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U.S. Citizenship and Immigration Services

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D7

File: WAC 05 156 51069 Office: CALIFORNIA SERVICE CENTER Date: NOV 28 2006

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)

ON 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, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of president[1] 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 California corporation, states that it is engaged in the import and export of precious stones. The petitioner claims to be an affiliate of [redacted], located in Belgium. The petitioner seeks to employ the beneficiary for a period of three years to open a new office in the United States.[2]

The director denied the petition, concluding that the record contains insufficient evidence to demonstrate: (1) that sufficient physical premises to house the new office have been secured; (2) that the beneficiary was employed by the foreign company in a primarily executive or managerial capacity; (3) that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position; and, (4) that a qualifying relationship exists between the foreign company and the United States entity.

On appeal, counsel for the petitioner asserts that the petitioner secured a lease for an office prior to the filing of the instant petition, however, due to contract negotiations, the lease was not signed until May 31, 2005. In addition, counsel for the petitioner states that there was "gross miscommunication and/or misunderstanding" between the petitioner, beneficiary and the prior attorney and thus the original petition erred in certain descriptions of the beneficiary's position and duties with the foreign company. Counsel for the petitioner further asserts that the beneficiary will hold a managerial position within one year of operation, even though the business is a small business. Finally, counsel for the petitioner asserts that the foreign company and the U.S. entity have established that they are qualifying organizations since the beneficiary owns 50% of the foreign company and 50% of the U.S. entity. The petitioner submits a brief and copies of previously submitted documents in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further states that an individual petition filed on Form I-129 shall be accompanied by:

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[1] The AAO notes that the petitioner also refers to the beneficiary's proposed U.S. position as "Chief Financial Officer" and "Integrations Specialist."

[2] The regulations under 8 C.F.R 214.2(l)(7)(i)(1)(3) states that if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year and will only allow the director to grant one year of L-1 status in a new office petition.

(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 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 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 this proceeding is whether the petitioner has secured sufficient physical premises to house the new office in the United States as required under the regulations 8 C.F.R. § 214.2(l)(3)(v)(A).

As noted by the director in his decision dated June 22, 2005, the petitioner's lease agreement was signed on May 31, 2005, subsequent to the filing of the petition, and valid for a one-year period commencing on June 1, 2005. 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).

On appeal, counsel for the petitioner asserts the following:

> The petitioner began its business in the Jewelry Theater Building [the leased premise] prior to the filing of the L-1 petition on May 12, 2005 while negotiations were in progress concerning the final wording of the lease. Therefore the lease was signed on May 31, 2005. The premises were in fact secured on May 1, 2005 prior to the filing of the L-1 petition.

Counsel for the petitioner does not explain why the landlord would allow the U.S. entity to occupy the premises if a contract was not yet agreed upon. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, the petitioner did not submit documentation to establish that the landlord of the leased premises did indeed allow the petitioner to occupy the space prior to signing the contract. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, the lease agreement was signed on May 31, 2005, after the instant petition was filed. Thus, the petitioner has not established that it had secured sufficient premises to house the new office prior to filing the petition.

Moreover, the petitioner has not described its anticipated space requirements for the new business, and the lease in question does not specify the amount of type of space secured. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner had secured sufficient space to house the new office. The petitioner has not submitted evidence on appeal to overcome the director's determination. For this additional reason, the appeal is dismissed.

The second issue to be addressed is whether the beneficiary has been employed in a primarily managerial or executive capacity for the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(15)(L), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> 1. 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), provides:

The term "executive capacity" means 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 nonimmigrant petition was filed on May 12, 2005. In a support letter dated November 12, 2004, the petitioner indicated that the beneficiary was employed by the foreign company in the position of Operations Manager and Owner since 2003. The petitioner described the duties performed by the beneficiary in this position as the following:

In 2003, [the beneficiary] began his career with [the foreign entity] as the Operations Manager and Owner. In the said capacity, he worked extensively with the staff, clients, sales and marketing companies to further develop and stabilize the company. He made use of his experience and knowledge gained from working with multi national companies and distributors of previous stones all over the world. He was able to consolidate all these experiences precious stones [sic] and the overall operations of a jewelry company. He also communicated with technical details to client forwarding the company's products [sic] given the knowledge and know how of the industry as a whole.

> After a few months, [the beneficiary's] managerial responsibilities were further expanded. [The petitioner] reached an increasing number of clients and demand for precious stones increased. [The beneficiary] shifted his operations to a higher gear. As such, he managed a team of individuals to develop the Operations Manual and Marketing Strategies for the company. He likewise managed and prepared the teams' project plans and goals. In managing his professional team, [the beneficiary] had authority to recruit, hire, train, promote and terminate the staff.

On May 17, 2005, the director issued a notice requesting additional information of the beneficiary's employment abroad with the parent company. Specifically, the director requested that the petitioner submit the following information and documentation: the total number of employees at the foreign company; an organizational chart of the foreign company including all employees under the beneficiary's supervision by name and job title, job description, educational level and annual salary; and a detailed description of the beneficiary's duties abroad.

In the response dated June 8, 2005, counsel for the petitioner stated that the foreign company "has engaged three full time employees and several on site workers depending of the scale of the project." In addition, the petitioner submitted an organizational chart of the foreign company. The chart indicated that the foreign company has a president who supervises the beneficiary as chief financial officer. The chart also indicated that the beneficiary supervises a secretary and three sales executives, however, these positions are vacant. Finally, the petitioner submitted a detailed description of the job duties the beneficiary will perform in the United States, rather then the duties the beneficiary performed with the foreign company. 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 director denied the petition and stated that the petitioner has not established that the beneficiary was employed in a managerial or executive capacity with the foreign company. The director also noted inconsistent statements made by the petitioner in the original petition whereby the petitioner stated that the beneficiary managed a team of individuals, however, this statement is not confirmed by the organizational chart of the foreign company which indicated that the beneficiary had no subordinates.

On appeal, the petitioner states that there was "gross miscommunication and/or misunderstanding between petitioner, beneficiary and their prior attorney." Counsel for the petitioner attempts to correct certain errors made with the original petition, however, these errors were not relevant to the director's ground for denial of the instant petition. Counsel for the petitioner confirms that the beneficiary was an owner and director or the foreign company. Counsel further asserts that the foreign company "is a small company, the type of business which the Immigration Act of 1990 (IMMACT 90) tried to assist."

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

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner stated vague duties such as the beneficiary "worked extensively with the staff, clients, sales and marketing companies to further develop and stabilize the company," and the beneficiary "managed a team of individuals to develop the Operations Manual and Marketing Strategies for the company." 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The job description also includes several non-qualifying duties such as the beneficiary "communicated with technical details to client regarding the company's products," and was responsible for "developing a database and interfaces that allow the company's system to interact with various customers' needs." Since the company's staff consisted of a president and the beneficiary, it appears that the beneficiary was providing the services of the business rather then directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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).

As noted above, in the request for evidence, the director requested that the petitioner submit a definitive statement describing the foreign employment of the beneficiary. The petitioner failed to submit this document in its response. This evidence is critical, as it would have established if the beneficiary performed primarily managerial or executive duties while employed by the foreign company. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The 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). In the instant matter, the petitioner did not submit a detailed job description of the duties performed by the beneficiary at the foreign company and thus AAO cannot determine if the beneficiary was employed by the foreign entity in a managerial or executive capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the petitioner indicated in a support letter dated November 12, 2004 that the beneficiary "managed a team of individuals to develop the Operations Manual and Marketing Strategies for the company." According to the organizational chart for the foreign company, the foreign company employed a president and the beneficiary and did not have any other employees. The petitioner also refers to the beneficiary's job title within the foreign entity as "operations manager" in its November 12, 2004 letter, and as "chief financial officer" on the foreign entity's organizational chart. 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. at 591-92.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on the totality of the record whether the description of the beneficiary's duties represents a credible account of the beneficiary's role within the organizational hierarchy. As noted by the director, the petitioner indicated that the foreign company employed a president and the beneficiary. Thus, it appears that the only individuals in charge of running the business and managing the sales, marketing, payroll, inventory, purchasing, exporting, customer service and finance operations will by the beneficiary and the president. The president supervises the beneficiary and the beneficiary does not have any subordinate employees, thus it is reasonable to assume that the beneficiary is the only employee who will perform the majority of the operational tasks required in running a business. Accordingly, the director reasonably concluded that the beneficiary as the petitioner's only managerial employee will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees. Again, an employee who "primarily" performs the tasks necessary to produce a product or 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. at 604.

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, 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.*

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the foreign entity was a 13-year-old import and export company that claimed to have a gross annual income of over 1 million dollars. The firm employed one president and the beneficiary as

the chief financial officer. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. 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 president and the beneficiary as the chief financial officer. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary was employed by the foreign company in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based upon the lack of a comprehensive job description, the lack of evidence of the company's staffing levels, and the minimal evidence submitted regarding the business activities of the foreign entity, it cannot be concluded that the beneficiary has been employed by the foreign entity in a managerial of executive capacity.

The third issue to be addressed in this proceeding is whether the petitioner submitted sufficient evidence to establish that the beneficiary will be employed in a managerial or executive capacity in the United States within one year.

The nonimmigrant petition was filed on May 12, 2005. On the Form I-129, the proposed position of the beneficiary is President. In a support letter dated November 12, 2004, the petitioner described the proposed duties of the beneficiary in the United States as the following:

> [The beneficiary] will be transferred to the US Company as an Integration Specialist. We believe that this transfer will enhance our company's competitiveness by assuring the cross-fertilization of ideas and skills between or employees in both the parent company and foreign subsidiary in the United States.
>
> He will be tasked to undertake a U.S. assignment as an Integration Specialist for [the petitioner] in order to continue to apply and further develop the Sales and Marketing including Operational Procedures for the U.S. company. The duties he will perform as an Integration Specialist will prove to be an excellent preparation for him in assuming the position of a Chief Executive Officer for the US based company.
>
> As an Integration Specialist, [the beneficiary] will ensure smooth transition, stable and time-tested implementation policies and most importantly, supervise the Operations Department. This department is one of the most critical functions of our company in terms of the gross sales and revenues it generates. In particular, he oversees the most essential department of our company, the Quality Assurance Department.
>
> Functioning autonomously, he manages retail customer implementations and exercise discretion over management of ongoing import/export deals with suppliers all over the world. He also sets goals and targets and monitor progress to ensure total customer satisfaction at all times.

> ... [The beneficiary] independently formulated best practices for implementation of business processes and integration methodologies. He also exercises independent judgment and discretion with report to the business process sessions and Integration technology sessions for the various departments of the company.
>
> In sum, [the beneficiary] has independent control and exercises wide latitude and discretionary decisions-making in establishing the most advantageous course of action for the successful management and direction of our import/export of previous stones mainly for the US subsidiary company, [the U.S. entity] and the parent company in the Republic of Armenia.

The petitioner stated that the company intends to hire ten employees within one year, including a vice president, general manager, marketing manager, sales staff, quality control manager and secretary.

On May 17, 2005, the director issued a notice requesting additional information of the beneficiary's employment in the United States. Specifically, the director requested that the petitioner submit the following information and documentation: the proposed number of employees and types of positions hired at the U.S. entity; an explanation of how the proposed business venture will, within one year, support a managerial or executive capacity; an organizational chart of the U.S. entity with the proposed staffing levels within one year of operation, including all employees under the beneficiary's supervision by name and job title, job description, educational level and annual salary.

In the response dated June 8, 2005, counsel for the petitioner stated that the beneficiary will start hiring an estimate of ten full-time employees to start the operations of the U.S. company. In addition, the petitioner submitted a proposed organizational chart of the U.S. company. The chart indicated that the U.S. entity has a president who will supervise the beneficiary as chief financial officer. The chart also indicated that the beneficiary will supervise an accountant, a secretary and three sales executives. Although counsel for the petitioner stated that the U.S. company will hire approximately ten employees, the organizational chart only indicates six proposed positions. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, the petitioner did not submit job descriptions for these positions as 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).

The director denied the petition on the ground that the petitioner did not establish that the beneficiary will hold a position of managerial or executive capacity within one year of operation. The director noted that the beneficiary will not supervise "professional" positions. The director also noted that the beneficiary's job title changed throughout the petition as Integration Specialist, President and Chief Financial Officer.

On appeal, counsel for the petitioner confirms that the position offered to the beneficiary is the position of President of the U.S. entity. In addition, counsel for the petitioner asserts the following:

> The District Director should heed INA § 101(a)(44)(C) and consider that this is a newly established (April 5, 2005) small jewelry company with staffing needs that cannot be reasonably expected to define an executive's position. There will be several employees in [the U.S. entity] in responsible positions who will be selected and overseen by the Directors. Trust is particularly important in the jewelry business as precious and often irreplaceable merchandise is traded. Therefore, of necessity these businesses employ a small number of people who are either family members or very trustworthy individuals carefully selected by the owners and placed in key positions.

The record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. 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 not submitted sufficient evidence to establish that the intended United States operations, within one year of approval, will support an executive or managerial position.

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

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary will be transferred to the United States in order to "continue to apply and further develop the Sales and Marketing including Operational Procedures for the U.S. Company," and the beneficiary will "ensure smooth transition, stable and time-tested implementation policies and most importantly, supervise the Operations Department." 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true

nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on the totality of the record whether the description of the beneficiary's duties represents a credible account of the beneficiary's role within the organizational hierarchy. According to the organizational chart, the petitioner plans to hire one accountant, one secretary and three sales executives. Thus, it appears that the only individuals in charge of running the business and managing the sales, marketing, payroll, inventory, import and export activities and customer service will be the president and the beneficiary. It appears that the proposed employees will assist with the administrative tasks, finance operations and the sales operations, however, the beneficiary and the president are the only employees who will perform the majority of the operational tasks required in running a business. Accordingly, the director reasonably concluded that the beneficiary as the petitioner's only managerial employee will be performing the day-to-day operations and directly be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or 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).

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 therefore. Most importantly, the business plan must be credible.

The petitioner submitted a business plan for the U.S. entity, however, the plan did not outline how the U.S. entity will reach the listed goals and plans, and if it is financially feasible to do so as 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Thus, the petitioner has not submitted sufficient evidence to demonstrate that the intended U.S. operation, within one year of the approval of the petition, will support an executive or managerial position. Specifically, the petitioner has not adequately defined the proposed nature of the office, and had not realistically described the scope of the entity, its organizational structure and its financial goals. For this reason, the appeal will be dismissed.

The fourth issue in this proceeding is whether a qualifying relationship exists between the foreign company and the United States entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer is 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).

The petitioner claims to be a branch office of the beneficiary's foreign employer, [redacted] In support of this claim, the petitioner submitted two stock certificates indicating that the beneficiary owns 10,000 shares of the U.S. company and a '[redacted] owns 10,000 shares of the U.S. company. In addition, the petitioner submitted a copy of the minutes of a company meeting which confirms that the U.S. company is owned by the beneficiary and [redacted] In addition, the petitioner submitted a letter indicating that the beneficiary owned 50% of the foreign company and an '[redacted] owned the other 50% of the foreign company.

On appeal, counsel for the petitioner asserts the following:

> Furthermore, as was mentioned hereinabove, the adjudicator states that the petitioner in its response to the RFE provided evidence that it was incorporated on April 5, 2005, its stock certificate and the minutes of the Organizational meeting showing that [the beneficiary] and [redacted] each owned 50% of the petitioning U.S. company. As such, [the beneficiary] own 50% of the Company in Antwerp, Belgium and also 50% of the Company in the U.S.A. Therefore, he maintains majority control and ownership of both companies.

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 the 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 International*, 19 I&N Dec. at 595. In the instant matter, the petitioner has not established that the beneficiary's 50% interest represents the requisite control of the foreign company and the U.S. company.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I & N Dec. 289 (Comm. 1982). Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the beneficiary controls both entities. Thus, the companies have not been demonstrated to be affiliates. Based on the evidence submitted, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petition indicates that the foreign company only has two employees, the president, [redacted], and the beneficiary. According to the organizational chart submitted by the petitioner, the U.S. company plans to hire the beneficiary and a president who is indicated as a '[redacted]' As the petitioner plans to hire the only two employees of the foreign company to work in the U.S. entity, this raises the question as to whether the parent organization will continue to do business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, the appeal must be dismissed and the petition denied.

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 the decision. 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.