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U.S. Citizenship and Immigration Services

D7

[redacted]

File: WAC 03 059 51797 Office: CALIFORNIA SERVICE CENTER Date: JUN 14 2005

IN RE: Petitioner: [redacted]
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:

[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 seeks to employ the beneficiary temporarily 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 U.S. petitioner, a corporation organized in the State of California, that is engaged in the distribution of medical and laboratory supplies and seeks to employ the beneficiary as its chief operating officer. The petitioner claims that it is the subsidiary of Far East Dental Lab, located in Quezon City, the Philippines.

The director denied the petition concluding that the petitioner did not establish that (1) a qualifying relationship existed between the U.S. entity and a foreign entity; and (2) the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence submitted with the initial petition and in response to the director's request for additional evidence clearly established that the beneficiary was employed in a primarily managerial or executive capacity as defined by the regulations and that the requisite qualifying relationship existed between the petitioner and a foreign entity. In support of this assertion, counsel submits a brief and additional evidence.

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 first issue in the present matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

(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.

(L) "Affiliate" means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or
>
> (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claims that the U.S. entity is the subsidiary of the foreign entity. The director found the initial evidence submitted with the petition to be insufficient to qualify the petitioner for the benefit sought, and consequently issued a request for evidence on March 3, 2003. In the request, the director asked the petitioner to submit evidence that definitively established its qualifying relationship with the foreign company, and specifically requested evidence of the foreign entity's ownership and control of the U.S. petitioner. On May 22, 2003, the petitioner submitted a detailed response to the director's request which was accompanied by numerous corporate documents for the U.S. and foreign companies as well as additional documentary evidence in support of the claimed relationship.

Upon review of the evidence submitted, the director concluded that the U.S. entity was not the subsidiary of the foreign entity based on the documentation submitted. Specifically, the director found that the petitioner had failed to substantiate its claim that the foreign entity owned a 59% interest in the U.S. entity. The director subsequently concluded that the petitioner's claim was invalid and, as a result, the petition was denied on June 30, 2003.

The petitioner appealed the decision, asserting that the foreign entity did in fact own the proportion claimed. In support of this contention, the counsel for the petitioner provided additional documentation which outlines the manner in which the ownership of the U.S. entity was acquired. The AAO will first examine the record of proceeding and the director's decision prior to examining the petitioner's claims on appeal.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology*, 19 I&N Dec. at 595.

Upon review of the record of proceeding, the petitioner did not establish that it has the required qualifying relationship with the foreign entity.

In this case, the petitioner provided documentary evidence outlining the shareholder interests in the U.S. entity, and supplemented this evidence with explanatory statements which discussed the manner in which the ownership interests were acquired by the foreign entity. The initial petition included no documentary evidence supporting the claimed relationship between the U.S. and foreign entities. Consequently, the director issued a request for evidence establishing the business relationship between the two entities. In response to this request, counsel submitted statements which claimed that Dr. [redacted] doing business as Far East Dental Labs, had agreed to transfer $150,000 to the U.S. entity in exchange for a 59% ownership interest in the entity. The evidence submitted consisted of a Memorandum of Understanding dated January 10, 2001, which outlined this agreement, as well as a Corporate Secretary's certificate, dated October 14, 2002, which stated that Dr [redacted] owned 100,000 shares, or 59% of the U.S. entity.

The director concluded that the evidence did not establish that the two companies were owned and controlled by the same parent, nor was there significant commonality of ownership in existence.[1] The director based his decision on the lack of evidence in the record regarding the ownership of both entities.

Upon review of the record of proceeding, the AAO concurs with the director's finding that the U.S. and foreign entities do not have a qualifying relationship as defined by the regulation at 8 C.F.R. §214.2(l)(1)(ii)(L). Specifically, the AAO finds that the evidence submitted in support of this petition was insufficient to clearly establish the ownership compositions of both of the entities in question.

On appeal, counsel for the petitioner again alleges that the Dr. [redacted] owns the foreign entity and owns 59% of the U.S. entity. The record, however, clearly indicates that at the time of the filing of the petition, the petitioning enterprise did not maintain a qualifying relationship with the overseas company. The petitioner claims, in the Corporate Secretary's Certificate dated October 14, 2002, that the U.S. entity was owned as follows:

Name	Shares	Percentage
Dr. [redacted]	100,000	59%
Beneficiary	40,000	23%
[redacted]	29,500	17%
	250	0.5%
	250	0.5%

[1] The AAO notes that with regard to the "commonality of ownership" analysis, the director erroneously concluded that "common control must exist for there to be a qualifying relationship." Since the claimed relationship in this matter is that of a parent and a subsidiary, commonality of control is not a requirement to establish such a relationship.

The petitioner, however, failed to provide any additional documentary evidence to corroborate this claim. Counsel submitted copies of receipts evidencing Dr. [redacted] periodic remittance of payments toward the alleged $150,000 claimed to have been paid in exchange for her ownership interests in the U.S. entity. More specifically, counsel asserts that Dr [redacted] entered into an "agreement" to purchase 59% of the petitioner's stock in exchange for a "promise" to invest up to $150,000. Although counsel asserts that this agreement was submitted, it is not present in the record of proceeding. The AAO assumes, therefore, that the Memorandum of Understanding contained in the record is the promissory note which counsel asserts is proof of Dr [redacted] ownership interests in the petitioner. This Memorandum is not a promissory note. Furthermore, it omits the date by which the $150,000 must be paid, and further omits any terms of interest commonly contained in promissory notes. Since the Memorandum clearly states that Dr. [redacted] will "contribute" $150,000 towards the purchase of stock, it must be assumed that a 59% ownership interest will not be established until the total amount is paid in full.

On appeal, counsel introduces for the first time evidence that Dr. [redacted] has not yet paid the entire purchase amount of $150,000 for her 59% interest in the U.S. entity. Specifically, counsel states that Dr. [redacted] has rendered only $35,090 to date toward her interests in the U.S. entity and, in support of this contention, counsel submits copies of receipts for periodic payments made by Dr. [redacted] toward the $150,000. It is clear, therefore, that although the petitioner alleged that a majority interest in the U.S. entity had been acquired by Dr [redacted] for the sum of $150,000, this contention is false and not an accurate representation of the ownership of the U.S. entity. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Since the record contains evidence of only $35,090 rendered to date toward the purchase of stock, and since there is no additional evidence to suggest otherwise, it must be concluded that Dr. [redacted] holds only 13.8% of the U.S. entity's stock and not 59% as alleged by counsel. 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). Furthermore, without documentary evidence to support the claim the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

As general evidence of a petitioner's claimed qualifying relationship, the Corporate Secretary's Certificate and the Memorandum of Understanding provided in this case are not sufficient to determine whether Dr. [redacted] maintains ownership and control of the U.S. entity. The corporate stock certificate ledger, stock certificates, 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 shareholders, 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.*, 19 I&N Dec. at 362. Without

full disclosure of all relevant documents, Citizenship and Immigration Services (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.

Although requested by the director, the petitioner submitted no documentary evidence, other than the statements of counsel, to substantiate the claim that Dr. [redacted] was the owner of the foreign entity. Without documentary evidence to support the claim the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter Of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. In addition, although the director requested specific evidence regarding the ownership and control of the U.S. entity, the petitioner omitted the specific documents, such as the stock registry and stock certificates, requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Based on the evidence presented, it is concluded that the petitioner and the foreign entity did not maintain a parent-subsidiary relationship as of the filing date of this petition, and thus did not have a qualifying relationship as required by the regulations. There is no evidence of the ownership of the foreign entity in the record, and the evidence provided in support of the U.S. entity's ownership is doubtful, contradictory, and uncorroborated. For this reason, the petition may not be approved.

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

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

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as

promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner stated that the beneficiary would be acting as the Chief Operating Officer. On March 1, 2003, the director requested additional evidence establishing that the beneficiary was qualified for the benefit sought. Specifically, the director requested evidence supporting the petitioner's claim that the beneficiary had been acting in a primarily managerial or executive capacity while abroad, and that she would continue working in a primarily managerial capacity while in the United States.

In a response dated May 22, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response included copies of organizational charts for both the U.S. and foreign entities, a copy of the U.S. entity's lease and proposed business plan, and an extensive summary of the beneficiary's duties.

On June 30, 2003 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that the duties of the beneficiary, as presented by counsel, were vague and general and added that the proposed duties appeared to merely summarize the regulatory definitions.

On appeal, counsel for the petitioner restates the four requirements of "managerial capacity" as defined by the regulations, and alleges for the first time that the beneficiary is appropriately qualified as a function manager.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties, it appears that the beneficiary will not be acting in a primarily managerial or executive capacity. The beneficiary will not be supervising other professional or supervisory employees. In addition, it does not appear that the beneficiary will be managing an essential function of the organization.

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). In this case, counsel initially described the beneficiary's duties as follows:

> As Chief Operating Officer, she will bring together the sales staff to work on each account; supervise their work in locating and contracting customers and suppliers specially at this time when [the U.S. entity] is expanding to the East Coast; set standards for the work and general guidelines for each assignment which must be followed and executed by the sales staff and coordinates them to assure that each account is properly maintained by servicing them adequately, and on schedule. She must also coordinate the continuous supply of medical and laboratory supplies, make sure that they are up to date and always in stock. She evaluates the performance of the sales staff and can recommend hiring and firing of personnel. Being the Chief Operating Officer, she must spend a majority of her time coordinating the work of each sales . . . staff, reviewing the quality of their products and the manner by which their clients are supplied (i.e., are they on time or up to date) and administering the sales staff and other support personnel. Strong managerial skills are needed for the important coordination and scheduling functions performed by the Chief Operating Officer.

In response to the director's request for additional evidence, counsel submitted an updated list prepared by the corporate secretary of the U.S. entity, which identified the beneficiary's duties as including:

1. Prepare and submit a comprehensive plan for the operations of the company together with the financial budget for the year.
2. Review and recommend needed staffing to effect the plan.
3. Develop marketing strategy and oversee import/export of medical & dental equipment and supplies to an[d] from the Philippines.
4. Supervise customer sales, service, and deliver as well as the procurement of inventory for resale.
5. Train all personnel on customer service and efficient marketing techniques.
6. Submit personnel job evaluation prior to employee's anniversary date.
7. Supervise stocking of merchandise for resale and implement necessary inventory controls.
8. Sit in [at] regular management meetings and at regular and special board meetings.
9. Establish written policy and procedures for marketing and procurement.
10. Visit customers and suppliers to develop and maintain efficient trade relationships.
11. Other duties and responsibilities that may be assigned from time to time.

On appeal, counsel for the petitioner provided a step-by-step analysis of the beneficiary's duties by examining them within the context of each of the four elements of managerial capacity. In addition, counsel alleges that the beneficiary is the "big cheese" and is "the only officer responsible in the day to day operations of the company and the activity and function of its employees and officers."

The AAO is not persuaded that the proposed duties of the beneficiary satisfy the regulatory requirements. In addition, the arguments provided by counsel on appeal are not convincing.

There are two problems with the beneficiary's stated duties. First, the beneficiary's proposed duties include numerous non-managerial tasks that are essential to the daily operations of the business. Specifically, the assertion that the beneficiary will be visiting customers and suppliers as well as supervising the stocking of merchandise suggests that she will be performing many undertakings that would normally be delegated to sales representatives or other non-managerial personnel. In this case, it is clear that the proposed duties include many practical obligations that would normally be delegated by a manager or supervisor to a subordinate staff. The actual duties themselves reveal the true nature of the employment. *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). Secondly, the description of her duties indicates that a significant portion of her time would be devoted to the supervision and direction of sales representatives. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

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

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of its sales and purchasing representatives. Any 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). Thus, the petitioner has not established that these employees possess or require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of the employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act

Counsel further alleges for the first time on appeal that the beneficiary is acting in the capacity of a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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).

Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists some of the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "visiting customers, and supervising the stocking of merchandise" do not fall directly under traditional managerial duties as defined in the statute. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. Therefore, the AAO cannot determine whether the beneficiary is 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).

Finally, counsel alleges that the beneficiary is the *de facto* head of the U.S. entity and that the Vice President for operations answers to her. The organizational chart provided, however, indicates that this is not accurate. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity. Although counsel and the petitioner refer to the beneficiary's overseas position as "Marketing and Procurement Manager," the description of duties provided listed numerous non-qualifying duties, such as contracting local and foreign customers and developing and promoting the company relationship with the customers and suppliers. Such duties suggest that the beneficiary played an active role in generating the services of the foreign entity. 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). The actual duties themselves reveal the true nature of the employment. *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). Based on the evidence submitted, it does not appear that the beneficiary has been acting in a primarily managerial or executive capacity while abroad. For this additional reason, the petition may 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).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.