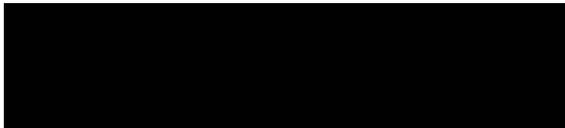


**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D-7

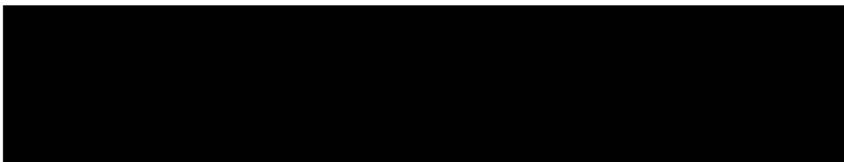
File: WAC 07 191 52217 Office: CALIFORNIA SERVICE CENTER Date: **APR 03 2008**

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 visa petition seeking to extend the employment of its vice president of sales and marketing and treasurer 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 is a limited liability company organized under the laws of the State of Ohio and is allegedly in the earth products business. The beneficiary was granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner has a qualifying relationship with the foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred, that the beneficiary's duties will primarily be those of an executive, and that the petitioner has established that both it and the foreign employer are owned and controlled by the same group of individuals thus establishing that the two entities are qualifying organizations.

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

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

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

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory

duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform 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 counsel appears to limit the beneficiary to the executive classification on appeal, the petitioner asserts in both the initial petition and in its response to the Request for Evidence that the beneficiary will manage a function of the organization. A petitioner may not claim that a beneficiary will be 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 will be employed in either a managerial *or* an executive capacity and will consider both classifications.

The foreign employer describes the beneficiary's proposed duties in the United States in a letter dated May 10, 2007 as follows:

[The beneficiary] will have continued responsibility for major decisions and company development strategies of [the petitioner] and will formulate and execute strategic objectives, and utilize her expertise to manage and direct the Company's operational efforts in the US and emerging markets. She has thorough knowledge of the non-ferrous products which we manufacture and fully understands the market. [The beneficiary] has profound experience in international business transactions.

[The beneficiary] will also continue to oversee the marketing of our full line of Cobalt products in the US. She will assist the parent company in outsourcing of consistent and reliable raw materials for supply to China, and marketing of products into the American and NAFTA marketplace. We also continue to plan for our US branch to serve as the international business transaction hub of our group companies, and ultimately to serve as the headquarters for the group of companies.

The foreign employer also asserts in the May 10, 2007 letter that the beneficiary will direct the management of a major component, or function, of the organization; will establish goals/policies of the component, or function of the organization; will exercise wide latitude in discretionary decision-making; will receive only

general supervision from higher levels; and will expand the business. Specifically, the foreign employer claims that the beneficiary will "direct our marketing efforts via the formulation and execution of strategic operation objectives" and will source "new and existing product possibilities." Her purported management of the petitioner's marketing function is further described in the letter as follows:

[The beneficiary] will benchmark the objectives for high quality, competitive pricing, sales, and excellent service and customized products for end-users' needs. [The beneficiary] will develop at least 3-5 major clients during the US company's second (2007) year of business. She will create at least one major distributor relationship on the West Coast, Southeast, and Eastern US regions to expand our business where our product volumes warrant. She will also build international marketing alliances in NAFTA and Europe, and Japan ([with third parties]). [The beneficiary] will also oversee our raw materials sourcing programs to assure sales growth of finished goods.

Finally, while the foreign employer claims that the petitioner plans to employ additional workers in the future, the petitioner indicates in the Form I-129 that it currently employs three workers. The petitioner claims to employ the beneficiary, a vice president of special projects, and an executive assistant.

On June 20, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed job description for the beneficiary, including a percentage breakdown of the time devoted to each of the beneficiary's ascribed duties, and job descriptions for each of the beneficiary's claimed subordinate workers.

In response, the foreign employer submitted a letter dated September 6, 2007 in which the foreign employer further describes the beneficiary's proposed duties as follows:

	The Duties of the Beneficiary – [REDACTED]	% Time Spent
1	Daily oversight of major industry information for perspective of the global market direction and business principles for coordination with our marketing plans and changes in Global Market pricing, trends, conditions, and political developments.	10%
2	Leads and develops customer accounts by maintaining high profile contacts and interactions with executive customer contacts	15%
3	Establishes business goals and objectives, and sales budgets. Directs and coordinates same with [the vice president of special projects] relative to specific NAFTA sales targets and outsourcing opportunities.	10%
4	Finalizes transactions and executes corresponding documents and contracts	5%
5	Develops and implements business strategies for the USA office, which has improved and increased our overall effectiveness.	10%
6	Conducts discussions with group companies' key management pursuant to global and North American market conditions, changes, and trends to facilitate the group companies' strategic plans to further develop business strategies that are critical to our successful growth.	5%
7	Meets with local professional associations and industry professionals to enhance sales and marketing opportunities regarding our products and services related to their	5%

	industries.	
8	Travels within the USA and Canada for marketing our products, and the establishment of outsourcing opportunities; also hosts travel with American and Canadian customers and suppliers to our plants in China.	20%
9	Provides general supervision of the work of [the vice president of special projects and the executive assistant].	5%
10	Conducts recruiting efforts for qualified personnel to assist with further market distribution and outsourcing plans for our Group Companies.	10%
11	Liaises with Company's Accountants and Lawyers to ensure proper Legal structures for the operation of the USA Office, and other business and legal matters.	5%

The foreign employer also further described the duties of the beneficiary's two subordinate employees. The vice president of special projects is described generally as performing sales, marketing, and administrative tasks. The executive assistant is described as performing clerical and general office administration tasks. Both the vice president of special projects and the executive assistant are described as reporting directly to the beneficiary.

On September 17, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary's duties are primarily those of an executive. In support of the appeal, counsel submits a brief and additional evidence, including an "expert opinion" addressing the beneficiary's purported employment in an "executive" capacity. Counsel also asserts that the petitioner has established that there are at least two levels of employees below the beneficiary.

Upon review, counsel's assertions are not persuasive.

Title 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Future hiring and expansion plans may not be considered in determining whether the beneficiary will be employed in a managerial or executive capacity upon petition approval. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant matter, the United States operation has not reached the point that it will employ the beneficiary in a predominantly managerial or executive position.

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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner

may not claim that a beneficiary will be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions.

In this matter, the petitioner’s description of the beneficiary’s job duties fails to establish that the beneficiary will act in a “managerial” or “executive” capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will “direct [the petitioning organization’s] marketing efforts via the formulation and execution of strategic operation objectives” and will source “new and existing product possibilities.” However, the petitioner never specifically describes any of these marketing efforts or objectives, or explains what, exactly, the beneficiary will do on a day-to-day basis to “direct” or “oversee” the marketing efforts when the record indicates that the petitioner employs only one other sales-related employee. Furthermore, general managerial-sounding duties such as “responsibility for major decisions and company development strategies” are not probative of the beneficiary performing qualifying duties. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). 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).

Likewise, most of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the petitioner asserts in the breakdown of duties that the beneficiary will directly contact, and interact with, customers (15% of her time); execute documents and contracts (5% of her time); meet with “local professional associations and industry professionals to enhance sales and marketing opportunities” (5% of her time); travel and directly market products and meet with customers (20% of her time); recruit personnel (10% of her time); and liaise with accountants and lawyers (5% of her time). However, these tasks, which will consume 60% of the beneficiary’s time, are not qualifying managerial or executive duties. To the contrary, these are operational or administrative tasks necessary to the provision of a service or the production of a product. Furthermore, the remaining duties ascribed to the beneficiary are so vaguely described that it has not been established that any of these duties constitute qualifying managerial or executive duties. *See supra*. Finally, as the petitioner has failed to establish that the two subordinate employees are supervisory, managerial, or professional employees (*see infra*), the supervisory functions ascribed to the beneficiary (5% of her time) are non-qualifying, first-line supervisory tasks. As the petitioner has indicated that the beneficiary will devote most of her time to these non-qualifying tasks, it has not been established that she will be “primarily” employed as a manager or an executive. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will directly supervise a vice president of special projects and an executive assistant. However, these employees are not described as having supervisory or managerial responsibilities. To the contrary, these employees are described as performing sales and clerical tasks. Furthermore, the record clearly indicates that the beneficiary will directly supervise both of these employees. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. 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. 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 failed to establish the skills and education required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

¹In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

²The petitioner has also not established that the beneficiary will manage an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

Similarly, the petitioner has failed to establish that the beneficiary will act 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 will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce with any certainty what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

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)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). While staffing levels alone, without taking into account the "reasonable needs" of the organization, may not be the determining factor in denying a visa to a multinational manager or executive, the "reasonable needs" of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A)-(C) of the Act, 8 U.S.C. § 1101(a)(44)(A)-(C). Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Finally, on appeal, counsel submits an "expert opinion" dated October 29, 2007 and signed by [REDACTED] Ph.D., Professor of Marketing and Marketing Department Chair at Albers School of Business, Seattle University. In the letter, Professor [REDACTED] concludes that the position offered to the beneficiary "is fairly characterized as 'Executive' in nature." Professor [REDACTED] indicates that, in reaching this ultimate conclusion, he relied on the accuracy of the job description provided to him by the petitioner. However, Professor [REDACTED]'s letter fails to serve as persuasive evidence for several reasons. First, while the author opines that the position offered to the beneficiary may be "fairly characterized" as executive in nature, the author fails to conclude, or even address, whether the beneficiary will primarily perform these executive

duties. The author, who admits that he assumes the accuracy of the job description, fails to address who will perform the non-qualifying tasks inherent to the inflated job duties ascribed to the beneficiary. Second, while the author lists some of the broad, executive-sounding duties ascribed to the beneficiary to support his conclusion, he ignores the fact that over 60% of the duties ascribed to the beneficiary (*see supra*) are not executive in nature. Third, the author adds no useful facts or analysis to the record and simply attempts to draw an inadmissible and unpersuasive legal conclusion that the beneficiary will perform qualifying duties. *See generally Good Shepherd Manor Found. v. City of Mومence*, 323 F.3d 557, 564 (7th Cir. 2003) (cited in *Superior Aluminum Alloys, LLC v. United States Fire Insurance Company*, 2007 WL 1850858 at *8 (N.D. Ind. June 25, 2007)). However, the authority as to whether the petitioner has met its burden of proof rests with CIS, and, in this matter, the petitioner has failed to establish that the beneficiary will be primarily employed in an executive, or a managerial, capacity.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

The second issue in the present matter is whether the petitioner has established that it and the foreign employer are qualifying organizations.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." *See also* 8 C.F.R. § 214.2(l)(14)(ii)(A). Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." "Subsidiary" is defined in pertinent part as a legal entity "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K). "Affiliate" is defined in pertinent part as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

The petitioner asserts in the Form I-129 that it is 90% owned by the foreign employer and 10% owned by the petitioner's vice president of special projects. However, counsel asserts in his letter dated June 8, 2007 which accompanied the initial petition that the petitioner is 70% owned by [REDACTED] 20% owned by the beneficiary, and 10% owned by the vice president of special projects. The petitioner also submitted (1) its balance sheet dated March 31, 2007 which assigns "partner capital" to [REDACTED] (\$106,969.50), the beneficiary (\$37,919.88), and the vice president of special projects (\$1,709.94); and (2) a copy of its 2006 Form 1065, U.S. Return of Partnership Income, which indicates that the petitioner is 70% owned by [REDACTED], 20% owned by the beneficiary, and 10% owned by the vice president of special projects.

On June 20, 2007, the director requested additional evidence. The director requested, *inter alia*, further evidence establishing the ownership and control of the foreign employer and a list of the petitioner's members and ownership percentages.

In response, the petitioner submitted a copy of its Operating Agreement indicating that the members of the limited liability company are [REDACTED] (70%), the beneficiary (20%), and the vice president of special

projects (10%). The petitioner also submitted evidence that it amended its 2006 tax return to indicate that the foreign employer owns 90% of the petitioner. However, the petitioner did not submit evidence that it had amended its Operating Agreement or other organizational documents.

On September 17, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. The director noted that the petitioner's Operating Agreement indicates that its owners are [REDACTED] (70%), the beneficiary (20%), and the vice president of special projects (10%), while other documents, including the amended tax returns, indicate that the petitioner is 90% owned by the foreign employer. In view of these inconsistencies, the director concluded that the record was not persuasive in establishing that the petitioner and the foreign employer are qualifying organizations.

On appeal, counsel asserts that the petitioner and the foreign employer demonstrate an "overwhelming showcase [of] commonality in both ownership and control." Specifically, counsel asserts that "the same group of seven shareholders" controls 94% of the foreign employer's interests and 82.09% of the petitioner's interests. Counsel also submits a document titled "Amendment of Establishment of Branch Company in USA" which purportedly supports counsel's argument that J [REDACTED] and the beneficiary are holding their collective 90% interest in the petitioner on behalf of the foreign shareholders "according to their each shareholding rate in our group of companies as revised in this time's 2006 shareholders' meeting resolution." In addition, counsel submits a document titled "Common Shareholders and Percentage of Ownership" (Exhibit 11). This document describes the owners of the foreign employer as follows:

[REDACTED]	24%
[REDACTED]	15%
[REDACTED]	15%
[REDACTED]	5%
[REDACTED]	15%
[REDACTED]	15%
[REDACTED]	5%
[REDACTED]	6%

The owners of the petitioner are described as follows:

[REDACTED]	45.428%
[REDACTED]	7.857%
[REDACTED]	7.857%
[REDACTED]	2.619%
[REDACTED]	7.857%
[REDACTED]	7.857%
[REDACTED]	2.619%
[REDACTED]	9%
[REDACTED]	3.65806
[REDACTED]	10%

Furthermore, counsel submits a letter dated November 17, 2007 from a certified public account, [REDACTED], in which the author provides a materially different description of the ownership structure of both the foreign employer and the petitioner. [REDACTED] claims that [REDACTED] owns 34.6645% of the petitioner and 38.51611% of the foreign employer. Finally, counsel submits an organizational chart labeled exhibit 10 which provides yet another materially different description of the ownership structure of both the foreign employer and the petitioner. This chart indicates that [REDACTED] owns 81.7% of the foreign employer and 70% of the petitioner.

Upon review, the petitioner's assertions are not persuasive.

As a threshold matter, the petitioner's attempt to further describe the ownership and control of both it and the foreign employer on appeal was inappropriate under the circumstances. The director specifically requested a list of members and corresponding percentages of ownership for both the foreign employer and the petitioner in the Request for Evidence. The petitioner chose to submit its Operating Agreement indicating that it is 70% owned by [REDACTED] and its amended tax returns indicating that it is 90% owned by a Chinese business entity. As the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, the petitioner may not now submit additional evidence on appeal which could have been submitted in response to the Request for Evidence. The AAO will not consider this evidence and will adjudicate appeal based on the record of proceeding before the director. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). Accordingly, as the record before the director failed to reconcile the two conflicting descriptions of the petitioner's ownership and control, the director correctly determined that the petitioner failed to establish that it and the foreign employer are qualifying organizations. 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). The appeal shall be dismissed for this reason.

Regardless, even if the evidence on appeal were being considered by the AAO, it is not persuasive in establishing that the petitioner and the foreign employer are qualifying organizations. To the contrary, the evidence submitted on appeal only serves to render both the petitioner's and the foreign employer's ownership and control more unclear.

First, as noted above, the record, including the evidence submitted on appeal, contains a variety of descriptions of both the petitioner's and the foreign employer's ownership structures. For example, [REDACTED] has been described as owning 70%, 45.428%, and 34.6645% of the petitioner. He has also been described as owning 24%, 38.51611%, and 81.7% of the foreign employer. The record fails to persuasively resolve any of these inconsistencies, or the inconsistency identified by the director in the decision denying the petition. As noted above, 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.

Second, the petitioner has not credibly established that [REDACTED] and the beneficiary are holding their interests on behalf of the alleged foreign owners of the foreign employer. As indicated above, the petitioner's

Operating Agreement clearly states that [REDACTED] and the beneficiary own 70% and 20% interests in the petitioner respectively. The record is devoid of evidence establishing that [REDACTED] or the beneficiary has agreed to cede control of these interests to any third parties. 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).

Third, even accepting the version of the petitioning organization's ownership and control that "the same group of seven shareholders" controls 94% of the foreign employer's interests and 82.09% of the petitioner's interests, this description of the organizations' ownership and control fails to describe an "affiliate" relationship. As noted above, "affiliate" is defined in pertinent part as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). In this matter, the same group of individuals do not necessarily own and control both the petitioner and the foreign employer. For example, over 22% of the petitioner's membership interests are allegedly owned by three persons who do not own any interests in the foreign employer. These three persons could control the petitioner in combination with [REDACTED] who allegedly owns 45.428% of the petitioner. Furthermore, [REDACTED] is described as owning an interest in the petitioner (45.428%), which is almost twice the size as his interest in the foreign employer (24%). Consequently, the six other common interest owners own interests in the petitioner, which are approximately half the size of their Chinese interests. Accordingly, the petitioner's description of the petitioner's and the foreign employer's ownership and control in exhibit 11 submitted on appeal does not establish that the two entities are "affiliates."

Accordingly, the petitioner has failed to establish that it and the foreign employer are qualifying organizations, and the petitioner may not be approved for this reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii), and (iv).

The foreign employer described the beneficiary's duties abroad in a letter dated May 10, 2007 as follows:

In 2003, [the beneficiary] was promoted to Vice President of Marketing, and was responsible for the supervision of two managers from our international and domestic marketing divisions, as well as a marketing staff of six (6) persons.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner failed to specifically describe the beneficiary's job duties abroad. 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, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the subordinate "managers" and marketing staff purportedly supervised abroad. Absent detailed descriptions of the duties of both the beneficiary and her purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad or supervised and controlled other supervisory, managerial,

or professional employees. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

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

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 partly owned by the beneficiary. As a purported owner of the petitioner, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that she 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. at 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.

The previous approval of an L-1A petition does not preclude CIS from denying an extension based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act, 8 U.S.C. § 1361.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.