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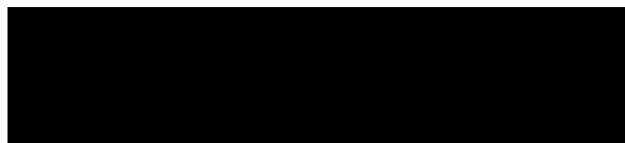
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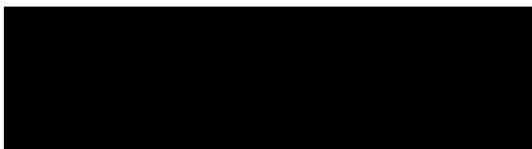
File: EAC 06 157 50627 Office: VERMONT SERVICE CENTER Date: **SEP 06 2007**

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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Georgia limited liability company, is described as an investment company that intends to operate gas stations/convenience stores and a poultry farm. The petitioner states that it is an affiliate of Jiwani Poultry Farm, located in India. The petitioner seeks to employ the beneficiary as the president and general manager of its new office in the United States.

The director denied the petition concluding that the petitioner did not establish: (1) that the U.S. company has sufficient physical premises to house the new office; (2) that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity; or (3) that the beneficiary would be employed in a primarily managerial or executive capacity within one year. The director also found insufficient documentary evidence establishing the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary as well as to commence doing business in the United States.

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 petitioner submitted evidence that it signed a commercial lease agreement, and provided sufficient evidence to establish that the beneficiary will manage an essential function within the company. Counsel further contends that the beneficiary served in a qualifying position abroad as managing partner, and that the U.S. company has sufficient funds to commence doing business in the United States. Counsel submits a brief and additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

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

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, 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 involves 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.

The first issue in this matter is whether the petitioner has secured sufficient physical premises to house the new office in the United States, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time of filing on April 19, 2006, the petitioner indicated its address as "5813 Summer Place Parkway, Hoover, Alabama," and also identified this as the beneficiary's U.S. address. The petitioner did not submit a lease agreement to show that it had secured sufficient premises to house the business, which initially intends to operate a gas station and convenience store.

On June 21, 2006, the director issued a request for evidence, in part, instructing the petitioner to submit an original lease agreement and a statement from the petitioner's lessor identifying the square footage of the leased premises. The director also commented that the petitioner had not shown that it had "warehouse and shipping and receiving facilities," however, the AAO notes that such facilities would not appear to be required for the petitioner's intended retail business.

In a response dated September 7, 2006, the petitioner submitted a "commercial office lease agreement" entered into by the U.S. company on July 17, 2006. According to the lease, the space consists of a 1,200 square foot store located in a shopping center. The commencement date for the lease is August 1, 2006. The lease states that the petitioner may operate a "general office" in the leased space.

The director denied the petition concluding that the petitioner did not establish that it had sufficient physical premises to house the new office.

On appeal, counsel for the petitioner re-submits a copy of its lease agreement signed on July 17, 2006.

Upon review, there is no evidence that the petitioner had secured any physical premises to house the new office as of the date the petition was filed in April 2006. 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).

Thus, the commercial lease agreement signed subsequent to the director's issuance of a request for evidence, and more than three months after the petition was filed, need not be considered in determining the petitioner's eligibility as of the date of filing. Further, although the lease agreement need not be considered, the AAO notes that it is unclear from the agreement what type of space has been leased by the company, as the agreement refers to both a "store" and "general office space." If the space is a store, then it appears the petitioner intends to operate a business other than a gas station or poultry farm, as indicated in the petitioner's statements and business plan.

Absent evidence that the petitioner had secured a commercial lease agreement prior to filing the petition on April 19, 2006, the petitioner has not met the requirement set forth at 8 C.F.R. § 214.2(I)(3)(v)(A). For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(I)(3)(v)(B).

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.

In a letter dated April 14, 2006, the petitioner described the beneficiary's duties with the foreign entity as follows:

He has been the Managing Partner of our poultry farm in India since 2003. In this position, he ran all aspects of our business, including managing the day-to-day operations of the farm, supervising 8 employees, ordering supplies, managing the distribution of our products, conducting market studies, and overseeing the financial aspects of the farm.

The petitioner submitted an employee list for the foreign entity, identifying eight workers, and monthly payroll rosters for the period July 2005 through February 2006. The payroll roster lists one employee as "manager," five laborers, and two helpers.

In her request for evidence dated June 21, 2006, the director requested: (1) a letter from the foreign employer describing the nature of the beneficiary's employment, including a complete position description identifying all duties performed; (2) a complete position description for all employees in the foreign office, including a

breakdown of the number of hours devoted to each of the employee's duties on a weekly basis, including one for the beneficiary; (3) and copies of the foreign employees' pay stubs for the last two years.

In response, the petitioner submitted a letter signed by a partner of the foreign entity, dated September 5, 2006, in which the beneficiary's duties were described as follows:

The beneficiary held a position of senior-most authority. As a Managing Partner (shareholder 30%), he determined all business decisions, had hiring and firing authority, and held the ability to bind the company to any negotiation, contract or sale. In all, he operated with absolute discretion in his ability to direct the company. Specifically, the beneficiary was charged with the following duties:

- 1) direct and coordinate activities of businesses concerned with the production, pricing, sales and distribution – 40%;
- 2) manage staff, preparing work schedules and assigning specific duties – 5%;
- 3) determine staffing requirements, and interview, hire, and train new employees, or oversee those personnel processes – 5%;
- 4) monitor businesses to ensure that they efficiently and effectively provide needed services while staying within budgetary limits – 20%;
- 5) oversee activities directly related to making products – 5%;
- 6) direct and coordinate organization's financial and budget activities to fund operations, maximize investments, and increase efficiency – 10%; and
- 7) determine quality of poultry to be sold, and set prices based on forecasts of customer demand.

The beneficiary managed a staff of eight and additional seasonal workers.

The petitioner submitted an organizational chart depicting the beneficiary and two other partners at the top of the hierarchy. The subordinate employees were identified as an accountant, a sales executive, a supervisor – poultry chicks, a supervisor – eggs, a laborer/caretaker, a veterinary assistant, a poultry van driver, and seasonal workers. The petitioner also provided position descriptions for the positions of accountant, the two supervisors, "farm workers," and "seasonal workers." The subordinate supervisors were described as managing the day-to-day operations of "poultry chicks" or "eggs"; carrying out production, financial and marketing decisions related to the farm; hiring, training and supervising employees and contract workers to carry out the day-to-day activities; and preparing cost and production records.

The director denied the petition on October 18, 2006 concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The director did not specifically reference the evidence submitted with respect to the beneficiary's foreign employment.

On appeal, counsel asserts that the beneficiary has been employed as managing partner of the foreign entity since 2003. Counsel re-submits the evidence offered in support of the petitioner's response to the request for evidence.

Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

As a preliminary matter, it must be noted that when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). Upon review of the director's decision, the reasons given for the denial are conclusory with no specific references to the evidence entered into the record. As the AAO's review is conducted on a *de novo* basis the AAO will herein address the petitioner's evidence & eligibility. *See 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's initial position description of the beneficiary's position was too brief and generalized to establish that he has been employed in a primarily managerial or executive capacity with the foreign entity. For example, the petitioner's statements that the beneficiary "ran all aspects of our business," managed the "day-to-day operations," managed the distribution of products, and oversaw "financial aspects" of the business was insufficient to explain what the beneficiary actually does on a day-to-day basis. It was unclear based on the evidence presented who was responsible for routine distribution and financial functions, or how the non-managerial work of the farm was divided among the eight workers, seven of whom were identified on the petitioner's payroll records only as "laborer" or "helper." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, the petitioner initially indicated that the beneficiary's duties include such non-managerial duties as ordering supplies, conducting marketing studies, and supervising non-professional farm workers. Based on the initial filing, it could not be determined whether the claimed managerial duties constituted the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative, operational and first-line supervisory duties. The petitioner's initial 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).

Accordingly, the director reasonably requested that the foreign entity clarify the nature of the beneficiary's duties and the amount of time he spends on each duty, as well as provide detailed position descriptions for the beneficiary's subordinate employees. Although the petitioner did submit a letter from the foreign entity offering a lengthier description of the beneficiary's duties and the approximate percentage of time he devotes to each, the description provided is composed of language taken almost verbatim from an occupational classification entry on the U.S. Department of Labor's Occupational Information Network (O*Net). *See* O*Net Online, "Summary Report for: 11-1021.00 – General and Operations Managers," available at <http://online.onetcenter.org/link/summary/11-1021.00> (accessed on August 16, 2007). Generic job

descriptions compiled by the U.S. Department of Labor have no bearing on an assessment of this beneficiary's duties within the context of the foreign entity's poultry business, and the petitioner cannot satisfy its burden of proof by paraphrasing or wholly repeating such descriptions; the regulations require the petitioner to submit a detailed description of the beneficiary's actual duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner has failed to provide any detailed or credible 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. at 1108.

Furthermore, the beneficiary's previously stated responsibilities for performing such non-qualifying duties as ordering supplies and performing market studies were not included in the petitioner's subsequent job description, while new generic duties were added. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition. As discussed above, the initial position description was not sufficient to establish the beneficiary's employment in a primarily managerial or executive capacity.

The definitions of executive and managerial capacity have two separate requirements. 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 doubt that the beneficiary had oversight authority over the foreign entity's poultry farm, but the record does not establish what duties he primarily performed on a day-to-day basis.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and 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.

While the petitioner has submitted evidence that the foreign entity employs eight workers, the AAO notes that the company's own payroll records show that seven of these employees are designated as laborers or helpers. However, in response to the request for evidence, the petitioner claimed that these same employees occupy the positions of accountant, sales executive, supervisors, veterinary assistant, driver, and laborer/caretaker. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner

submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, the petitioner has not submitted evidence that it utilizes seasonal workers, as the payroll documents submitted all show exactly eight employees. 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)). Further, upon review of the position titles and duties assigned to the foreign workers in response to the director's request for evidence, the AAO questions how a poultry farm operates with a managing partner, an accountant, a sales executive whose duties have not been described, two supervisors who do not appear to supervise anyone, one driver, one veterinary assistant, and a single farm laborer.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates likely perform the actual day-to-day labor involved in operating a poultry farm. 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 under the statutory definitions based on his supervisory duties.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not claimed that the beneficiary manages an essential function of the foreign entity, nor has the petitioner established that the beneficiary performs primarily managerial or executive duties.

The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. See section 101(a)(44)(A)(iv) of the Act; see also 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799).

Based on the foregoing discussion, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The third issue addressed by the director is whether the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(v)(C).

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

In its letter dated April 14, 2006, the petitioner described the beneficiary's proposed duties as follows:

The beneficiary will serve as the U.S. Company's President and General Manager. As such, he will be responsible for locating and researching various gas stations to purchase and making the ultimate decision on which locations to purchase. He will oversee all operations of the gas stations and convenience stores, formulate all policies and procedures, will be in charge of all future investments for the company; will oversee all marketing and promotions; will oversee all hiring and employment practices for the company; will ensure compliance with all local, state and federal laws; and will oversee all inventory and purchasing. Additionally, [the beneficiary] will be responsible for researching and assessing various poultry farms and other poultry related businesses in the United States to purchase. Once purchased, [the beneficiary] will be responsible for overseeing the poultry business.

On June 21, 2006, the director issued a request for additional evidence to establish that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. The director requested: (1) a complete position description for all proposed U.S. employees, including a breakdown of the number of hours devoted to each duty on a weekly basis; (2) a detailed description of the type of business to be conducted by

the U.S. entity; and (3) a copy of the petitioner's business plan providing a specific timetable for each proposed action for the first two years, starting with the date of filing the petition.

In a response dated September 7, 2006, the petitioner submitted the following description of the beneficiary's proposed duties:

Business planning and expansion: The beneficiary will negotiate to open new businesses; specifically work with business brokers to look for investments; work with business brokers to perform due diligence; investigate new investment plans for the company; meet with business brokers and investigate prospective investment deals for the company; work with brokers to perform due diligence in order to properly investigate potential investments; liaise with prospective sellers; negotiate leases; meet with property owners and negotiate leases; review contracts and sale agreements; arrange for financing for business investments; negotiate on behalf of, and bind the company in securing loans, sale agreements, contracts, etc. 14 Hours per week.

Financial/Sales management: Establish budgetary plans for the company and ensure compliance therewith; review daily takings with management, together with review of banking, budgeting, accounting issues. Review monthly financial statements to determine business expansion possibilities and ensure efficient and cost effective management of company. Liaise with Accountant to discuss financial issues. 10 Hours per week.

Recruiting and hiring: Install management and staff teams into businesses; recruit and hire staff; ensures that management trains staff appropriately: 4 hours per week.

Operations and administrative management: Ensure smooth operation of company by implementing administrative operating systems through Manager and, including inventory control. Direct purchasing of inventory, sourcing of vendors, negotiating with vendors. 8 Hours per week.

Set and implement corporate policy through Management (Manager). 4 hours per week.

The petitioner stated that the petitioner anticipated hiring five employees by the end of one year, including a store manager, an assistant store manager and three cashiers, all of whom will report to the beneficiary. The petitioner further indicated that the beneficiary will manage the essential function of "inventory, sales, and marketing" and will exercise direction over the day-to-day activities for sales, inventory and operations. The petitioner further indicated that it had already hired a management consultant in August 2006, and noted that he would initially assist the beneficiary in opening a new poultry business, and eventually manage the petitioner's poultry farm. The petitioner provided position descriptions for each of its proposed retail and poultry operations workers and indicated that all retail workers would work 50 hours per week. According to the petitioner's business plan, the poultry farm would be acquired some time after the first twelve months of operation.

In the petitioner's business plan, the petitioner describes its initial hiring plans as follows:

We intent [sic] to hire around three to five American workers on full time or part time basis besides our general manager [the beneficiary] who shall supervise all hired employees. Later on we intent [sic] to hire a manager who will supervise all the junior staff.

According to the business plan, the petitioner anticipates paying salaries and wages of \$8,500 to \$9,500 per quarter, and a total of \$36,000 for the first year of operations.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. The director noted that the record contained no comprehensive description of the beneficiary's duties, and contained insufficient evidence to show that the beneficiary would be relieved from performing non-executive and non-managerial duties. The director also referenced the petitioner's failure to show that the U.S. company had substantial receipts and sales or paid salaries to subordinate employees. As the petitioner qualifies as a new office pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F) in that it has yet to commence business operations or hire any employees, these comments will be withdrawn. The petitioner is not required to demonstrate that it is currently doing business or that it has hired a subordinate staff.

On appeal, counsel for the petitioner emphasizes that the petitioner has already hired a management consultant, and intends to hire five employees for its retail business by the end of the one-year start-up period. Counsel re-iterates the beneficiary's proposed duties and states that he will manage the inventory, sales and marketing functions, and exercise discretion over the day-to-day activities for sales, inventory and operations.

Upon review, the petitioner has not established that the petitioner will employ the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

While the beneficiary's position description is composed of duties that would typically be considered managerial or executive in nature, the totality of the evidence does not support a conclusion that he would

primarily be performing several of the duties at the end of the first year of operations. For example, the petitioner indicates that the beneficiary will devote the largest portion of his time, 14 hours per week, to "business planning and expansion" performing duties related to sales negotiations for new investments and new businesses. However, according to the petitioner's business plan, the petitioner anticipates investing in one gas station and convenience store as soon as a suitable prospect can be located, and expects to invest in a poultry farm in approximately 12 months. No other investments are planned for the first two years of operation, which raises questions as to whether the beneficiary would realistically devote such a large portion of his time to investigating new businesses after the first year of operations.

The petitioner's proposed staffing levels must also be considered in determining whether the beneficiary's proposed managerial and executive duties are plausible. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Although the petitioner has stated the petitioner's intention to hire five full-time employees for its proposed gas station and convenience store, who would work a total of 250 hours per week, the petitioner's business plan suggests that a different hiring plan will be put into place. As noted above, the business plan indicates that the petitioner will hire "three to five" employees on a full-time or part-time basis, and suggests that the beneficiary will be responsible for supervising the employees and day-to-day operations of the gas station at the end of the first year of operations, with a manager hired to supervise the junior staff "later on." 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).

Given that the petitioner intends to open a retail business that typically requires long operating hours, this discrepancy in the proposed number of employees and the uncertainty as to when a manager might be hired to oversee the business is significant. The AAO has looked to the petitioner's financial projections and notes that the petitioner anticipates paying wages of approximately \$9,000 per quarter, an amount that could compensate no more than three full-time employees at minimum wage. The petitioner does not appear to have planned to pay wages to five full-time retail employees plus a management consultant by the end of its first year of operations.

Furthermore, given that there is no evidence that the petitioner has even begun to research potential locations for its retail operations, it is uncertain that the petitioner's business would reach its full staffing levels within one year. The petitioner's business plan simply states "we did a lot of research on the Gas Station and Convenience store business," and notes the company's intention to locate a store in Georgia or Alabama.

Overall, the evidence does not establish that the beneficiary would be relieved from performing non-qualifying administrative, operational and first-line supervisory tasks within one year. The AAO has consistently interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from primarily performing operational and administrative tasks.

While the AAO recognizes that the beneficiary will exercise discretion over the day-to-day affairs of the business, the fact that the beneficiary manages a small business is insufficient to establish that the beneficiary is employed in a managerial or executive capacity. The petitioner has not established that it would employ sufficient lower-level staff within one year to perform the day-to-day tasks associated with operating a retail business, or 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. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

The AAO acknowledges the petitioner's claim that the beneficiary would manage the essential functions of "inventory, sales and marketing." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description that clearly explains the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. In order to establish that the beneficiary manages the inventory, sales and marketing functions, the petitioner must establish that someone other than the beneficiary will perform the non-managerial aspects of these functions. The petitioner has not met this burden. Furthermore, the petitioner has not described the managerial duties to be performed by the beneficiary in relation to these functions. 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.

Based on the foregoing discussion, the AAO concurs with the director's conclusion that the beneficiary will not be employed in a primarily managerial or executive capacity within one year. For this additional reason, the appeal will be dismissed.

The final issue addressed by the director is whether the petitioner submitted sufficient evidence of the size of the financial investment in the U.S. entity and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States.

At the time of filing, the petitioner submitted a copy of its bank statement for April 2006, which showed a balance of \$36,580. The petitioner also submitted a tax audit report and statement of accounts for the foreign entity for the year ended March 31, 2005, but all figures were reported in Indian rupees.

The director subsequently requested evidence of canceled checks, letters of credit, monetary transfers or other documentary evidence to show that the foreign entity funded the incorporation of the U.S. entity. The director further instructed the petitioner to provide evidence of the foreign entity's ability to invest in the U.S. entity and a copy of the foreign entity's most recent income tax return or equivalent document, with figures converted into U.S. currency.

In response, the petitioner submitted a bank statement for the foreign entity encompassing March 8, 2006 through August 14, 2006, and showing a balance equivalent to \$35,302.25. The petitioner indicated that the "foreign entity has not transferred any funds to the United States as yet." The petitioner also provided a letter from its U.S. bank indicated that the company had a balance of \$31,268.32 as of August 24, 2006.

In addition, the petitioner re-submitted the foreign entity's statement of accounts as of March 2005, but included figures in U.S. currency. The company's gross profit was \$45,658.66. Finally, the petitioner submitted its business plan, which indicates that the company's initial capital requirement is \$100,000. The plan explains the financing as follows:

Most of our initial capital will come from business back home and other personal funds. We already have transmitted \$40,000/- to our United States bank account. Other funds will be acquired as and when required.

The director determined that the record lacks sufficient documentary evidence establishing the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary, as well as to commence doing business in the United States.

On appeal, the petitioner re-submits the bank letters from the foreign entity's and U.S. entity's banks.

Upon review, the petitioner has not submitted sufficient evidence that it will have sufficient investment to meet its stated initial capital requirement of \$100,000. The petitioner has not submitted evidence that either the foreign entity or the petitioner's individual members have the funds available for investment in the U.S. company. Further, the fact that the foreign entity has over \$30,000 in its bank account is insufficient to establish that these funds are available to the U.S. company to pay its anticipated start-up costs. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). The petitioner has not submitted evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.