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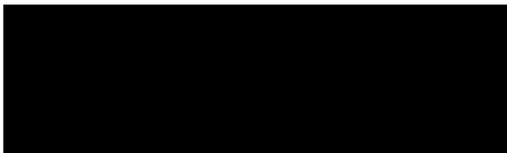
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U.S. Citizenship
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Services

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File: EAC 06 138 52349 Office: VERMONT SERVICE CENTER Date: NOV 14 2007

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

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

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of president to open a new office in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a corporation organized under the laws of the State of California, is allegedly in the grocery and food service business.¹

The director denied the petition concluding that the petitioner failed to establish that the beneficiary "has been or will continue to be employed in a managerial capacity." Therefore, the director denied the petition for two reasons: (1) the petitioner failed to establish that the beneficiary has been employed abroad in a managerial capacity; or (2) the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the petitioner is a "new office" and that it has established that the beneficiary will perform qualifying duties within one year of petition approval.

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.

¹According to California state corporate records, the petitioner's corporate status in California has been "suspended." Therefore, since the corporation has lost all rights and powers to transact business, the company can no longer be considered a legal entity in the United States. Therefore, if this appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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 first issue in this matter is whether the petitioner has established that the beneficiary was employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

The petitioner described the beneficiary's job duties abroad as "general manager" in a letter dated March 20, 2006 as follows:

[The beneficiary] is responsible for all Managerial decisions in the business in the UK and he is responsible for the overall direction of the business practices as well as ensuring implementation of policies, philosophy and strategies of the business.

He has been responsible for hiring/firing of supervisory and other staff and seeing to it that the business policies, strategies and directions are carried out by Supervisors/staff.

The following is a more detailed description of the Managerial duties and functions of the beneficiary with the UK entity:

*The setting and determining [of] the policies, strategies, business practices and philosophy of the business. These decisions are made after due deliberation and consideration of business climate and other economic issues

*Ensuring that all executive and managerial level decisions as well as policy, business, strategy and philosophies of the business are implemented by the staff. This is ensured by employees['] reports regarding their compliance

*Responsibility to hire and fire staff and/or determine sanctions or otherwise as regards these employees

*Particular concentration on setting policy and strategy in the business and having same implemented by the staff in the business

*Authority to sign [c]ontracts on behalf of the business and that these [c]ontracts will be binding upon the business.

It is noted that the petitioner does not clarify whether the beneficiary was primarily engaged in performing managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. While both the petitioner and counsel repeatedly describe the beneficiary as having performed managerial duties, counsel also describes the beneficiary as having performed "executive duties" in his letter dated March 20, 2006. A petitioner may not claim that a beneficiary was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary was employed abroad in either a managerial *or* an executive capacity and will consider both classifications. *See generally 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 petitioner also submitted an organizational chart for the foreign employer. The chart shows the beneficiary reporting to a chief executive officer and directly supervising eight employees: an accountant, a finance manager, a purchase & sales billing assistant, a marketing assistant, a wholesale clerk, a retail sales clerk, a purchase assistant, and a stores inventory employee. The petitioner also provided a separate list of the eight employees allegedly supervised by the beneficiary.

On April 17, 2006, the director requested additional evidence. The director requested, *inter alia*, a more detailed organizational chart for the foreign employer showing its management and personnel structure. The director requested that the petitioner identify the number of subordinate supervisors under the beneficiary's management abroad, a description of the subordinate employees' job duties, and an explanation addressing how much time the beneficiary devotes to qualifying duties versus non-qualifying duties.

In response, counsel submitted a letter dated April 25, 2006 in which he refers to the organizational chart and employee list appended to the initial petition. Counsel further indicates that "the total number of employees in UK entity are 9, including [the] beneficiary. The beneficiary has therefore 8 individuals who are responsible ultimately to [the] beneficiary either directly or through [department] Managers or Supervisors[.]"

Finally, counsel indicates that the beneficiary devotes 100% of his time to "[e]xecutive level functions."

The petitioner also submitted a materially different organizational chart for the foreign employer. This chart includes three additional employees not previously identified by the petitioner, i.e., [REDACTED]

[REDACTED] The chart places these three additional workers between the beneficiary and seven of the previously identified employees thus implying, for the first time, that the beneficiary supervises a subordinate tier of supervisors who, in turn, supervise seven of the eight previously identified employees. The petitioner offers no explanation addressing why it neglected to include these three alleged subordinate supervisors on the initial organizational chart or why these three workers were left off the list of employees submitted with the initial petition. The petitioner also does not reconcile this materially altered organizational chart, which now shows 12 employees, with counsel's assertion in the April 25, 2006 letter that the foreign employer has nine employees, including the beneficiary.

Finally, the petitioner submitted a list of job duties for each of the employees identified on the materially altered organizational chart. This list describes the "accountant" (identified as "account" on the new organizational chart) as working "as bookkeeper." The list vaguely describes the other employees, including the newly identified "department heads," as performing the tasks necessary to provide a service or to produce a product, e.g., inventory tasks, retail sales, taking orders, meeting with customers, billing, contacting vendors, and purchasing. The petitioner's descriptions of the "department heads" fail to provide any details addressing their implied supervision of subordinate workers.

On May 11, 2006, the director denied the petition concluding that the petitioner failed to establish that the beneficiary has been employed in a managerial capacity.

On appeal, counsel does not address this determination by the director.

Upon review, the AAO concurs with the director's decision and will dismiss the appeal.

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) 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.* As explained above, a petitioner cannot claim that some of the duties of the position entailed executive responsibilities, while other duties were managerial. A petitioner may not claim that a beneficiary was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner's description of the beneficiary's job duties 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 abroad. For example, the petitioner states that the beneficiary was responsible "for all [m]anagerial decisions" and for the "overall direction of the business practices." However, the petitioner did not identify any of these decisions or describe the foreign employer's "business practices." Furthermore, the petitioner states that the beneficiary set, determined, and implemented "policies, strategies, business practices and philosophy."

However, the petitioner did not identify any of these policies, strategies, or philosophies. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary actually performed managerial duties. Despite counsel's assertion that there is "no lack of clarity" in the job description, specifics are clearly an important indication of whether a beneficiary's duties were 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 original organizational chart and job descriptions for the subordinate staff members, the beneficiary appears to have supervised eight subordinate workers. However, the petitioner has not established that any of these eight workers was primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these employees were performing the tasks necessary to produce a product or to provide a service, e.g., inventory tasks, retail sales, taking orders, meeting with customers, billing, contacting vendors, and purchasing.

Furthermore, the petitioner's attempt in its response to the Request for Evidence to insert for the first time a tier of subordinate supervisors between the beneficiary and the originally described subordinate workers is not persuasive in establishing that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees. First, the petitioner does not credibly describe these three "department heads" as being truly supervisory or managerial employees. To the contrary, they also appear to be performing the tasks necessary to produce a product or to provide a service. An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). 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 managerial position.

Second, the petitioner's insertion of this tier of subordinate supervisors in response to the Request for Evidence is simply not credible under the circumstances. As indicated above, the petitioner offered no explanation addressing why it neglected to include these three alleged subordinate supervisors on the initial organizational chart or why these three workers were left off the list of employees submitted with the initial petition. The petitioner also does not reconcile the insertion of this tier of employees, which results in an employee count of 12, with counsel's assertion in the April 25, 2006 letter accompanying the response to the Request for Evidence that the foreign employer still has nine employees, including the beneficiary. 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. *Id.* at 591.

In view of the above, the beneficiary would appear to have been primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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). A managerial 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. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner did not specifically reveal the skill level or educational background of the subordinate employees, the petitioner has not established that the beneficiary managed professional employees.² Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.³

²In evaluating whether the beneficiary managed professional employees, the AAO must evaluate whether the subordinate positions required 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 the 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 duties of any of the subordinate employees. Furthermore, the petitioner has not established that any of the claimed employees have earned the equivalent to United States bachelor's degrees. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

³While the petitioner has not clearly argued that the beneficiary managed an essential function of the organization, the record nevertheless would not support this position even if taken. 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

Similarly, and beyond the decision of the director, 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 employed as a first-line supervisor. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

It is appropriate for Citizenship and Immigration Services (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.* In this matter, as noted above, the petitioner's attempt to insert a subordinate tier of supervisors between the beneficiary and the other workers in response to the Request for Evidence without any explanation or elaboration casts doubt upon the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

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 has not provided evidence that the beneficiary managed an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties were managerial functions, if any, and what proportion were non-managerial. Also, as explained above, the record establishes that the beneficiary was primarily a first-line supervisor of non-professional employees. 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).

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary was primarily employed abroad in a managerial or executive capacity, and the petition may not be approved for that reason.⁴

The second issue in this matter is whether the petitioner has established that the beneficiary will be employed in the United States in a primarily managerial or executive position.

As indicated above, the director also denied the instant petition because the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial capacity. However, the petitioner indicated in its petition that the beneficiary is coming to the United States to open a "new office." A "new office" is defined as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." 8 C.F.R. § 214.2(l)(1)(ii)(F). In this matter, the record indicates that the petitioner was incorporated on or about November 21, 2005, and that "it has not been operative since its formation." The instant petition was filed on April 11, 2006. Therefore, as the record indicates that the petitioner has been doing business for less than one year, the director should have applied the "new office" criteria in 8 C.F.R. § 214.2(l)(3)(v). As this regulation recognizes that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level during the start-up phase, it was not necessary for the petitioner to establish that the beneficiary will be employed in the United States in a primarily managerial or executive position immediately upon his arrival in the United States. Therefore, the director's denial of the petition for this reason was in error and will be withdrawn.

However, beyond the decision of the director, the petitioner has failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, and the petition will be denied for this additional reason. 8 C.F.R. § 214.2(l)(3)(v)(C).

In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See id.* This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

⁴Counsel cited the Foreign Affairs Manual (FAM) as authority. It must be noted that the FAM is not binding upon CIS. *See Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

In this matter, the petitioner described the beneficiary's proposed job duties in a letter dated March 20, 2006 as follows:

In [his] executive capacity as President, [the beneficiary] will be responsible for all executive level decisions of the business and will accordingly attend to the establishment of the business, its direction, guidance, management, coordination and development. He will be responsible for our policies, strategies and philosophy for implementation by managerial and supervisory employees.

More specifically [the beneficiary], as President, will ensure that the Managers and/or supervisors implement [the beneficiary's] executive level decisions, policies, strategies and business philosophy. He will furthermore be the individual responsible for establishing guidelines and direction for the promotion/development of our business.

[The beneficiary] will give instruction and direction to the Managers and the latter will in turn instruct, manage and guide supervisors. [The beneficiary] will be responsible for setting all guidelines and parameters within which the various departments of the business will conduct their operations and all directives and policies in the various departments will be in the sole discretion of [the beneficiary] and he will be responsible for the direction, guidance, coordination, philosophy and development of our business.

The petitioner also submitted a "business plan" describing the petitioner's proposed business as owning and operating a chain of "ethnic Indian Grocery Stores/New[s] Agent Business." In the plan, the petitioner projects 2006 sales to reach \$715,000.00 and projects, by 2007, that it will employ two managers, three clerks, one bookkeeper, and one cleaner. A proposed organizational chart places a manager between the beneficiary and the other employees. The petitioner, however, did not corroborate any of its financial projections with independent analysis, did not describe with any specificity its proposed products, suppliers, pricing, competitors, locations, or marketing strategies, and did not describe the proposed duties of any of the

subordinate employees. Finally, the petitioner submitted evidence that \$50,000.00 was deposited into its bank account apparently as partial repayment of a debt by a personal debtor of the beneficiary. However, the business plan indicates that the United States operation will be funded by the foreign employer in the United Kingdom, a partnership in which the beneficiary has a 50% interest owned with his spouse.

On April 17, 2006, the director requested additional evidence. The director requested, *inter alia*, complete position descriptions for the beneficiary's subordinates, evidence establishing the size of the United States investment, and evidence establishing that the United States operation will support a managerial or executive position within one year.

In response, counsel submitted a letter dated April 25, 2006, in which counsel describes the duties of the proposed subordinate employees. Counsel vaguely describes the general manager as reporting to the beneficiary and as supervising the subordinate employees who, in turn, will perform the tasks necessary to provide a service or to produce a product. Counsel also further described the beneficiary's proposed duties as:

1. Plan and develop policies, strategy and philosophy. These include overall business policy and Financial direction and policy.
2. Analysis of overall business operations[.]
3. Reviewing financial statements[.]
4. Hire and fire staff in sole discretion[.]
5. Coordinate with foreign holding entity.
6. Instruct, guide and direct Managers and more specifically General Manager for implementation through the General Manager to other employees of the petitioner[.]

Upon review, the petitioner in this matter has failed for several reasons to establish that the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner's description of the beneficiary's proposed duties, as well as of the petitioner's proposed business and staffing plan, has failed to credibly establish that the beneficiary will perform qualifying duties after the first year; has failed to establish that an investment was made in the United States operation; has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office; and has failed to credibly describe the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C).

First, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that

the beneficiary will establish and implement the organization's "policies, strategies, and philosophy" through subordinate managers. However, the petitioner fails to describe any of these policies, strategies, or philosophies. Once again, the fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary will actually perform managerial duties after the first year of operations. Specifics are clearly an important indication of whether a beneficiary's duties will be 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, *aff'd*, 905 F.2d 41. 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.

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The petitioner failed to specifically describe the duties of the proposed subordinate employees or to explain how, exactly, these prospective employees will relieve the beneficiary from performing non-qualifying tasks even though this evidence was requested by the director. 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). Moreover, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (*per curiam*); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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. While the petitioner asserts that a subordinate tier of supervisors will separate the beneficiary from the other proposed workers, the petitioner has not credibly established that the proposed business will develop the organizational complexity within one year to warrant the employment of a subordinate tier of supervisors. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization will become sufficiently complex to support an executive or managerial position. In view of the above, it appears that the beneficiary will primarily be, at most, a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* § 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial or executive capacity after the petitioner's first year in operation.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to credibly establish that a sufficient investment was

made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). In this matter, the record indicates that the petitioner held \$50,000.00 in a bank account at the time the petition was filed. However, the record indicates that this money was invested by ██████████ in partial repayment of a debt owed to the beneficiary personally as explained in a promissory note dated June 15, 2005. The petitioner's business plan indicates that "[t]he project will be financed by [the foreign employer's funds] transferred from the business accounts in the United Kingdom." The petitioner does not address this fundamental inconsistency in the record. Once 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. Furthermore, as the petitioner failed to corroborate its revenue, income, and expense projections in the business plan with any objective data, or to describe with any specificity the organization's proposed products, locations, competitors, or suppliers, it is impossible for CIS to confirm the sufficiency of the \$50,000.00 investment. Finally, the foreign employer's assurance in an undated letter appended to the initial petition that it will invest additional funds in the future is not probative of an investment having been made in the United States operation. 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). Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year for this additional reason.

Third, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(1). As explained above, the petitioner's "business plan" vaguely describes the United States operation as a proposed chain of ethnic Indian grocery stores and newsstands. However, the plan fails to specifically describe the petitioner's proposed products, services, customers, locations, marketing plans, or competitors. The plan also fails to corroborate its projections regarding revenue, income, expenses, or financial goals. The record does not contain any independent analysis or data. Absent a detailed, credible description of the petitioner's proposed United States business operation addressing the petitioner's proposed product, marketing plan, customers, staffing, and income/expense projections, it is impossible to determine whether the proposed enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year for this additional reason.

Fourth, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner failed to credibly describe the organizational structure of the foreign entity. 8 C.F.R. § 214.2(l)(3)(v)(C)(3). As indicated above, the petitioner's description of the foreign employer's organizational structure is not credible. The petitioner's attempt to insert a subordinate tier of supervisors between the beneficiary and the other workers in response to the Request for Evidence without any explanation or elaboration casts doubt upon the reliability and sufficiency of both the organizational chart and the remaining evidence offered in support of the visa petition. Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial

position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above additional reasons.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be owned and controlled by the foreign employer which, in turn, is 50% owned by the beneficiary and his spouse. As a purported owner, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign entity.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States 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). A subsidiary is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595. As ownership is a critical element of this visa classification, the means by which stock ownership was acquired is relevant.

In this matter, the petitioner asserts in the Form I-129 that it is 100% owned and controlled by the foreign employer, a partnership formed under the laws of the United Kingdom. However, counsel asserts in his letter dated March 20, 2006 that the foreign employer "owns and controls 51%" of the petitioner. Furthermore, as explained above, the business plan indicates that the foreign employer would fund the United States entity.

However, the record indicates that a third party, [REDACTED] invested funds in the petitioner as a partial repayment of a debt owed to the beneficiary personally. Therefore, the petitioner's actual ownership cannot be determined as it appears that the petitioner is owned and controlled either by the beneficiary or by a third party. The petitioner does not attempt to resolve any of these inconsistencies. Once 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.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity, and the petition may not be approved for this additional reason.

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 at 1002 n. 9 (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 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.