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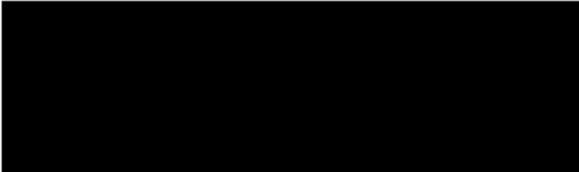
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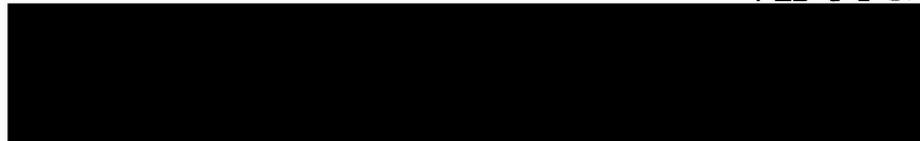
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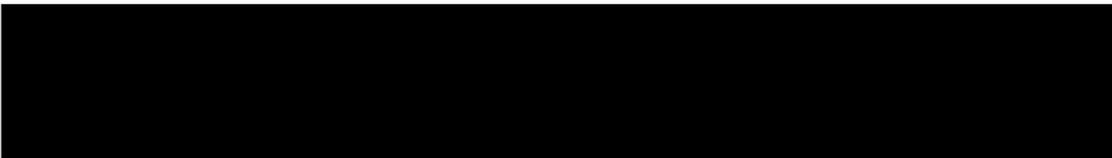
Date: FEB 01 2008

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

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

The director denied the petition concluding that the petitioner failed to establish (1) that the petitioner has secured sufficient physical premises to house the new office; (2) that the beneficiary was employed abroad in a primarily executive or managerial capacity for one continuous year in the three years preceding the filing of the petition; or (3) that the United States operation will support an executive or managerial position within one year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts (1) that the petitioner entered into a lease for physical premises before the director's denial of the petition; (2) that the beneficiary was performing qualifying duties abroad; and (3) that the beneficiary will perform qualifying duties in the United States within one year of petition approval.

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

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

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

managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

The first issue in the present matter is whether the petitioner has established that it has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A).

In support of the petition, the petitioner submitted no evidence that it has secured physical premises to house the new office. On October 25, 2006, the director requested that the petitioner submit documentary evidence establishing that it has secured sufficient premises. In response, counsel submitted a letter dated November 14, 2006 in which he asserts the following:

The Beneficiary has not yet acquired a leased premise [sic] because he is still in Chile and cannot take steps to secure something he has not yet seen. **Unlike an E-2 visa, it is my understanding of the law that the acquisition of leased premise [sic] is not required for the approval on an L-1A.** [The beneficiary] needs approval to come to the US as an L-1A

before he will be able to find a satisfactory location. [The beneficiary] has been in negotiation with a Real Estate Leasing Company who has shown him at least one location that [the beneficiary] is interested in [citation omitted], but all good businessmen and women understand that there is no substitute for a personal take on the locale and building.

On November 30, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that it has secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

On appeal, counsel asserts that the petitioner secured sufficient physical premises after submitting a response to the Request for Evidence but before the director's denial of the petition. In support, counsel submits a copy of a lease agreement.

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

As indicated above, a petition, which indicates that the beneficiary is coming to the United States to open a new office, must include evidence that "[s]ufficient physical premises to house the new office have been secured." As the record indicates that the petitioner has been doing business for less than one year, it is a "new office" for purposes of 8 C.F.R. § 214.2(l)(3)(v). See 8 C.F.R. §§ 214.2(l)(1)(ii)(F) and (H). As the petitioner failed to secure sufficient physical premises prior to the filing of the instant petition, the petition may not be approved for that reason. The petitioner's search for sufficient physical premises does not constitute the securing of these premises as required by the regulations. Furthermore, counsel's assertion that the petitioner secured physical premises after the filing of the instant petition is not relevant to this matter. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Accordingly, the petitioner has not established that it has secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A), and the petition may not be approved for this reason.

The second issue in the present matter is whether the petitioner has established that the beneficiary was employed abroad in a primarily executive or managerial position.

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 primarily performed managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Counsel to the petitioner indicated in a letter dated October 12, 2006 that the foreign employer is a restaurant. Counsel also described the beneficiary's job duties abroad in the letter as follows:

[The beneficiary] has been working with [the foreign employer] since February of 2004 as General Manager/President of the Company. As President, [the beneficiary] continues to retain control over the management of the Company, he establishes goals and policies for the organization, and exercises wide-latitude authority in decision making. [The beneficiary] analyzes the financial capacity of the Company and determines financial and business development opportunities. He manages the overall fiscal budget as well as reviews separate projects and financial proposals for the Company, and he designs and formulates strategies leading to the discovery of economic and market opportunities for the Company.

* * *

As Director and Operations Manager, [sic] oversaw the start up operations of the Company, including all pre-incorporation business deals. He now oversees all expansion efforts of the Company. He analyzes the financial capacity of the Company and determines financial and business development opportunities, he manages the overall fiscal budget as well as reviews separate projects and financial proposals for the Company. He designs and formulates strategies leading to the discovery of economic and market opportunities for the Company.

It is unclear why counsel refers to the beneficiary as "[REDACTED]" in his letter dated October 12, 2006.

The petitioner also submitted an organizational chart for the foreign employer. The chart shows the beneficiary at the top of the organization directly supervising a "kitchen manager," a "plant coordinator and first waiter," and an "account" worker. The "kitchen manager" is, in turn, portrayed as supervising a first kitchen assistant and the "plant coordinator and first waiter" is portrayed as supervising two wait staff.

On October 25, 2006, the director requested additional evidence. The director requested, *inter alia*, job descriptions for the beneficiary's subordinates abroad and a more detailed organizational chart for the foreign employer.

In response, counsel submitted a letter dated November 14, 2006 in which he reiterates that the beneficiary supervises three subordinate supervisors abroad (a "kitchen manager," a "plant coordinator and first waiter," and an "account" worker). Counsel describes the "kitchen manager" as follows:

Coordinate the work of the kitchen staff and direct the preparation of meals. Determine serving sizes, plan menus, order food supplies, and oversee kitchen operations to ensure uniform quality and presentation of meals. Prepare a wider selection of dishes, cooking most orders individually, supplemented by short-order specialties and ready-made desserts. Head cook prepares all the food with the help of other kitchen workers.

Counsel also describes the "plant coordinator" as follows:

Coordinate waiter/waitress scheduling, order stock supplies for general operations (cleaning, menu, paper, decorations, alcohol, etc[.]). **Manage bar (wine and beer). In charge of timekeeping and is the first point of contact for customers.**

Counsel further explained that the "account" worker is actually a contractor who performs accounting services for the foreign employer. The accountant is not an employee of the foreign employer.

Finally, counsel describes the duties of the beneficiary as the "restaurant manager" abroad. As this description appears in the letter dated November 14, 2006, it will not be repeated here. In general, the beneficiary is described as being the primary operator of a single-location, six-employee restaurant operation.

He is described as placing food orders with suppliers, planning for linen and cleaning services, inspecting quality of food, receiving food orders, motivating employees, hiring and training employees, resolving customer complaints, preparing payroll records, completing tax and licensing paperwork, maintaining records, conducting market research, and administering cash receipts.

On November 30, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a primarily executive or managerial capacity.

On appeal, the petitioner asserts that the beneficiary's duties were primarily those of an executive or manager.

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

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

As a threshold issue, the AAO notes that, as counsel failed to corroborate his descriptions of the duties of both the beneficiary and his subordinates in the letters dated October 12, 2006 and November 14, 2006 with evidence, these assertions have no evidentiary value. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, given that counsel referred to the beneficiary as "Mr. Sun" in the letter dated October 12, 2006, it is more likely than not that this job description does not apply to either the beneficiary or the foreign employer. In view of the above, as the petition is devoid of evidence establishing the job duties of either the beneficiary or his subordinates abroad, the petition may not be approved. 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).

Regardless, in this matter, counsel's descriptions of the beneficiary's job duties fail to establish that the beneficiary acted in a "managerial" or "executive" capacity. In support of the petition, counsel submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary did on a day-to-day basis. For example, counsel states that the beneficiary established goals and policies, determined financial and business development opportunities, reviewed projects and financial proposals, and formulated strategies "leading to the discovery of economic and market opportunities." However, the petitioner did not specifically define these goals, policies, opportunities, projects, proposals, or strategies, or how they relate to his operation of a six-employee, single-location restaurant. 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 actually performed 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). 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 Treasure Craft of California*, 14 I&N Dec. 190.

Likewise, most of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which do not rise to the level of being managerial or executive in nature. The beneficiary is generally described as being the primary operator of a six-employee, single-location restaurant. Counsel describes the beneficiary as placing food orders, planning for linen and cleaning services, inspecting quality of food, receiving food orders, motivating employees, hiring and training employees, resolving customer complaints, preparing payroll and completing tax and licensing paperwork, maintaining records, conducting market research, and administering cash receipts. However, such duties are non-qualifying administrative or operational tasks. Furthermore, as the petitioner has failed to establish that the subordinate workers were supervisory, managerial, or professional employees (*see infra*), the supervisory functions ascribed to the beneficiary would also be non-qualifying, first-line supervisory tasks. As the petitioner has not established how much time the beneficiary devoted to such non-qualifying tasks, it cannot be concluded that he was "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 supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As alleged in the organizational chart and counsel's job descriptions, the beneficiary directly supervised a "kitchen manager" and a "plant coordinator and first waiter" and, indirectly, a kitchen assistant and two wait staff workers. Despite their managerial titles, the petitioner has failed to persuasively establish that the "kitchen manager" and the "plant coordinator and first waiter" were truly supervisory or managerial employees. To the contrary, it appears that these restaurant workers performed primarily tasks necessary to the provision of a service or the production of a product, i.e., cooking, greeting customers, and waiting on tables. An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not established that the reasonable needs of the foreign employer compelled the employment of a managerial or executive employee to oversee one or more subordinate supervisors. It is more likely than not that both the beneficiary and his staff all primarily performed non-qualifying tasks related to the daily operation of a single-location restaurant. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006).¹

¹It is further noted that the petitioner's purported supervision of an independent contractor, an accountant, will not qualify him as a managerial employee. First, it has not been established that the beneficiary devoted a majority of his time to this duty. Second, it has not been established that this individual is a professional (*see*

In view of the above, it appears that the beneficiary was primarily a first-line supervisor of non-professional employees, 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 required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary managed professional employees.² Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.³

infra). Third, the supervision of an independent contractor will not permit a beneficiary to be classified as a managerial employee as a matter of law. *See* section 101(a)(44)(A)(ii) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The Act is quite clear that a managerial employee must manage *employees*, not independent contractors, in order to qualify in part under section 101(a)(44)(A) of the Act.

²In evaluating whether the beneficiary managed professional employees, the AAO must evaluate whether the subordinate positions required a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

³The petitioner has also not established that the beneficiary managed an essential function of the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties were managerial, if any, and what proportion were non-managerial. Also, as explained above, the record establishes that the beneficiary was primarily a first-line supervisor of non-professional employees and/or was engaged in performing non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties were managerial, nor can it deduce whether the beneficiary was primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary was primarily employed as a first-line supervisor in the operation of a single-location restaurant and was performing the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Counsel correctly observes that a company's size 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. *See* § 101(a)(44)(C) of the Act. However, in reviewing the relevance of the number of employees an employer has, federal courts have generally agreed that Citizenship and Immigration Services (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 at 1316 (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, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary have been "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Accordingly, in this matter, the petitioner has failed to establish that the beneficiary primarily performed managerial or executive duties, and the petition may not be approved for that reason.

The third issue in the present matter is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

Counsel explained in his letter dated October 12, 2006 that the petitioner plans to open and operate a restaurant in Jacksonville, Florida. As the record is devoid of details regarding the proposed business operation, the director requested additional evidence on October 25, 2006. The director requested, *inter alia*, a copy of the petitioner's business plan and evidence that the United States operation will grow to a sufficient size to support a managerial or executive position within one year.

In response, counsel submitted a "business plan" on his law firm's letterhead summarizing the United States operation's projected growth and development during its first year in operation. Counsel did not support the "business plan" with any evidence. Generally, counsel asserts that the petitioner plans to find a suitable location for its restaurant, open the restaurant for business approximately three months after petition approval, and hire between five and seven workers to assist the beneficiary in the restaurant's operation.

On November 30, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that, within one year, the beneficiary would perform primarily qualifying duties.

On appeal, counsel asserts that the petitioner has established that the beneficiary will perform qualifying duties within one year of petition approval.

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

When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

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

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

Id.

For several reasons, the petitioner in this matter has failed to establish that the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner (1) has failed to establish that the beneficiary will perform primarily qualifying duties after the petitioner's first year in operation; and (2) has failed to sufficiently describe the nature, scope, organizational structure, investment, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).⁴

First, as correctly noted by the director, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. As explained in counsel's business plan and other correspondence, the petitioner plans to open a single-location restaurant in Florida and, within one year, hire between five and seven employees to assist in its operation. However, neither counsel nor the petitioner described the duties of these proposed employees. Absent specific job descriptions for these prospective workers, it is impossible to confirm whether the beneficiary will likely be relieved of the need to perform non-qualifying tasks within one year, or whether the beneficiary will likely supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. Furthermore, neither counsel nor the petitioner specifically described the beneficiary's proposed duties after the first year in operation. Specifics are clearly an important indication of whether a beneficiary's duties will be primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner has failed to sufficiently describe the nature, scope, organizational structure, investment, and financial goals of the new office. 8 C.F.R. §§ 214.2(l)(3)(v)(C)(1)-(2). As explained above, counsel's "business plan" vaguely describes the United States operation as a proposed South American themed restaurant. However, the plan fails to specifically describe the petitioner's proposed location, seating capacity, investment needs, existing capital, marketing strategy, or potential

⁴As a threshold issue, the AAO notes that, as counsel failed to corroborate facts asserted in his "business plan" dated November 14, 2006, this plan has no evidentiary value. Once again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. In view of the above, as the petition is devoid of evidence describing the scope or proposed organization of the United States operation, the petition may not be approved for this reason alone. 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. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

competitors. The plan also fails to project revenue, income, or expenses, or to set financial goals. The record does not contain any independent analysis or data. Once again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Absent a detailed, credible description of the petitioner's proposed United States business operation addressing the petitioner's marketing plan, location, investment, and income/expense projections, it is impossible to determine whether the proposed enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above reasons.

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

In this matter, the petitioner claims that it and the foreign employer are owned and controlled 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 he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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

Beyond the decision of the director, the petitioner has failed to establish that it is a qualifying organization.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (*i.e.*, one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). If one individual owns a majority interest in the petitioner and the foreign employer, and controls those entities, then the entities will be deemed to be "affiliates" under the definition. 8 C.F.R. § 214.2(l)(1)(ii)(L). It must also be established that a qualifying organization "is or will be doing business." 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of good and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H).

In this matter, the record indicates that the petitioner has failed to secure sufficient premises to house the proposed restaurant. *See supra*. Counsel also indicates in the "business plan" that the petitioner does not plan to open for business for at least three months after petition approval. If view of these assertions, it has not

been established that the petitioner will be "doing business" in the United States and, thus, it has not been established that the petitioner is a qualifying organization. As of the date of the filing of the petition, the operation of the United States enterprise is entirely speculative. 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).

Accordingly, the petitioner has failed to establish that it is a qualifying organization, and the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 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, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.