U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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File: WAC 04 009 51601 Office: CALIFORNIA SERVICE CENTER Date: AUG 30 2005

IN RE: Petitioner:
Beneficiary: [redacted]

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

IN BEHALF OF PETITIONER:

[redacted]

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, Director
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 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 is a corporation organized in the State of Nevada that claims to be engaged in the provision of paramedical, clinical laboratory and educational and professional career development services. The petitioner claims that it is the subsidiary of New Monte Medical Supply, Inc. located in Baguio City, Philippines. The petitioner seeks to open a new office in the United States and has requested that the beneficiary be granted a one-year period of stay to serve as its vice president finance/general manager.

The director denied the petition concluding that the petitioner did not establish that: (1) the petitioner has a qualifying relationship with the foreign entity; (2) the petitioner has secured sufficient physical premises to house the new office; or that (3) the beneficiary will be employed in a primarily managerial or executive capacity within one year of the approval of the petition.

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 sufficient evidence was submitted to establish that the foreign entity and the petitioner have a parent-subsidiary relationship. Counsel asserts that the director placed undue emphasis on the number of employees the beneficiary would supervise, and did not consider whether she will perform executive duties or manage a function of the organization. Finally counsel states that the petitioner previously submitted a sub-lease agreement, but has since obtained a new lease for an office in a different location. In support of the appeal, counsel submits a brief and additional supporting documentation.

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 petitioner, 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 established a qualifying relationship between the United States entity and the beneficiary's foreign employer.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) 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;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

* * *

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

(J) *Branch* means an operating division or office of the same organization housed in a different location.

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

On Form I-129, the petitioner indicated that the foreign entity is the parent company of the U.S. entity based on its ownership of 60 percent of the petitioner's stock. The petitioner did not submit supporting documentation to establish the claimed qualifying relationship.

On February 12, 2004, the director issued a request for additional evidence, instructing the petitioner to submit, in part: (1) evidence to show that the foreign company has paid for the U.S. entity, including copies of original wire transfers, canceled checks, deposit receipts or other documentation of the stock purchase; (2) minutes of the meeting for the U.S. company which lists the shareholders and the number and percentage of shares owned; (3) copies of all of the U.S. company's stock certificates; (4) a copy of the U.S. company's stock ledger showing all stock certificates issued, including total shares of stock sold, names of shareholders and purchase price; and (5) a copy of the U.S. company's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts, accompanied by evidence which clearly documents that the parent company has paid for its stock ownership.

In a response received on May 6, 2004, the petitioner submitted in part its stock certificates, stock transfer ledger, partially illegible cash deposit or wire transfer slips, and minutes of the organizational meeting of the board of directors dated September 20, 2003, indicating that the petitioner was authorized to issue 75,000 shares of stock with a par value of $1.00. The stock transfer ledger indicates that the foreign entity paid $20,000 for its 45,000 shares, while four individuals paid $250 each for 5,000 shares, two individuals paid $250 each for 2,000 shares, and one individual paid $250 for 1,000 shares. The petitioner's business plan

indicated that the petitioner's bank account would be opened with a deposit of $3,000 and the foreign entity would transfer the initial funds of $20,000 to organize the U.S. corporation.

The director denied the petition on May 14, 2004, in part determining that the petitioner had not established the claimed parent-subsidiary relationship with its parent company. The director noted that although the petitioner submitted a copy of a cash deposit slip for $20,000, the deposit slip does not indicate the date or bank account into which the funds were deposited. The director also observed that the petitioner submitted no evidence to document the origin of the funds, and provided insufficient documentation to establish that the foreign parent company has the needed capital to establish the new office. The director concluded that absent copies of wire transfers and bank statements from the claimed foreign parent company showing that the capital used for the petitioning entity originated with the foreign entity, the petitioner did not establish a qualifying relationship between the two companies.

On appeal, counsel for the petitioner states that the foreign entity owns 60 percent of the petitioner's stock and had transferred the money to the petitioner for the initial investment to start the business in the United States. The petitioner submits a copy of its May 2004 bank statement indicating that it received a wire transfer in the amount of $19,982.00 originating from the foreign entity on May 21, 2004. The petitioner also provides a copy of the foreign entity's May 2004 bank statement, which shows a $20,000 debit from its account on or about May 13, 2004.

On review, the record does not demonstrate that the U.S. and foreign companies were qualifying organizations at the time the petition was filed. The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988)(In immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, *supra* at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional

supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The instant petition was submitted on October 14, 2003. While the stock certificates and stock transfer ledger indicate that the foreign entity owns the majority of the petitioner's stock, there is no evidence that the petitioner received any consideration in exchange for its stock until May 21, 2004, one week after the director's decision to deny the petition. 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 becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The stock certificates alone are insufficient to establish the foreign entity's majority ownership interest in the U.S. company as of the date of filing.

The AAO also notes a discrepancy between the stated par value of the petitioner's stock certificates, and the amount purportedly paid by its shareholders in consideration for the shares. The petitioner's stock certificates and minutes of its organizational meeting indicate that the company's stock has par value of $1.00 per share; however, the stock ledger indicates that the shareholders paid a purchase price between $.02 to $.44 per share, resulting in a total purchase price of only $22,000 for stock valued at $75,000. 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 petitioner has not submitted sufficient evidence to overcome the director's decision on this issue. For this reason, the appeal will be dismissed.

The AAO will next turn to the issue of whether the petitioner has secured sufficient physical premises to house its new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In support of the petition filed on October 14, 2003, the petitioner submitted a copy of a "commercial property lease" for 1200 square feet of office space located at "510 south burnside avenue unit 10M." The term of the agreement was for twelve months with a monthly rent of $3,000.

In his February 12, 2004 request for evidence, the director instructed the petitioner to provide additional evidence that it had secured sufficient premises to house the new office, including: (1) a detailed description of the type of business the petitioner will operate; (2) an explanation as to why the petitioner chose its specific location; (3) the type of building in which the office is located; (4) a copy of the U.S. company's floor plan for all spaces including an office, warehouse and production spaces; (5) photographs of the U.S. business premises including the inside and outside of all office, production and warehouse spaces with equipment, merchandise, products and employees clearly visible, and any company logos or signs displayed on and in buildings and on products; (6) the U.S. business's office hours and the hours during which the beneficiary will occupy the workplace; and (7) the current operating business phone number located within the company's physical premises.

In a response received on May 6, 2004, the petitioner indicated that it would engage in the placement of medical equipment and supplies to hospitals, laboratories and clinics. In an accompanying business plan, the petitioner indicated that it plans to provide group studies, lectures and continuing education programs for clinical laboratory scientists and assist its students with job placement. The petitioner submitted another copy of its lease, a floor plan for the office space, and photographs.

The director denied the petition on May 14, 2004, in part concluding that the petitioner did not establish that it had secured sufficient physical premises to house the new office. The director observed that the 1200 square feet of office space indicated in the lease would not be sufficient to accommodate the petitioner's projected staff or allow it to provide its planned educational programs to clients. The director also observed that the submitted photographs appear to be of two different locations, noting: "The outside signage appears to be a temporary posted sign on the exterior of a building and a paper taped to the outside of an office door."

On appeal, counsel for the petitioner states: "The petition is for a new office, a sublease was obtained before to start the US Corporation, which was submitted with the response to [the request for evidence.] And the mean time a Lease is obtained." The petitioner submits a new lease and photographs purportedly depicting its new office space.

Counsel's argument is not persuasive. The petitioner has not secured sufficient physical premises to house the new office. Although the petitioner submitted a lease agreement with the initial petition, there is no evidence to establish that the company actually occupied the 1200 square feet of office space located at the address listed on the lease agreement. As noted by the director, the exterior and interior photographs provided do not appear to depict the same location. Rather, the photographs submitted in response to the request for evidence depict the exterior of the building with a building entrance and street address displayed, a temporary sign for the petitioner's business affixed to the exterior of the building, an interior door with the petitioner's name affixed, along with a temporary sign indicating "Unit 10 M," and the interior of what appears to be a small office with one desk and computer workstation. The floor plan, which appears to have been created by the petitioner, indicates that the door to the office opens to a long hallway with a large staff room, work area/office space, an information desk, a lounge and two restrooms. The small office that appears in the single interior photograph submitted by the petitioner is clearly not 1200 square feet in size, nor is it depicted on the petitioner's floor plan. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal, rather than addressing the problems noted by the director, the petitioner simply submits a new lease agreement and photographs for a different location. The submitted evidence undermines, rather than supports, the petitioner's claim that it has secured physical premises for its new office. The lease agreement was purportedly signed on May 4, 2004, one day after the petitioner submitted its response to the director's request for evidence, yet the petitioner did not mention that it intended to relocate to a new office space as of May 5, 2004. The lease agreement does not identify the use for which the leased premises may be used or identify the size of the leased property. The lessor, "[redacted]," cannot be found in California State public records or telephone directories. The petitioner did not provide photographs of the exterior of the building that houses the new office. The petitioner provides photographs of a very narrow wooden door that appears to be in a residential building. Beside the door, the petitioner attached with thumb tacks a temporary sign with the petitioner's name, address, telephone and fax numbers, and a small sign

indicating the office number as "103." The photographs of the interior depict a large, modern office space with at least ten cubicles, and two or three separate offices. The photographs appear to have been taken after 11:00 pm when the office was unoccupied, but all of the workstations are clearly assigned to employees. The petitioner's new office is not yet staffed. These photographs obviously depict two different locations and do not represent the petitioner's actual office space. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Regardless, 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. at 248. Accordingly, even if the new lease agreement were legitimate, it was signed seven months after the petition was filed and would not be given any evidentiary weight in this proceeding.

Based on the foregoing discussion, the petitioner has not established that it had secured sufficient premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). For this reason, the appeal will be dismissed.

The third issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity within one year of approval of the petition.

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 an October 6, 2003 letter submitted with the initial petition, the petitioner described the beneficiary's proposed duties as vice president finance/general manager:

> Direct and coordinate activities of the U.S. Corporation. She will [be] in over-all-in-charge [sic] of the company's operation department. She will formulate and administer organization policy discussing the business plan with Parent Company; Participate in formulating and administering company policies and developing long range goals and objectives; direct and coordinate activities of the company to further attainment of goals and objectives.
>
> Further she will do comprehensive analysis of company's financial status, budget management study, and comparative reports based on economist standardize computation of stocks and bonds. Will review analyses of activities, cost, operation and forecast data and objectives.

With the initial petition, the petitioner submitted two organizational charts depicting the staffing or proposed staffing of the United States company. One chart depicts a CEO/president and vice president/director over the beneficiary's position and a vice president marketing/corporate secretary position. The chart indicates that the beneficiary will supervise a "director/maintenance officer" and the vice president marketing will supervise a "director/international officer." All of the individuals on the chart are identified by name and are shareholders of the company. The other organizational chart depicts the beneficiary's proposed subordinates. It shows that she will supervise an operation manager who in turn will supervise a purchasing officer, customer relations officer, front desk employee and clerk. The operation manager will also supervise a director of education who is depicted as supervising "hematology," "chemistry," "microbiology," and "blood bank/immunology." Finally, the petitioner submitted a document titled "Company's Future Plan" which states that the U.S. company "shall be engaged on [sic] paramedical services, educational and or professional career development, manpower pooling services, clinical laboratory field services and professional consultation."

On February 12, 2004, the director requested additional evidence to establish that the U.S. organization would be able to support the beneficiary in a managerial or executive capacity within one year. Specifically, the director requested the following: (1) an original letter from the foreign company explaining the need for the new office, the proposed number of employees and types of positions they will hold, the amount of the U.S. investment, the financial ability of the foreign company to pay the beneficiary and commence doing business, and the size and staffing level of the foreign company; (2) minutes of meetings for the foreign company to illustrate discussions to form the U.S. entity; (3) a copy of the feasibility study by which the foreign parent company determined the need for, and feasibility of the proposed United States company; (4) copies of

current and original plans prepared by the foreign company for the U.S. entity, including specific details as to the business to be conducted and one, three, and five-year projections for business expenses, sales, gross income and profits or losses; and, (5) proof of business conducted by the foreign parent company in the United States to date.

The petitioner submitted the requested documents from the foreign entity, including a business plan, feasibility study, and minutes of meetings related to the establishment of the U.S. company and the beneficiary's transfer to the United States. The feasibility study indicates that the U.S. entity intends to provide lectures and group studies to prepare students for the California licensure examination for clinical laboratory scientists, provide continuing education programs for laboratory scientists, and assist successful examinees with job placement in hospitals and clinical laboratories. The petitioner also provided the following description of the beneficiary's proposed duties as general manager of the U.S. entity:

1. Under supervision and control of COO, to have over-all supervision and control of operations of the business.
2. To select, screen, hire and discipline and fire employees in keeping with current employment laws; 20%
3. To train and transfer knowledge and technology to trainees and recruits, such that they would eventually acquire the proper procedures and operations of the business especially on the marketing and recruitments 20%
4. To coordinate with the rest of the officers, and to foreign company in regard to financial requirements and projected income of the corporation. 20%
5. Under the control and supervision of COO, to negotiate, transact, conclude[,] enter into, execute and deliver any and all contracts and/or agreements on behalf of the corporation and provide such terms and conditions that would make the corporation's [sic] competitive in the industry. 20%
6. Subject to COO's review and/or supervision, to directly exercise management required and otherwise necessary to lawfully competitively do and carry out the business. To generally to take care of the day-to-day business affairs of the corporation and assume all responsibilities relating to questions, problems, strategies and solutions and alternatives to any and all business matters. 10%
7. Under supervision and control of COO, to ensure compliance with all laws, ordinances, administrative rules and regulations of the industry. 5%
8. To report periodically to the Chief Operating Officer and/or President on the over-all picture of the corporation, i.e., financial, administrative and technical aspects of the corporation. 5%

The foreign entity provided a hiring plan for the U.S. entity that indicated that the petitioner intended to hire a clerk to assist the beneficiary with communications and record-keeping within two months after the approval of the L-1A petition. The hiring plan indicated that a marketing manager would be hired one year after approval, a human resources specialist would be hired within two years, an education consultant would be hired "eighteen months or a year" from the date of approval, and instructors and trainers would be hired "after all this organizational structure has been established and upon the opening of the first session or classes." The petitioner submitted another copy of the organizational chart submitted with the initial petition.

On May 14, 2004, the director denied the petition, in part concluding that the petitioner did not establish that the beneficiary will be employed in an executive or managerial capacity within one year. The director noted that the petitioner intended to hire only one employee within the first year of operations, and that the beneficiary would not have a staff to relieve her from performing the day-to-day duties of the business. As such, the director could not conclude that substantially all of the beneficiary's duties would be at the executive or managerial level.

On appeal, counsel for the petitioner asserts that the director erroneously based his decision on the number of employees to be supervised and did not consider whether the beneficiary would perform executive duties or manage a function of the organization. Counsel claims that the beneficiary will perform executive duties, and will also manage the finance function of the organization. Counsel claims that the beneficiary will be performing executive duties by "making major decisions, establishing goals and policies of the company, directing the management and marketing of the company," will receive only general supervision from the foreign company, and will "decide to invest in other assets and business." Counsel emphasizes that the position offered to the beneficiary is not a first-line supervisor position, and claims that the petitioner did not state that the beneficiary would supervise managers or other staff.

Counsel'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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner's description of the beneficiary's duties is too general and vague to convey what duties she will actually perform as vice president finance and general manager of the U.S. company. The initial description of the beneficiary's duties included broad responsibilities such as "direct and coordinate activities of the U.S. company," "formulate and administer organization policy," and "participate in formulating and administering company policies and developing long range goals and objectives." These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In response to the request for evidence, the petitioner provided an account of how the beneficiary would allocate her time, yet still failed to provide a detailed description of her day-to-day duties. For example, the petitioner stated that the beneficiary would devote 20 percent of her time to negotiating, transacting and delivering all contracts and agreements on behalf of the company. The petitioner does not, however, specify the types of contracts or provide any additional explanation that would distinguish these duties from routine sales tasks, nor has it stated that it intended to hire any other employees who would be responsible for selling the petitioner's services. If the beneficiary is selling the petitioner's services, this portion of her time will not be considered time spent performing managerial or executive duties. The petitioner stated that the beneficiary would devote an additional 20 percent of her time to "train and transfer knowledge and technology to trainees and recruits." The petitioner's hiring plan indicates that the petitioner will employ only an office clerk during the first year of operations. The petitioner has not explained how the beneficiary's responsibility for training a

low-level employee would satisfy the definition of either managerial or executive capacity. The remainder of the job description provided in response to the request for evidence is couched in general terms, such as "have overall supervision and control of the operations of the business," "take care of day-to-day business affairs," "ensure compliance with all laws, ordinances, administrative rules," and "report periodically to the Chief Operating Officer and/or President." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. The AAO is unable to determine what duties the beneficiary will perform on a day-to-day basis, and therefore cannot conclude that the beneficiary will be performing primarily managerial or executive duties.

The petitioner has also failed to provide a consistent depiction of the beneficiary's level of authority within the petitioning organization and the U.S. company's proposed staffing levels. The job description for the beneficiary's position indicates that she will control the U.S. entity "under supervision and control," of the chief operating officer of the foreign entity. The petitioner's organizational chart indicates that the beneficiary will report to a vice president/director, who in turn is supervised by the president of the U.S. entity. If the beneficiary will, in fact, have two tiers of management above her, the petitioner's claim that she will establish the goals and policies of the company is not credible, as the highest-level executive would reasonably perform these duties.

With respect to the petitioner's staffing levels, the petitioner indicated in its hiring plan that it intends to hire an office clerk during the first year of operations, a marketing manager after one year, an "education consultant" in twelve to eighteen months, and "instructors and trainers" to be hired "after all this organizational structure has been established." The petitioner also submitted two conflicting organizational charts. One chart depicts a CEO/President, Vice President/Director, the beneficiary as Vice President Finance/General Manager supervising a Director/Maintenance Officer, and a Vice President Marketing who will supervise a Director/International Officer. The second chart indicates that the beneficiary will supervise an operation manager, who will oversee a front desk employee, a clerk, a purchasing officer, a customer relation officer, and a director of education, who will supervise hematology, chemistry, microbiology, and blood bank/immunology employees or departments. 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). Based on the conflicting information provided regarding the petitioner's proposed organizational structure and the beneficiary's place within it, the AAO cannot conclude that the beneficiary would occupy a position at a senior level within the petitioner's organizational hierarchy, or that she would manage the organization or a component or department of the organization.

The director concluded, and the petitioner does not dispute on appeal, that the beneficiary would supervise only one employee, an office clerk, by the end of the first year of operations. On appeal, counsel correctly states that section 101(a)(44) of the Act was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprises. A company's size alone, without taking into account the reasonable needs of the organization, may not be determining factor in denying a visa to a multinational manager or executive *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

An analysis of the nature of the petitioner's business undermines counsel's assertion that the beneficiary will be engaged in primarily executive duties. The petitioner intends to provide training courses for clinical laboratory scientists and offer job placement services, and therefore reasonably requires employees to obtain accreditations from state authorities, perform bookkeeping and banking functions, research market conditions, market and sell the petitioner's services, prepare invoices, prepare training materials, deliver training to clients, and develop relationships with local hospitals and laboratories for job placement purposes. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager and one clerk. It can therefore be assumed, and has not been proven otherwise, that either the petitioner does not expect the company to become operational within one year, or the beneficiary herself will be performing many non-qualifying duties even at the end of the first year of operations, which would prevent her from performing primarily managerial or executive duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel further asserts that the director failed to consider that the beneficiary will manage the finance function of the U.S. company. 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 comprehensive and detailed description of the duties to be performed, 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 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 manages an essential function. The petitioner indicates that the beneficiary will "be in charge of the financial affairs of the company," yet includes in this broad responsibility non-qualifying duties such as paying bills, and being responsible for billing and collection accounts. The fact that the beneficiary will be the only employee with any responsibility for the petitioner's finances does not elevate her duties to a "function manager" position for immigration purposes. 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).

On appeal, counsel further refers to unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial capacity for L-1 classification as a function manager. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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.

The petitioner has provided a vague description of the beneficiary's proposed duties, a meager outline of the U.S. company's proposed operations and objectives, and a confusing picture of its planned organizational hierarchy and the beneficiary's place within it. There is no evidence that the foreign company had invested any money in the U.S. entity at the time the petition was filed, and, as discussed above, the petitioner did not provide probative evidence that it had secured sufficient premises to house the new office. Collectively, the evidence submitted does not demonstrate that the petitioning organization will support the beneficiary in a managerial or executive capacity within one year of commencing operations. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary has been employed with the foreign entity in an executive or managerial capacity as required 8 C.F.R. § 214.2(l)(3)(v)(B). The job description submitted by the foreign entity indicates that the beneficiary served as "assistant vice-president/operation manager" with the foreign entity from September 1999 to December 2002 and was "over-all in-charge on the company's operation department supervisions and implementation of management policies and regulations" as well as "comprehensive analysis of company's financial status, budget management study, and comparative report based on economist standardize computation of stocks and bonds." In his request for evidence, the director requested a comprehensive description of the beneficiary's duties with the foreign entity, an organizational chart depicting all employees under the beneficiary's supervision, and brief job descriptions for all of the beneficiary's subordinates. The petitioner provided only the requested organizational chart. 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). The vague job description submitted with the petition does not contain sufficient detail to establish that the beneficiary has been employed in a managerial or executive capacity with the foreign entity.

In addition, the staffing of the foreign entity is also relevant to the issue of whether the beneficiary served in a managerial or executive capacity with the foreign entity. The AAO finds reason to doubt that the foreign entity employs the more than seventy employees listed on its organizational chart. In support of the initial petition, the petitioner provided a lease for the foreign entity indicating that it leased 586 square feet of office

space, consisting of two adjoining rooms and a bathroom. In the request for evidence, the director instructed the petitioner to provide photographs of the foreign company's business premises, with equipment, merchandise, products and employees clearly visible, and any company logos, emblems or signs displayed on buildings or products. The photographs submitted appear to depict a showroom with medical supplies, a small warehouse room, a conference room, and a single office with two workstations. No employees or company logos appear on any of the photographs. The petitioner also submitted a floor plan for the foreign entity which depicts approximately eighteen separate offices or rooms. The floor plan clearly does not coincide with the foreign entity's lease or photographs. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Finally, the director requested copies of the foreign entity's payroll records pertaining to the beneficiary for the year preceding the filing of the petition. The foreign entity provided a payroll summary for the beneficiary for January 1 through December 31, 2003; however, the beneficiary indicated on her resume that she left the foreign entity in December 2002. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Further, CIS records show that the beneficiary was in the United States as a nonimmigrant visitor for all but two weeks in 2003, and for an extended periods of at least six months or longer in 2001 and 2002. The petitioner has not established that the beneficiary was employed in a qualifying capacity with the foreign entity for one continuous year in the three years preceding the filing of this petition. *See* 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv). For this additional reason, the petition will not be approved.

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. 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.

ORDER: The appeal is dismissed.