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U.S. Citizenship
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FILE: SRC 05 108 51245 Office: TEXAS SERVICE CENTER Date: NOV 28 2006

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner, a Florida corporation, claims to be in the import, export, wholesale and retail business. It operates a grocery store. The petitioner states that it is a wholly-owned subsidiary of [REDACTED] and [REDACTED] located in China. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 seeks to employ the beneficiary as its general manager for a three-year period.

The director denied the petition concluding that the record contains insufficient evidence to demonstrate the following requirements: (1) that the beneficiary has been employed in a primarily managerial or executive capacity by the foreign entity; and (2) that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

On appeal, counsel for the petitioner states that the beneficiary was employed in a “senior manager/executive capacity” with the foreign company and will continue to be employed in a managerial and executive capacity with the U.S. entity. Counsel for the petitioner also asserts that the position held by the beneficiary in the United States will not be a first-line supervisor. Counsel submits a brief and copies of supporting documentation previously submitted 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:

- (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 to be addressed in this proceeding is whether the petitioner has established that the beneficiary has been employed in a primarily managerial or executive capacity by the foreign entity.

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

The term "managerial capacity" means 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), 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 instant petition was filed on March 7, 2005. In the support letter dated March 4, 2005, the petitioner stated the beneficiary's duties in the position as a senior manager of the department of business administration of the foreign company as the following:

[The beneficiary] has served [the foreign company] in an executive and managerial position as Senior Manager of the Department of Business Administration since 2001.... As Senior Manager of [the foreign company], [the beneficiary] oversees the operations and management of the Department of Business Administration. [The beneficiary] is responsible for the formulation and execution of the Department's policies related to new business and products development. [The beneficiary] exercises a wide latitude of discretionary decision-making over the day-to-day operations of the Department and received only general supervision from the president.

On March 17, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit the exact duties of the beneficiary for his position with the foreign company, and the names, titles, duties and educational level of the employees he supervises. In addition, the director requested an organizational chart for the foreign company.

In a response to the director's request, dated June 1, 2005, the petitioner submitted the following job description of the duties performed by the beneficiary for the foreign company:

[The beneficiary] is currently the senior manager of the Department of Business Administration of the foreign company, is responsible [sic] for conducting the management and progress of new business and products development and existing business management. He formulates strategies and plans for developing new business and products, and rules and regulations regarding how existing business and projects should be managed to ensure quality control and project progress. [The beneficiary] supervises two Sections: Section of Existing Business Management headed by [REDACTED] as manager and [REDACTED] has an associate degree and Section of New Business Development headed by [REDACTED] as manager and [REDACTED] has an associate degree, [the beneficiary] reports directly to Chairman of the Board, Board of directors and president of [the foreign company]. He has the last word on the hiring and firing of personnel in the Department for Business Administration.

In addition, the petitioner submitted an organizational chart for the foreign company that indicates that the chairman and CEO supervises the beneficiary who in turn supervises one employee in existing business management and one employee in new business. In addition, the petitioner submitted a brief job description for the two employees supervised by the beneficiary.

The director denied the petition on June 16, 2005 on the ground that the petitioner did not establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign company.

The petitioner submitted an appeal on July 12, 2005. On appeal, counsel for the petitioner did not acknowledge that the decision was based partially on the fact that the petitioner did not establish that the

beneficiary has been employed in a managerial or executive capacity with the foreign company. Instead, counsel for the petitioner asserts "apparently TSC does not deny that [the beneficiary's] position with the parent company was a senior managerial/executive position since it is not challenged in the decision."

Counsel's assertions are not persuasive. Upon review of the director's decision, the director asserted "evidence is insufficient that the duties of the beneficiary are either managerial, executive or in a specialized capacity in the United States or abroad."

Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. 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)(iii).

On review, 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 is "responsible [sic] for conducting the management and progress of new business and products development and existing business management," and "he formulates strategies and plans for developing new business and products, and rules and regulations regarding how existing business and projects should be managed to ensure quality control and project progress." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the business development functions that the beneficiary supervises. 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. 1103, 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 performed, such that they could be classified as managerial or executive in nature.

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* at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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 held a position of managerial or executive capacity 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 resubmitted the previous job duties and included the employees the beneficiary supervises. Thus, 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, although the petitioner claims that the beneficiary supervised two managers, in reviewing the payroll records for the foreign company for 2004, one of the managers is not listed on the payroll records. Thus, the petitioner did not submit any documentation as to whether the manager of the new business development is actually employed by the company. The petitioner did not provide any financial documents for the foreign entity which would show salaries paid to the manager for new business development as pay statements, tax forms, or financial statements. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, a critical analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary is "responsible for conducting the management and progress of new business and products development and existing business management." If the beneficiary has supervisory control over such functions, it is unclear who will for example actually handle the day-to-day administrative operations of the foreign company. The petitioner claims that the only subordinates assisting the beneficiary are the new business development manager and the existing business manager, however, as noted above, it is unclear if the new business manager is in fact employed by the foreign entity. Moreover, the petitioner has not explained how the services of the subordinate employees obviate the need for the beneficiary to perform operational tasks associated with the business administration department. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, although the beneficiary is not required to supervise personnel, if it is claimed that his 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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is

actually necessary, for example, to perform the project management work of the new business manager and existing business manager, who are among the beneficiary's subordinates, nor does either employee possess a bachelor's degree.

Based upon the lack of a comprehensive job description, and the lack of evidence of the company's staffing levels, it cannot be concluded that the beneficiary has been employed by the foreign entity in a managerial or executive capacity. As neither counsel nor the petitioner have addressed this issue on appeal, the appeal will be dismissed.

The second issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

The nonimmigrant petition was filed on March 7, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of general manager for the petitioner, which claimed to have three employees. In a support letter dated March 4, 2005, the beneficiary's proposed duties in the U.S. are described as the following:

As General Manager of [the petitioner], [the beneficiary] will help develop new business and new products that will be best suited to the specific needs of the markets. [The beneficiary] will have full decision making power over the daily operations and reports only to the Board of Directors of [the petitioner]. [The beneficiary's] duties at [the petitioner] include, but not limited to, responsibility for all financial functions and administrative policy planning of the company and direction of the management of the company. [The beneficiary's] efforts are essential to the successful operations of [the petitioner] during his proposed employment in the United States.

In a separate letter, also dated March 4, 2005, the petitioner added that the beneficiary will be responsible for "directing daily operations and planning business strategies" and that "he will help manage the operations of the business and supervise the personnel, all policies and procedures of the business." Finally, the petitioner stated that the beneficiary "will have the last word on the hiring and firing of personnel." The petitioner noted that the beneficiary would assist the company's vice president in managing the U.S. subsidiary.

On March 17, 2005, the director determined that the petitioner did not submit sufficient evidence to process the petition. The director requested that the petitioner submit the exact duties of the proposed position offered to the beneficiary in the United States, including the names, titles, duties and educational level of the employees he will supervise. In addition, the director requested an organizational chart for the United States company.

In a response to the director's request, dated June 1, 2005, the petitioner submitted the following description of the duties the beneficiary will perform in the position of general manager for the U.S. company:

As General Manager of [the petitioner], the U.S. company, [the beneficiary] will be responsible for the day to day operations for [the petitioner] exercising a wide latitude of discretionary decision-making powers in directing daily operations and planning business strategies. He will oversee that plans and strategies be properly executed to ensure steady

sales increase and business expansion. He will supervise the personnel [redacted] Manager of Import & Export, [redacted] Manager of Sales and [redacted] (and etc), all policies and procedures of the business because the Board of Directors of parent company, [the foreign company], has plans to transfer [redacted] currently vice president of the US subsidiary, [the petitioner], back to our China Headquarter office once [the beneficiary] is transferred to US subsidiary. He will have the last word on the hiring and firing of personnel. He will direct our US subsidiary's business expansion and developing new business and products for North American and South & Latin American countries, particularly in the field of Natural Food supplements, Chinese herbs and Acupuncture related equipment and accessories, and will report directly to Chairman of board and president of parent company, [the foreign company][.] [The beneficiary] also has a bachelor's degree in Chinese Traditional Medicine.

In addition, the petitioner submitted an organizational chart for the United States company, but the chart does not identify the beneficiary or his proposed position as general manager. The chart indicates that the company employs a president, a vice president, who supervises one manager in import and export and one sales manager, who in turn supervises two employees with no job titles. The petitioner did not submit a brief job description and educational level for all the employees he will supervise 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). Furthermore, the organizational chart indicates a total of six employees, excluding the beneficiary's proposed position. The petitioner indicated on the Form I-129 that the U.S. entity had three employees, and the petitioner's Florida Form UCT-6, Employer's Quarterly Report, for the fourth quarter of 2004 shows only two employees. The petitioner does not explain the discrepancy between the Form I-129, the quarterly wage report and the organizational chart submitted in response to the director's request for additional information. 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 director denied the petition on June 16, 2005 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

The petitioner submitted an appeal on July 12, 2005. On appeal, the petitioner asserts "the Beneficiary will occupy the highest position within the hierarchy of the U.S. business, would manage a subordinate staff which includes other managers, he would not engaged in actually performing the sales function of the company since other personnel have been hired for this purpose, and he would exercise discretion in the day-to-day operations." Counsel for the petitioner also reiterates that the petitioner plans to transfer the current vice president of the U.S. company back to China and promote the beneficiary to be the head of the U.S. company.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. 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. at 604.

On review, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states vague duties such as the beneficiary will be: "responsible for the day to day operations for [the petitioner] exercising a wide latitude of discretionary decision-making powers in directing daily operations and planning business strategies," "will oversee that plans and strategies be properly executed to ensure steady sales increase and business expansion," and will "direct our US subsidiary's business expansion and developing new business and products for North American and South & Latin American countries, particularly in the field of Natural Food supplements, Chinese herbs and Acupuncture related equipment and accessories." The petitioner did not, however, define the petitioner's goals and policies, or clarify the role of the marketing, operational, and personnel functions that the beneficiary will supervise. 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. 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.

As noted above, according to the petitioner's statement on Form I-129, the U.S. company has three employees. However, in the organizational chart submitted by the petitioner, the U.S. company appears to have five employees, not including the position the beneficiary will fill. The petitioner's Form UCT-6, Employer's Quarterly Report for the quarters ended September 30, 2004 and December 31, 2004, indicates that the U.S. company employed two employees, the import and export manager and the sales manager. The petitioner has not presented any evidence to document the employment of the three additional employees listed on the U.S. organizational chart. Without documentary evidence to support its statements, the petitioner does not meet its 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)).

Although the director based his decision partially on the size of the enterprise and the number of staff, the director did not take into consideration the reasonable needs of the enterprise. 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 petitioner was a one-year-old import and export company that claimed to have a gross annual income of \$312,590. The firm employed an import and export manager and a sales manager. The AAO notes that all of the employees have managerial or executive titles. 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 beneficiary as general manager and two managerial employees. 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 is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

As the United States company can only document the existence of two employees, the import and export manager and the sales manager, it can be reasonably assumed that the beneficiary will be directly performing the promotion, purchasing, marketing, financial development, and administrative functions and many of the various operational tasks inherent in operating a retail store on a daily basis, such as acquiring products, maintaining inventory, paying bills, and customer service. Based on the record of proceeding, the beneficiary's job duties will be principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Accordingly, the director reasonably concluded that the beneficiary 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.

Based on the vague job description submitted with the petition, and considering the petitioner's failure to document the employment of several of the employees listed on the U.S. organizational chart as of the date of filing, the director reasonably concluded that the petitioner has failed to demonstrate that the beneficiary would be primarily performing managerial or executive duties in his proposed position.

In addition, on appeal, counsel for the petitioner asserts that the petitioner plans to transfer the current president back to China and promote the beneficiary as the head of the U.S. company and he will be "the senior executive of the entire enterprise in the United States." 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). Furthermore, in the letter submitted in support of the petition, the petitioner clearly stated that the beneficiary was being transferred to the U.S. office to assist the vice president in her duties, not to replace her as the head of the U.S. company. A new organizational chart submitted on appeal also indicates that the beneficiary will report to the vice president of the company. Accordingly, the petitioner has not provided a consistent account of the beneficiary's proposed level of authority within the company. 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, although the beneficiary is not required to supervise personnel, if it is claimed that his 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. The record establish that the beneficiary will supervise an import and export manager and a sales manager.

On appeal counsel claims that the beneficiary will “supervise the work of other supervisory personnel.” However, as discussed above, the petitioner has not established that either of these employees were supervising other employees as of the date the petition was filed.

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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the import and export and sales functions of the subordinates supervised by the beneficiary. Rather, based on the type of business operated by the petitioner and its staffing levels, both “managers” would necessarily be involved in the routine tasks associated with operating a retail grocery store, which can not be considered professional in nature.

Furthermore, if the position offered to the beneficiary is executive in capacity, the statutory definition of the term “executive capacity” focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a

first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant matter, the petitioner has not established evidence that the beneficiary is in an executive capacity with the U.S. entity. Thus, the petitioner has not established that the position is in an executive capacity.

As discussed above, the beneficiary's job description included primarily non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

Finally, the AAO acknowledges counsel's contention that "the service further erred in not identifying the position as an essential function within the petitioner's organization." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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)).

Other than stating that the proposed position is an essential function, counsel provides no explanation or evidence in support of his claim that the beneficiary would qualify as a function manager pursuant to section 101(a)(44)(A)(ii) of the Act. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operations duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's operations, the indirect supervising of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the beneficiary's job description included primarily non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not identified other employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations.

Based upon evidence submitted, it appears that the beneficiary will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its general manager. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record contains inconsistent evidence which casts doubt on the petitioner's claim that it is a subsidiary of the foreign 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 are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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.

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 petitioner submitted a stock certificate, number two, indicating that [REDACTED] is the holder of 1000 shares of the U.S. company. However, the petitioner did not present any documentation to support that this stock certificate was the only one issued for the U.S. company. In addition, the U.S. company's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004 indicates in Schedule E that [REDACTED] owns 60% of the common stock, [REDACTED] owns 20% of the common stock and [REDACTED] owns 20% of the common stock for the U.S. company.

In addition, the petitioner on Form 1120, Schedule K responded "no" to the question as to whether a foreign person owns directly or indirectly at least 25% of the total voting power of all classes of stock of the corporation entitled to vote or the total value of all classes of stock of the corporation. According to the IRS Form 1120, it appears that the petitioner is not owned by the foreign entity which is required in order to establish the claimed parent-subsidiary qualifying relationship between the petitioner and a foreign company. Finally, as evidence that the foreign entity provided funding for the initial start-up expenses of the U.S. operation, the petitioner submitted two wire transfer confirmations from its bank

confirming the receipt of approximately \$100,000 from “ [REDACTED] ” The petitioner provided no explanation for any of these discrepancies. 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). 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). The petitioner has not resolved this conflicting information and thus it cannot be concluded that the petitioner and the foreign entity have a qualifying relationship. For this additional reason, the appeal will be dismissed.

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.