

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

D7

PUBLIC COPY



File: EAC 02 240 53316 Office: VERMONT SERVICE CENTER Date: **AUG 06 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

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, Vermont Service Center, denied the petition for a nonimmigrant visa and affirmed the denial on a subsequent motion to reopen. 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 extend the employment of its president 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 Maryland corporation, describes itself as a private investment company. It operates a motel. The petitioner claims that it is the subsidiary of Wananchi Auto & Hardware, Ltd., located in Nairobi, Kenya. The beneficiary was initially granted a one-year period in L-1A classification to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status for two years.

The director denied the petition on October 2, 2002, concluding that the petitioner did not establish: (1) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity; (2) that the foreign entity had employed the beneficiary in a managerial or executive capacity prior to his transfer to the United States; or (3) that the foreign entity is a qualifying organization doing business abroad. The petitioner subsequently filed a motion to re-open. On August 23, 2006, the director affirmed his previous decision, determining that the petitioner had established that the foreign entity continues to do business, but that the petitioner had not overcome the other two grounds for denial.

On appeal, counsel for the petitioner contends that sufficient evidence has been submitted to establish the beneficiary's employment as an executive in the United States, but counsel does not specifically address the beneficiary's foreign employment. Counsel submits a brief and additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue to be addressed in the present 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.

The nonimmigrant petition was filed on July 15, 2002. In a letter dated June 24, 2002, the petitioner described the U.S. company as a "private investment company" and stated that it purchased a hotel in Baltimore, Maryland as its first investment. The petitioner stated that the hotel employs a manager responsible for supervising employees, preparing work schedules, attending to customers and ordering supplies, as well as two desk clerks and two housekeepers. The beneficiary's duties as president of the company were described as follows:

Locate investment businesses to purchase (this involves contacting business brokers and evaluating financial records of potential business prospects); establish financial goals for each investment; analyze financial reports of each investment by reviewing and evaluating report of daily business operations & establish plans to increase sales, review profit/loss statements; develop marketing strategies to attract additional customers; ensure the smooth operation of each investment.

The petitioner submitted the lease agreement for the motel operated by the U.S. company, as well as an employee list identifying the names and social security numbers of the manager, two housekeepers and two desk clerks. The petitioner's Maryland quarterly wage report for the first quarter of 2002 confirmed the employment of the beneficiary and two desk clerks only.

On July 22, 2002, the director issued a request for additional evidence, in which the petitioner was advised that it had not adequately described the beneficiary's duties. The director requested evidence to establish the duties the beneficiary has performed in the past year, and to establish the duties to be performed if the petition is extended. The director also inquired as to what steps have been taken by the petitioner to acquire other investment properties. Finally, the petitioner requested evidence of the employment of the five claimed hotel employees.

In a letter dated August 28, 2002, the petitioner provided the following description of the beneficiary's duties for the past year: "Established new office; located investment; hired personnel for motel; responsible for overall management of the new U.S. business; established financial goals." The petitioner stated that the beneficiary's duties under the extended petition would be those described in its letter dated June 24, 2002, which are already recited above.

The petitioner re-submitted its employee list and a copy of its quarterly wage report for the second quarter of 2006, which indicates that the company employed all six employees as of June 2002. The evidence shows that the manager and both housekeepers were all hired in June 2002 and all received the same monthly salary of \$1,200 during that month.

In response to the director's request for evidence related to additional investment properties, the petitioner submitted a "Business and Building Contract of Sale" between the petitioning company and Oh's Family, Inc. for the business known as "Knight's Liquors" in Baltimore, with a purchase price of \$380,000 and anticipated settlement date of December 2, 2002, contingent upon the petitioner's approval for a loan. The document has not been signed by the seller.

The director denied the petition on October 2, 2002, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director found that the petitioner had not submitted evidence to establish the beneficiary's role in operating the motel managed by the petitioning company, and questioned the beneficiary's stated responsibilities for researching and locating potential investment businesses, based on the lack of documentary evidence of such investments. The director further determined that the petitioner had not established that the U.S. business has a managerial staff or professional staff to direct, or that the business has major components or functions requiring executive direction.

The petitioner filed a timely motion to re-open and reconsider, contending that the director erred by determining that the beneficiary would not be supervising any managerial staff when the petitioner in fact employs a motel manager. Counsel further emphasized that the beneficiary's "main duties" are "to locate business investments for the petitioner, to supervise the investments and to develop marketing strategies for successful growth." Counsel insisted that these duties must be considered executive duties in a small business and stresses that such duties could not be entrusted to the motel employees. Counsel concluded that the director erred in determining that an employee who is responsible for locating investment property, making final decisions regarding investments, developing goals and plans, and establishing marketing strategies is not an executive.

In support of the motion, the petitioner stated that it was providing previously unavailable evidence related to the beneficiary's efforts to locate additional investment properties. This evidence included: (1) a letter from the owners of "Rosen's Liquors" indicating that the beneficiary and two other individuals had qualified to purchase a liquor store located in Baltimore, Maryland, with an expected closing date of November 30, 2002; (2) an undated letter from the President of Ruchier, Inc. indicating that the beneficiary was interested in purchasing "Millington Market" from his company and had visited the business "on 15th September"; and (3) a statement from the beneficiary indicating that he had contacted seven businesses to discuss possible purchases prior to finalizing the agreement to operate the Baltimore, Maryland motel. The petitioner provided the business details, contact information and date of contact for the seven businesses located in Florida, North Carolina, Virginia, and New Jersey. All of the dates of contact were in August and October 2001.

The director affirmed the denial of the petition on August 23, 2006, concluding that the evidence submitted on motion was not sufficient to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director concluded that the size and scope of the business would not support an executive level position. The director noted that while all businesses require some degree of management, not all individuals who manage a business can be considered executives.

The director further emphasized that the record contained no documentation indicating that the petitioner had purchased any additional properties or businesses. The director found the beneficiary's statements that he had contacted seven different individuals "about businesses" unpersuasive.

On appeal, counsel for the petitioner contends that the petitioner "submitted evidence that the beneficiary was complying with his duties of researching ongoing investment opportunities by providing evidence of all the businesses he had evaluated, and establishing policies and goals for the U.S. investments." Counsel asserts that the evidence previously submitted establishes the beneficiary's employment in an executive capacity. In support of the appeal, counsel submits the petitioner's 2005 IRS Form 1120, U.S. Corporation Tax Return, and evidence of wages paid to employees in 2005 and 2006. Counsel asserts "the fact that petitioner employs people and earns income to justify filing a corporate tax return is evidence that petitioner has made an investment and has an ongoing business."

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

Preliminarily, the AAO notes that the evidence submitted on appeal with respect to the petitioner's current employees and business activities is not relevant to the issue of whether the beneficiary's eligibility was established as of July 2002. 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, this evidence actually undermines the petitioner's claims that the beneficiary is primarily engaged in researching and finalizing negotiations for investment properties. Notwithstanding the petitioner's claims that it is an "investment company," the record on appeal shows that the company is still leasing and operating exactly one business five years after it was established.

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(1)(3)(ii).

As highlighted by the director in the request for evidence and in both previous decisions, the petitioner and counsel have provided vague and non-specific job descriptions that fail to demonstrate what the beneficiary does on a day-to-day basis. The petitioner states that the beneficiary locates investment businesses to purchase, contacts business brokers, evaluates financial records for prospective purchases, establishes financial goals and ensures the smooth operation "of each investment," evaluates reports and profit/loss statements, and develops marketing strategies. The petitioner has been able to document that it has entered an agreement to operate and manage a motel. To date, there is no evidence of any other investment, and thus it is questionable that the beneficiary devotes the majority of his time to the stated duties. 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 has now had four opportunities to clarify the nature of the beneficiary's day-to-day duties, and in particular, to explain his role in the management of the one business the petitioner operates. 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)). The definitions of executive and managerial capacity have two specific requirements. 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). Here, while the beneficiary evidently exercises discretion over the U.S. company as its president, the record does not contain evidence of the actual duties the beneficiary will perform, 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 a totality of the record whether the description of the beneficiary's duties and those of his or her subordinate employees represents a credible representation of the beneficiary's role within the organizational hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. 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 petitioner claims that the beneficiary supervises a motel manager and implies that this employee is responsible for supervising the lower-level motel employees. While the record contains evidence that the petitioning company employed the manager as of June 2002, the petitioner has not explained why its manager earned the same salary as its housekeepers and lower wages than the two individuals identified as desk clerks,

and there is some overlap between the manager's duties and those of the desk clerks. 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). In the present matter, as discussed further below, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating a motel. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

At the time of filing the petitioner was a one-year-old company engaged in operating a motel with 45 rooms. It claimed to employ the beneficiary as president, one manager who orders supplies, creates work schedules and assists customers, two desk clerks, and two housekeepers. The motel's front desk and housekeeping operations are reasonably required to be staffed seven days a week, with hours that extend significantly beyond a normal forty-hour week. It is unclear from the record who supervises the desk clerks and housekeepers when the manager is off-duty, if not the beneficiary. The petitioner also requires employees to perform the clerical, administrative and financial aspects of the business, such as payroll functions, maintaining licenses, paying bills, record keeping, banking, and bookkeeping, yet has not identified any employees to perform these functions.

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 president, and the described five-person staff. 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 provided a detailed description of the beneficiary's actual duties and has therefore not established this essential element of eligibility.

The petitioner has not established that the beneficiary is acting in a managerial capacity by directing and controlling a staff of managerial, professional or supervisory employees or managing an essential function of the petitioner's organization. *See* section 101(a)(44)(A)(ii). 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-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. Here, the petitioner has not established that the beneficiary is relieved from involvement in the day-to-day operations of the motel, such that he could primarily perform duties at an executive level.

In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. The petitioner has not submitted evidence on appeal to overcome the director's decision. For this reason, the appeal will be dismissed.

The second issue to be addressed is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity prior to his transfer to the United States in L-1A status, as required by 8 C.F.R. § 214.2(1)(3)(iv).

In a letter dated June 24, 2002, the beneficiary described his duties with the foreign entity as follows:

I have held the position of Sales and Marketing Manager for our Kenyan company. In this position I was responsible for counter sales monitoring and marketing planning. I coordinated all sales and marketing related activities; expedited the workflow of the sales department with efficient scheduling and reduced downtime in counter sales. I was also responsible for periodic review of prices and promotions.

The petitioner submitted an employee list for the foreign company, which indicated that it had four company directors, including a chairman and managing director, as well as seven employees, including three salesmen, a store keeper, an assistant store keeper, and three paint "tinters." The petitioner provided brief job descriptions for the seven employees. The foreign entity was described as a dealer of automobile spare parts and hardware, specializing in mixing car paint.

In his request for evidence, the director noted that the foreign entity, as of the date of filing, did not employ a sales and marketing manager, and questioned whether the beneficiary supervised and controlled the work of managerial, supervisory or professional personnel, or whether he managed an essential function while employed by the foreign entity. Accordingly, the director instructed the petitioner to describe the typical managerial responsibilities the beneficiary performed while employed by the foreign entity, and requested that the petitioner articulate and submit documentary evidence of the managerial decisions made by the beneficiary on behalf of the foreign organization. The director also requested evidence of the marketing

activities carried out by the foreign entity and inquired as to what role the beneficiary played as "marketing director."

In a response dated August 28, 2002, counsel for the petitioner reiterated the beneficiary's previous job description and submitted two reference letters from vendors as "proof" that the beneficiary performed the stated duties. One letter referenced the beneficiary's "high integrity" and "pleasant personality," while the other letter confirmed that the beneficiary "played a very active role in promoting and distributing [the vendor's] products namely Paints, Compounds, Fillers, Varnishes and other allied products."

The director denied the petition on October 2, 2002, concluding that the petitioner failed to establish that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director noted that the petitioner's response to his request for evidence had included none of the specific evidence requested to address the director's concerns, and thus there is no documentation to support the petitioner's assertion that the position was in a managerial capacity.

On motion, counsel for the petitioner asserted that the beneficiary was employed as a "function manager" for the foreign entity, noting that his stated duties, as recited above, "are important to the functioning of the valid and legitimate activities within a company." Counsel also alleged that the director's decision was unfairly based on the size of the foreign entity. In support of the motion, the petitioner submitted "newly discovered evidence," namely, six additional letters found in the foreign entity's records subsequent to the director's decision. Counsel asserted that the evidence rebuts the director's allegations concerning the beneficiary's foreign employment. The letters included: (1) a December 15, 1998 letter from the beneficiary, addressed to an employee of the foreign entity, advising him of his promotion to "senior salesman – Jua Kali sector"; (2) a letter dated October 16, 1998, in which the beneficiary made an inquiry to "Welrods Ltd." regarding the suitable grade of welding rods for a specific purpose; (3) a letter dated June 5, 1998, addressed to a customer, in which the beneficiary responded to a request for an extension of credit terms, and inquired as to the customer's requirements for the next three months; (4) a letter dated May 4, 1998, addressed to a vendor, in which the beneficiary informed the vendor of the foreign entity's anticipated paint order for the months of May, June and July 1998; (5) a letter dated August 15, 1997, addressed to Sodoline Paints Ltd., in which the beneficiary requested an increased discount on the foreign entity's purchases of paints and other products; and (6) a letter dated February 19, 1997, addressed to Wyco Paints Ltd., in which the beneficiary expressed the foreign entity's interest in promoting Wyco Paints, and requested catalogs, pamphlets, technical specifications and quotes for quantity orders for various items.

In a decision dated August 23, 2006 the director concluded that the petitioner had failed to establish that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director noted that the documentation submitted on motion suggested that the beneficiary was the only employee who handled marketing activities, acquisition of paint products, and pricing. The director again noted that the organizational chart for the foreign entity does not include a "sales and marketing manager" position and questioned the beneficiary's level of authority within the foreign entity's organizational hierarchy.

Counsel's appellate brief does not address the director's determination that the beneficiary was not employed in a qualifying capacity abroad. However, the petitioner submits a letter from "[REDACTED]," an individual

described as a "Kenyan Advocate" who is "familiar with [the] foreign entity." Mr. Sharma states that the beneficiary was employed by the foreign entity as "a manager" and was responsible for the following duties:

- He was handling purchase of raw material & finished products as per daily & monthly requirement and marked demand.
- He was budgeting input as previous years quotation system, according to stock & output and sales as pre requirement & subject to wealth & public demand.
- Previous years output to control as per others company & manufacturing demand order manifesting system.
- Daily cash output & daily payment and incoming projected to manage & also daily wages for casual worker to control cash flow & draw from bank.
- Correspondence to purchases and sales company and to refer overseas correspondents.
- He had to make sure all customers & suppliers from overseas and local had received proforma and technical data [sic] in time.
- To refer sales reports, marketing reports, technical advisor report, organizing meetings with all department and rectify mistaken divisions.
- To organize meetings with overseas suppliers and discuss future marketing system and advertising procedure in our neighbouring [sic] countries.
- Also to organize meetings with logistic officers in different demands and to check loss and profits and to take necessary action.

The petitioner also submits a letter from the foreign entity dated October 4, 2006, which indicates that the beneficiary's duties as "manager" were taken over by Varsha Patel, who will handle "Sales system, purchase, correspondent to technical matters, banking and meeting with suppliers."

Upon review, the petitioner has not overcome the director's determination that the petitioner failed to establish that the beneficiary was 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)(ii). In this matter, the petitioner initially provided only a vague, general description of the beneficiary's duties that fell significantly short of establishing that the beneficiary's duties as "sales and marketing manager" of the foreign entity were primarily managerial or executive in nature. For example, the petitioner stated that the beneficiary was responsible for "counter sales monitoring," "marketing planning," coordinating sales and marketing activities, and ensuring efficient workflow in his department. These duties suggested, at most, that the beneficiary performed at most as a first-line supervisor of in-store sales people, and the lack of a "sales and marketing manager" on the foreign entity's organizational chart raised further questions regarding the beneficiary's actual employment capacity with the foreign entity. 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)).

Accordingly, the director requested a detailed description of the beneficiary's managerial duties and instructed the petitioner to clearly articulate and document such duties. In response, the petitioner submitted the same position description and offered no additional clarification as to how the beneficiary met the statutory requirements for managerial capacity as outlined at section 101(a)(44)(A) of the Act. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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). Accordingly, the director properly denied the petition based on the petitioner's failure to submit the requested evidence related to the beneficiary's foreign employment.

Furthermore, the minimal "newly discovered evidence" submitted on motion suggested that the beneficiary's role with the foreign entity involved such non-qualifying duties as purchasing inventory from suppliers, making product inquiries, and corresponding with customers regarding their purchase requirements. While the letters submitted on motion confirmed that the beneficiary's title was "marketing & sales manager," the record remained devoid of a detailed description of the position, the managerial duties involved, and the percentage of time spent on managerial functions and non-managerial functions. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. 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 the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because the few concrete tasks described, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, 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).

On appeal, the petitioner finally offers a lengthier description of the beneficiary's duties while employed by the foreign entity in the form of a letter from [REDACTED]. However, the evidence submitted on appeal is deficient for several reasons. First, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Second, the petitioner has provided no explanation regarding the qualifications of [REDACTED] who does not appear to be an employee of the foreign entity, to issue a statement regarding the duties performed by the beneficiary for the foreign entity prior to his transfer to the United States in 2000. Counsel's statement that [REDACTED] is "familiar with foreign entity" is not sufficient. 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). Because of the uncertainty of [REDACTED] connection to the foreign entity, his statement has limited probative value.

Finally, even if the AAO were to accept [REDACTED] statement, the job description submitted on appeal supports a conclusion that the beneficiary performed primarily non-qualifying duties as marketing and sales manager for the foreign entity. For example, the beneficiary's responsibility for purchasing products and raw materials, handling "cash output & daily payment," handling sales and purchase correspondence, and providing pro forma and technical data to customers and suppliers cannot be considered managerial in nature. The foreign entity's statement that the beneficiary's replacement within the company is responsible for "sales system, purchase, correspondent to technical matters, banking and meeting with suppliers" also leads to a finding that the beneficiary performed primarily non-qualifying operational tasks while employed by the foreign entity. Again, 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Other than submitting the new statement from [REDACTED] in support of the appeal, counsel has not addressed the director's findings with respect to this issue. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, evidence submitted on appeal raises the question of whether the petitioning entity maintains a qualifying relationship with 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 petitioner claims to be a wholly-owned subsidiary of Wananchi Auto & Hardware Ltd., located in Kenya, and has submitted its stock certificate number one, indicating that 100 of the petitioner's 1,000 authorized shares were issued to the foreign entity in September 2001. No other evidence of the ownership and control of the petitioning company was submitted in support of the initial petition or on motion.

On appeal, the petitioner submits a copy of its 2005 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates at Schedule E that the beneficiary owns 100 percent of the U.S. company. This conflicting information has not been resolved. 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. For this additional reason, the petition cannot 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.

ORDER: The appeal is dismissed.