and develop financial methods and procedures, direct the implementation of policies, procedures, and practices, devise forms, and prepare manuals. However, these duties constitute administrative or operational tasks when the tasks inherent to them are performed by the beneficiary. As the beneficiary is described as having only one subordinate worker, a financial manager, who is described as developing and implementing financial plans, the record does not identify any subordinate workers who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent in such duties as developing policies, preparing reports and manuals, and devising forms. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart, wage reports, and job descriptions for the subordinate staff members, it appears that the beneficiary will supervise a "finance manager." However, according to the wage reports, this worker is not an employee. Furthermore, the record is devoid of any evidence revealing the amount of time, if any, this non-employee, presumably an independent contractor, spends providing services to the petitioner. Regardless, the supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. *See* section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that only subordinates of a managerial employee who are *employees* qualify for purposes of this visa classification. Moreover, the petitioner has not established that the beneficiary will manage a professional employee.² Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

²In 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);

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The job description provided for the beneficiary vaguely describes the beneficiary as primarily engaged in performing a variety of operational and administrative tasks. Furthermore, as the beneficiary will report to the president of the company and supervise no employees, it appears that he will not direct the management of the organization or a major component or function. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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 denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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 master'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, or a master's, degree is actually necessary to perform the duties of the finance manager.

³While the petitioner has not clearly argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The petitioner's description of the beneficiary's duties do not demonstrate that the beneficiary will manages the function rather than perform the duties related to the function. 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 will be managerial, if any, nor can it deduce whether the beneficiary will be primarily performing the duties of a function manager. *See IKEA US, Inc.*, 48 F. Supp. 2d at 24.