

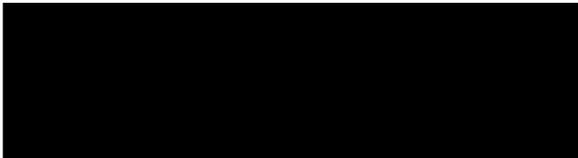


U.S. Citizenship
and Immigration
Services

PUBLIC COPY

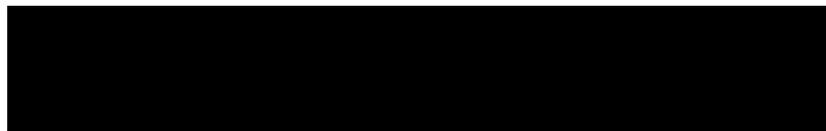
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

D7



File: EAC 04 024 50514 Office: VERMONT SERVICE CENTER Date: **MAR 28 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)

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 extend the employment of its president and managing 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 Pennsylvania corporation, operates a gas station and convenience store with fast food service. The petitioner claims that it is a subsidiary of LEO Contracting, located in Lebanon. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for two additional years.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the U.S. company and the foreign entity have a qualifying relationship.

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 asserts that the U.S. entity and the foreign entity are both wholly-owned by the beneficiary, and thus have a qualifying relationship for the purposes of this visa classification. Counsel states that the beneficiary is employed in a managerial or executive capacity, and contends that the director misinterpreted the salary information provided for the petitioning organization, understated the number of employees, and failed to take into account the petitioner's early stage of development, and the delays experienced by the beneficiary in obtaining his L-1 visa. Counsel submits a detailed brief and additional documentation 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 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 first issue in the present 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 November 3, 2003. The petitioner stated on Form I-129 that it intended to employ the beneficiary as the "President Executive Managing Director" of the 15-person U.S. company for a period of two years. In a letter dated October 30, 2003, the petitioner provided the following description of the beneficiary's duties as president:

[The beneficiary] defines corporate goals and objectives for the development of the first hybrid commercial real estate project in New Brighton, Pennsylvania. This duty requires [the beneficiary] to serve as a leader for our 8-staff management team in the U.S. in negotiating and securing contracts with commercial investors and researching and contacting potential development partners for future construction projects in the East Coast. The President also leads Project Architects and Project Managers through the initial design phases of the first SUPER M.A.R.T. project to make sure that the innovative concept of the hybrid model is maintained throughout all phases of construction. Finally, the President works closely with the Vice President to ensure that corporate goals and standards are met throughout all phases of development.

As the President of [the petitioner], [the beneficiary] serves as an executive role model for the Vice President and management team in the U.S. who benefit from his strong entrepreneurial initiative and unique leadership style in conceptualizing and implementing corporate goals.

[The beneficiary] also carries the title of a temporary Managing Director with [the petitioner]. As previously mentioned, [the petitioner] currently employs 8 full-time staff who are responsible for the micromanagement of the current SUPER M.A.R.T. hybrid project and future construction projects secured by our subsidiary company. The duties of the existing staff include securing construction materials, hiring on-site construction workers and subcontractors on a temporary basis, managing accounting records, seeking inspections and permits, and ensuring full compliance with deadlines.

As the Managing Director, [the beneficiary] does not work with the micromanagement aspect of our projects. Instead, the Managing Director oversees the work of the Vice President, Commercial Senior Project Developer, Operations Manager, Financial Manager, and the General Manager. These employees comprise the highest level of personnel employed [by] [the petitioner] and will be trained to carry out corporate objectives in [the beneficiary's] absence.

In addition, the Managing Director develops business networks and relationships with future investors and partners in the East Coast region. This requires [the beneficiary] to represent [the petitioner] in meetings with product distributors, heads of various commercial development firms, city council representatives, and community leaders.

In a cover letter dated October 30, 2003, counsel for the petitioner noted that the beneficiary's initial L-1 petition was approved for a one-year period ending on November 7, 2003. Counsel stated that the beneficiary had limited time to achieve his objectives in the United States because he was not "granted clearance to return to the United States," until July 2003, due to security investigations conducted in connection with the visa application process. The petitioner submitted a copy of the beneficiary's prior approval notice, which shows that he was granted a change of status to L-1A classification on November 9, 2002. The petitioner did not indicate when he departed the United States to obtain an L-1 visa in his passport.

The director requested additional evidence on February 18, 2004, in part instructing the petitioner to (1) indicate the duties performed by each employee, and explain the management and personnel structure, including the number of hours worked by each employee and remuneration received by each; (2) clarify the role of each member of the petitioner's claimed eight-member managerial staff, including the vice president, commercial senior project developer, operations manager, financial manager, general manager, and three other managers; (3) explain the roles of any contracted employees; (4) provide copies of all state quarterly wage reports, federal tax returns, and Forms W-2 to document the number of individuals on the payroll since the formation of the company; (4) submit additional evidence of the staffing of the U.S. company; and (5) submit evidence of the duties performed by the beneficiary, including copies of contracts negotiated and executed with investors and potential partners; and (6) describe the corporate goals and objectives established and document what the beneficiary has achieved since July 2003.

In a response dated May 10, 2004, counsel for the petitioner noted that the U.S. company currently employs ten people, explaining that "in original proposal, [the beneficiary] had other managers and other employees working for him." Counsel noted that fewer workers were required due to necessary improvements made to

the company's gas station/convenience/fast food store, but that such improvements would lead to increased financial gains which would allow the petitioner to expand and open future stores.

Counsel provided the following description of the beneficiary's duties:

The beneficiary will define corporate goals and objectives for the development of the first hybrid commercial real estate project. He will redefine these corporate goals and objectives as situations call for it. For example...he needed to implement new changes to the pilot project in order to ensure that it will be a success. He serves as the leader for his management staff. He has weekly meetings with the managers in order to ensure that the pilot project and other developing projects are on track. He also lead[s] the Project Architects and Project managers through the initial design phases of the first SUPER M.A.R.T. project Additionally, he is negotiating contracts for the purchase of other locations where he will copy the pilot project and implement other stores like the SUPER M.A.R.T. In negotiating contracts, he is the main person that makes the decisions on where the other gas stations/convenience stores will open and how much to pay for the location.

[The beneficiary] will not work in the micro-management aspect of [the petitioner's] projects. ... He is currently developing business networks and relationships with investors and partners in the East Coast Region. He represents [the petitioner] in meetings with product distributors, heads of various commercial development firms, city council representatives, and community leaders. He is already negotiated [sic] food contacts with several companies. . . .

Counsel for the petitioner also provided position descriptions for the beneficiary's claimed subordinates. Counsel indicated that the U.S. company employs a facility manager who: supervises and coordinates maintenance and minor construction related to the gas and food store facilities; supervises contractors, vendors and the "operations crew" to ensure that the building systems are in excellent working condition; researches and qualifies new contractors; prepares and manages an annual repair and maintenance budget; manages repair and maintenance of specific projects and develops scope of work; and solicits bids and proposals. Counsel indicated that the facilities manager is employed full-time at an hourly wage of \$10.00. Counsel indicated that the facilities manager is supported by an assistant facility manager who: ensures compliance with the Occupational Safety and Health Act, local health and safety codes and company safety and security policy; conducts facility inspections; and trains other works on how to effect minor repairs.

Counsel stated that the U.S. company employs a supervisor and head cashier who is responsible for: maintaining fast, accurate service, positive customer relations, and consistent product quality; following cash control and security procedures; maintaining inventory; managing labor; reviewing financial reports; playing an active role in payroll, scheduling, inventory, and proper cash handling; interviewing and hiring new crew members; managing and training four cashiers; assisting the beneficiary in recruiting, interviewing, hiring and evaluating team members; and ensuring food quality, customer satisfaction, and complete and timely execution of corporate, local marketing and development plans. Counsel indicated that the company's four cashiers are responsible for sales transactions, ordering paper products, preparing coffee and maintaining cleanliness of service counters, and communicating issues to the head cashier. Counsel indicated that all four

cashiers work 40 hours per week at a wage of \$5.50, while the head cashier works 35 hours per week at a salary of \$5.50.

Counsel stated that the petitioner also employs a food manager who works 30 hours per week and who is responsible for the store's food and beverage inventory, including responsibility for ordering out of stock items, inspecting food and beverage displays, selecting food and beverage items to sell, tracking the rate of perishable items, estimating food and beverage costs, and requisitioning and purchasing supplies. Finally, counsel stated that the petitioner employs an assistant food manager who works 35 hours per week, and who stocks and sets up food and beverage displays, installs promotional items and advertising from food and beverage vendors, assists the food manager with the inventory and upkeep of food and beverage stock, and removes and returns damaged or outdated products. Counsel indicated that both managers receive a wage of \$5.50 per hour. Counsel emphasized that the employees are not involved in the preparation of food "as everything comes to the store frozen."

The petitioner submitted an organizational chart for the U.S. company which identifies the beneficiary as president, supervising a vice president, who in turn supervises the facility manager. The chart includes the assistant facility manager position, a supervisor, and six cashiers, for a total of ten employees in addition to the beneficiary. The only individual who appears in both the petitioner's employee list and the organizational chart is the facilities manager, [REDACTED], although counsel did note that the petitioner had hired different cashiers since the filing of the petition. The organizational chart shows that the company intends to hire a "real estate development team" consisting of engineers, architects and marketing/public relations personnel following the approval of the beneficiary's visa petition. Counsel stated that the beneficiary comes into contact with all of the employees, particularly the management employees, noting that he "has created and will be implementing new training seminars."

The petitioner submitted its state and federal quarterly wage reports for the fourth quarter of 2003, which included the beneficiary along with the employees identified as the facilities manager, assistant facilities manager, supervisor and head cashier, food manager, assistant food manager, and one cashier on the petitioner's employee list. The remaining seven workers listed on the quarterly wage report did not appear on either the organizational chart or the employee list.

In response to the director's inquiry regarding the beneficiary's specific accomplishments during the first year of operations, the petitioner noted that the beneficiary has implemented interior and exterior improvements to the petitioner's store, and has plans to open two additional gas/station convenience stores in the near future. The petitioner submitted a letter dated November 10, 2003 from the chief operating officer of CoGo's Co. (USA), providing the beneficiary with information on stores available for sale in the Pittsburgh metropolitan area, and information regarding the remodeling of the current store, which involved renovation of the kitchen and installation of fast food service equipment. The petitioner noted that the petitioner has negotiated, contracted and implemented three food concepts provided by a vendor, A.J. Silberman & Company, including Chicago style pizza, fried chicken and "Super Subz," and included a copy of the contract between the petitioner and the vendor. The petitioner highlighted the beneficiary's responsibility for developing the revisions to the petitioner's floor plan and contracting a construction company to implement the renovation project.

The director denied the petition on March 10, 2005, concluding that the petitioner had failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The director, noting that the petitioner initially claimed to employ an eight-member management team, concluded that the petitioner inflated its staffing structure, the description of its business, and the beneficiary's duties "to give the impression that the U.S. entity supported an executive with an 8 member management team." The director noted that based on the earnings and job descriptions for the petitioner's employees submitted in response to the request for evidence, "it is unlikely that the beneficiary or any of the employees are employed in positions that are executive or managerial." The director further found that none of the subordinates would qualify as professionals, and noted that the beneficiary would be responsible for performing many day-to-day duties associated with operating a gas station and convenience store.

The director acknowledged that all businesses need some degree of management, but noted that not all individuals who manage a business can be considered executives or managers for purposes of this visa classification. The director observed that the petitioner does not have an organizational structure that requires a manager or executive as those terms are defined in the statute.

The AAO acknowledges that the director erroneously referred to the beneficiary as ' [REDACTED] ' on page three of the notice of decision. The director's reference to this individual is withdrawn. Despite this error, a review of the director's decision as a whole reveals that proper review and consideration was given to the evidence submitted by the petitioner, including evidence relating to the beneficiary's job duties and his role within the U.S. company. Counsel's suggestion that the director "may have continued its error by making assumptions in the present case that were based on" the other individual's case is not supported by the record.

On appeal, counsel for the petitioner asserts that the beneficiary's duties clearly comply with the statutory definitions of managerial and executive capacity. Counsel asserts that in his managerial capacity, the beneficiary:

Manages [the petitioner]; supervises all the employees, including [the vice president]; manages the essential function of finding locations in which to build stores like SUPER M.A.R.T.; negotiates contracts with suppliers and investors; has the authority to hire and fire all employees; and, exercises discretion over the day-to-day operations of creating a pilot store and developing new stores.

Counsel further states that, as an executive, the beneficiary "directs the management of [the petitioner], establishes the goals and policies of the company, exercises wide latitude in making contracts with suppliers and investors, and receives only general supervision from high level executives of the company."

Counsel emphasizes that the petitioner clearly stated that the beneficiary "does not work in the micro-management aspect of the projects, but instead oversees the work of the managers." Counsel asserts that more recently, the beneficiary has successfully contracted to purchase additional properties, and submits an agreement of sale for two additional properties located in East Rochester and Ambridge, Pennsylvania. While it appears the agreement was initially finalized in August 2004, it appears that closing for the two properties was scheduled to occur on August 28, 2005, contingent upon securing of financing. Counsel emphasizes that

the beneficiary successfully negotiated and secured contracts for the supply of food and gasoline, and notes his role in designing architectural renovations for the petitioner's "pilot store."

In addition, counsel asserts that "the Service makes the mistake of assuming that [the beneficiary] must manage employees that are engaged in positions that are executive or managerial," noting that the beneficiary may "manage an essential function within the organization." Counsel contends that the beneficiary clearly manages several essential functions within the petitioner, including his involvement in designing the store, negotiating contracts for services, and locating other locations for stores. Counsel emphasizes that the beneficiary plans the growth of the company, designs the pilot project and negotiates contracts for future stores, while nine other employees complete the daily tasks of running the business.

Counsel further objects to the director's characterization of the salaries paid to the beneficiary's subordinates as too low for managerial employees, noting that all of the employees receive more than the minimum wage, and wages which are consistent with the per capita income in New Brighton, Pennsylvania. Counsel acknowledges that many employees have been employed part-time or have taken time off of work because of construction and renovation projects. Counsel notes that in March 2004, the petitioner hired an additional full-time professional employee, a Public Relations Representative/Market Research Analyst, who receives an annual salary of \$49,000.

Counsel also contends that the director erred in assuming that none of the beneficiary's subordinates are employed in a managerial or executive capacity, noting that the petitioner employs a vice president, Sami Rafidi, who chooses not to receive any compensation. Counsel acknowledges that the beneficiary supervises "some of the day-to-day aspects" of the gas station/convenience store, but notes that once additional stores are established, the petitioner will require a hierarchy of managerial and professional staff members to oversee the operations of all the projects. Counsel emphasizes that the director is required to consider the petitioner's reasonable needs in light of its overall purpose and stage of development. Counsel states that the beneficiary's duties "are not any less executive or managerial because he is supervising a smaller number of employees with lower ranks," as he is still managing the essential functions of the company.

Counsel addresses the director's conclusion that the petitioner initially "inflated" the petitioner's staffing levels and the beneficiary's duties, stating that the director did not consider that "the original description of the business, staffing, and beneficiary's duties were a part of the a business plan in which [the beneficiary] has not had time to enforce." Counsel asserts that the beneficiary was forced to remain outside the United States for seven months while awaiting approval of his visa application and did not have time to develop the company to the point where the eight-member management team would be required. Counsel emphasizes that the beneficiary is highly involved in developing the pilot project and has not yet finalized the acquisition of other locations. Counsel contends that the beneficiary has had only four months to develop his project and has made "incredible progress" in that short time.

Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. 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(1)(3)(ii). The petitioner's description of the job duties must clearly

describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner has described the beneficiary's duties in vague and general terms and has failed to provide a clear account of what the beneficiary does on a day-to-day basis. For example, the petitioner initially indicated that the beneficiary "defines corporate goals and objectives"; leads an "8-staff management team . . . in negotiating and securing contracts with commercial investors and researching and contacting potential development partners"; "leads Project Architects and Project Managers through the initial design phases of the first SUPER M.A.R.T. project"; and "works closely with the Vice President to ensure that corporate goals and standards are met throughout all phases of development." At the time of filing, the petitioner also claimed to employ a vice president, commercial senior project developer, operations manager, financial manager and general manager, who carry out the corporate objectives of the company and relieve the beneficiary from the "micro-management" aspects of the petitioner's projects.

As noted by the director, it appears that the petitioner initially artificially inflated both the beneficiary's job duties and the petitioner's organizational structure in an attempt to establish the beneficiary's employment in a managerial or executive capacity. The petitioner does not and has not employed an operations manager, a financial manager, a general manager, a commercial senior project developer, a project architect, or a project manager. The petitioner has consistently claimed to employ a vice president; however, the petitioner did not include a job description for this employee in response to the director's request for evidence, and asserts that this employee chooses not to receive a salary for whatever services he provides. On appeal, counsel argues that the director failed to understand that "the original description of the business, staffing, and beneficiary's duties were a part of a business plan in which [the beneficiary] has not had time to enforce." Counsel's assertion is not persuasive. The regulations at 8 C.F.R. § 214.2(l)(14)(ii) require a statement describing the staffing of the new operation, including the number of employees and the types of positions held. At the time of filing, the petitioner unequivocally stated that the beneficiary currently oversees an eight-member management team, referred to these employees as its "existing team," and made no mention of its actual staffing levels or organizational structure. It is reasonable to conclude that the petitioner sought to represent the stated organizational structure as its staffing at the end of the first year of operations. Doubt cast on any aspect of the petitioner's proof may undermine 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). For these reasons, the job description submitted in support of the initial petition is of little probative value.

The job description submitted in response to the director's request for evidence was also insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The petitioner indicated that the beneficiary "will define corporate goals and objectives," "serve as the leader for his management staff," "lead project architects and project managers," "negotiate contracts for other locations," develop business networks and relationships with investors and partners, represent the petitioner in meets with product distributors, commercial development firms, city council representatives, and community leaders. These duties, while they may contain some managerial components, do not provide a clear understanding of what actual tasks the beneficiary performs on a daily basis. For example, as of the date of filing, the only "project" undertaken by the petitioner was the remodeling of its store. According to the evidence in the record, the project was completed in one month or less at a cost of

\$4,200. While the beneficiary may have used his architectural background to assist in the planning of the project and hired the contractor to perform the work, the record does not support the petitioner's assertion that the beneficiary regularly performs managerial duties associated with construction and renovation projects. Similarly, while the petitioner submitted evidence that the beneficiary is engaged in the location of additional properties for expansion of the petitioner's business, there is no evidence that he is currently negotiating with partners or investors, city council representatives or community leaders. At the time of filing, it appears that the beneficiary himself was responsible for performing non-qualifying duties associated with researching and identifying potential properties. Nor is there evidence that the beneficiary is continuously involved in contract negotiations with suppliers, now that the petitioner has been operational and receives regular deliveries from food, gasoline, beverage and other suppliers.

Overall, the petitioner's descriptions of the beneficiary's duties are either speculative in nature or overly general in describing the beneficiary's day-to-day role within the petitioner's operations. 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). Furthermore, the inconsistent job descriptions and descriptions of the petitioner's organizational structure make it impossible for the AAO to determine what duties the beneficiary was actually performing on a daily basis at the time the petition was filed. 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, 591-2 (BIA 1988).

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). As discussed further below, the petitioner's repeated statements that the beneficiary is not involved in the "micro-management" of the U.S. company are not supported by the record.

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 depiction of the beneficiary's role within the organizational hierarchy. As discussed above, there was a clear discrepancy between the petitioner's claimed organizational structure and actual organizational structure as of the date the petition was filed. Although the petitioner attempted to clarify its actual staffing and structure in response to the director's request for evidence, there are clear discrepancies between the petitioner's organizational chart, employee list, and quarterly wage reports which make it difficult to discern the structure of the company. As noted above, only one individual identified on the petitioner's organizational chart also appears on the employee list and quarterly wage report for the fourth quarter of 2003.

Nevertheless, the record confirms the employment of the employees identified as facility manager, assistant facility manager, supervisor/head cashier, food manager, assistant food manager, and cashier at the time the petition was filed. The other employees identified in the employee list and organizational chart do not appear on the relevant quarterly wage report, although the petitioner did indicate that it hired new cashiers between the filing of the petition and the response to the director's request for evidence. The AAO notes that the positions of "food manager" and "assistant food manager" do not appear on the petitioner's organizational chart, and no explanation for this discrepancy has been provided. Again, 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. at 591-92. As previously discussed, the petitioner claims to employ a vice president who chooses to work without a salary, but the record contains no explanation regarding his job duties or the amount of time he devotes to the petitioning organization on an unpaid basis. 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)).

On appeal, counsel for the petitioner suggests that the number of employees supervised by the beneficiary is not determinative, and asserts that the director failed to take into account the fact that the petitioner is in an early stage of development and does not yet require an extensive team of executives. 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, U.S. Citizenship and Immigration Services (USCIS) 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.

As already discussed, a review of the record with respect to the petitioner's staffing levels reveals many inconsistencies in both the petitioner's claims and the evidence provided. At the time of filing, the petitioner had been operating a gas station/convenience store with a fast food counter for approximately one year. The petitioner indicates that its food managers do not prepare food, and states that no food preparation workers are required, yet the petitioner's floor plan shows that the petitioner had a full kitchen and food preparation equipment installed at approximately the time the petition was filed. Again, 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. at 591-92. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The petitioner provided evidence that it employed the beneficiary as president and managing director, a facility manager, an assistant facility manager, a supervisor/head cashier, and several cashiers. The petitioner appears to have also employed the individuals identified as food manager and assistant food manager, although the absence of these positions from the organizational chart raises questions regarding their actual duties. Based on a company overview provided by the petitioner, the store is open daily from 5:00 a.m. until 12:00 a.m., or 133 hours per week. Operation of a gas station, convenience store and fast food outlet involves many mundane tasks, including stocking shelves, assisting customers with gas, food and other purchases, preparing food, monitoring inventory, ordering inventory, receiving deliveries, cleaning the store, food preparation area and restrooms, supervising cashiers and many other routine duties. The petitioner also requires someone to perform the day-to-day administrative, bookkeeping, banking and other clerical tasks associated with operating the business. The petitioner claims to employ a single cashier supervisor who works 35 hours per week, but has not indicated who is responsible for supervising the cashiers or overseeing the day-to-day operations of the store during the remaining 100 hours the store is open during the week. The duties of the claimed facility managers and food managers do not include any responsibility for overseeing many aspects of the day-to-day store operations. The petitioner does not claim to employ any food preparation workers, yet clearly has a fairly extensive food preparation area and food service counter that would need to be occupied for a significant portion of each business day. The petitioner does not indicate who performs its office-related and administrative functions.

Based on the petitioner's representations, it does not appear that the claimed staff might plausibly meet the reasonable needs of the petitioning company. Given the absence of employees who would perform the non-managerial or non-executive operations of the company, it is reasonable to conclude that the beneficiary would need to spend a significant portion of his time engaged in the supervision of low-level employees in the petitioner's store, and performing the clerical, administrative and financial functions associated with running the business, all of which are non-qualifying tasks. It does not appear that these duties would be merely incidental to any managerial or executive duties the beneficiary performs. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

As noted above, when examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals, notwithstanding the petitioner's claim to employ at least five managers or supervisors. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the gas station/convenience store/fast food outlet. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

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 AAO does not dispute that the beneficiary spends some portion of his time performing duties which meet the definition of executive capacity. See section 101(a)(44)(B) of the Act. However, the petitioner has not established that he *primarily* performs these duties. 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. The AAO is not required to conclude that the beneficiary qualifies as an executive under section 101(a)(44)(B) of the Act simply because he possesses an executive job title and exercises discretionary decision-making authority over the petitioner's operations.

The AAO also acknowledges the petitioner's claim on appeal that the beneficiary did not fully carry out the petitioner's business plan because he was outside the United States for seven months awaiting issuance of an L-1 visa stamp in his passport. The petitioner did not, however, provide documentation to establish the stated length of the delay and the reasons therefore. 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. Furthermore, it is evident from the record that the business operated from the date of the approval of the new office petition, even during the beneficiary's claimed extended absence. Any request for an extension of a petition that was originally approved as a new office must be evaluated under the criteria set forth at 8 C.F.R. § 214.2(l)(14)(ii) and establish the beneficiary's eligibility as of the date of filing. Again, 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.

The AAO acknowledges that the record contains numerous references to the future objectives of the U.S. operation. However, business activity that occurs after the date of filing is not probative of the petitioner's eligibility as of the filing date. The AAO is not required to consider evidence of speculative future activity. 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). The relevant inquiry is whether the beneficiary will be employed in a primarily managerial or executive capacity in the future, commencing on the filing date. While the beneficiary may have achieved significant accomplishments toward establishing

the petitioner's operations in the United States, the petitioner has not shown that it has reached the point that he will be employed in a primarily managerial or executive capacity as of the filing date.

In sum, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily executive or managerial capacity. The fact that an individual operates a business does not necessarily establish eligibility for classification in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties will be directing the management of the organization or that he will be primarily supervising a subordinate staff that would relieve him from performing the non-qualifying duties of operating a gas station and convenience store. The many inconsistencies in the record with respect to the beneficiary's duties and the petitioner's staffing levels further undermine the petitioner's claims. Based on the foregoing discussion, the appeal will be dismissed.

The second issue to be discussed in the present matter is whether the petitioner has established that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulations at 8 C.F.R. § 214.2(l)(1)(ii), in relevant part, provide the following definitions for purposes of establishing a qualifying relationship:

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(J) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(K) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner stated on Form I-129 that the U.S. company is a subsidiary of LEO Contracting. The petitioner described the ownership of each company as follows:

LEO Contracting: Business establishment fully owned and Executive managed by [the beneficiary]. LEO/USA Co. [the petitioner]; shares totally owned by [the beneficiary] owner of foreign entity.

In support of the petition, the petitioner submitted a translated copy of a statement from the Secretary of the Commercial Register in Baabda, Lebanon, dated October 6, 2003, indicating:

"[The beneficiary] is registered in the commercial register of Baabda in the capacity of Businessman on November 10, 1983. . . . The commercial name of his Establishment is: "The Lebanese Engineering office for contracting" . . .

Furthermore and according to his commercial file, we confirm that his registration is still valid today.

On February 18, 2004, the director requested additional evidence to establish the existence of the claimed qualifying relationship, including, in part: copies of all share certificates and stock ledgers documenting ownership and control of each company; copies of the foreign entity's articles of incorporation and bylaws; and a copy of the articles of incorporation or organization for the U.S. company.

In a response dated May 10, 2004, the petitioner submitted: (1) an "Offer to Sell Stock Pursuant to Sec. 1244 I.R.C.," dated April 30, 2002, offering the beneficiary 100 shares of the petitioner's stock; (2) the U.S. company's stock certificate number one issuing 100 shares of stock to the beneficiary on April 30, 2002; (3) the petitioner's "Corporate Record of Shares Issued Under Section 1244 of the Internal Revenue Code" indicating that the beneficiary was issued 100 shares of stock in consideration for \$75,000 on April 30, 2002; (4) the petitioner's stock transfer ledger identifying the beneficiary as the sole shareholder of the company; and (5) a letter from the attorney who incorporated the U.S. company, dated March 29, 2004, confirming that no additional stock in the U.S. company has been issued. With respect to the foreign entity, the petitioner submitted, among other documents, a Certificate for the Registration of a Commercial Firm, issued by the Chief of the Bureau of the First-Instance Civil Court in Mount Lebanon, confirming the registration of "Lebanese Engineering office for Contracting Works" (L.E.O. Contracting) in the commercial register on November 10, 1983. The submitted documents identify the beneficiary as the registered merchant or business man and only person authorized to sign on behalf of the business.

The director denied the petition on March 10, 2005, concluding that the petitioner had failed to establish the existence of the claimed parent-subsidiary relationship. The director noted that the evidence shows that the U.S. company is owned by the beneficiary, not by the foreign entity as indicated on the Form I-129. The director acknowledged that it appears that the beneficiary may be the sole owner of the foreign entity, which would establish an affiliate relationship between the two companies; however, the director found that the record did not conclusively establish the ownership of the foreign entity.

On appeal, counsel for the petitioner asserts that evidence of the beneficiary's sole ownership of the foreign entity was submitted in support of the initial petition. Counsel asserts that both the U.S. and foreign entities are wholly-owned by the beneficiary, and therefore the petitioner has established the existence of a qualifying relationship.

Upon review, counsel's assertions are persuasive. The AAO finds sufficient evidence in the record to establish that the foreign entity is a sole proprietorship owned by the beneficiary, and that the beneficiary is the sole shareholder of the U.S. company. Accordingly, the petitioner has established that the U.S. and foreign entities have an affiliate relationship based on common ownership and control by the same individual. The director's determination with respect to this issue will be withdrawn.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.