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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Δ7



DATE: **FEB 07 2012**

Office: VERMONT SERVICE CENTER

FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, Vermont Service Center, denied the nonimmigrant visa petition. 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 beneficiary's employment as a 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 New Jersey corporation established in March 2007, states that it is engaged in the import, export and distribution of consumer products. It claims to be a subsidiary of Summit Co., Ltd., located in Seoul, South Korea. The petitioner currently employs the beneficiary as its executive director and seeks to extend his L-1A status for two additional years.¹

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director overlooked and disregarded evidence submitted in support of the petition and placed undue emphasis on size of the petitioner's staff in determining that the beneficiary will not be employed as a manager or executive. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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.

¹ The beneficiary was approved for L-1A classification for the period October 31, 2008 through October 30, 2009. The record shows that the U.S. company was established in March 2007 and achieved sales of \$121,045 during that calendar year. It appears that the petitioner was treated as a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) at the time the beneficiary's previous L-1A petition was adjudicated. Therefore, the AAO will adjudicate the instant petition as a request for an extension of a petition involving a new office pursuant to 8 C.F.R. § 214.2(l)(14)(ii).

- (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.

II. The Issue on Appeal

A. Employment in a Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

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

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

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

1. Facts and Procedural History

The petitioner stated on the Form I-129 that the U.S. company was established in 2007 and is engaged in the import, export and distribution of consumer products. The petitioner indicated that it has one employee, gross annual income of "\$50,000 or more," and net income that is "enough to pay alien's salary."

In a letter submitted in support of the petition, the petitioner indicated that the beneficiary has been employed as its executive director "since last year" and described the beneficiary's duties as the following:

- Implement US office policies in its personnel transactions, such as hiring, promotions, transfers, and terminations;
- Maintain one of the key positions of the company and will make key fundamental decisions with ultimate responsibility in all phases of the U.S. operation;
- Responsible for strategic management and planning of overseas operations;
- Establish the goals and policies of the company's operations, exercising wide latitude in discretionary decision-making;

- Aid the mother company [REDACTED] and search for cosmetic brands to be imported into Korea;
- Closely contact with the brands make the importing business more effective;
- Contact the local distributors in the United States to continue the export of nail products of companies such as [REDACTED] into Japan, and expand the export business;
- Negotiate with the local distributor makes it possible to export more products.
- [REDACTED] of new client [REDACTED];
- Check the overall export procedures when exporting the products to Korea; and
- Import a Korean made air cleaner [REDACTED] into the United States and establish sales and marketing strategy to major companies within the United States

The petitioner indicated that the U.S. company expects to generate \$180,000 in revenue in 2009. With respect to the company's staffing, the petitioner stated:

We expected to employ more employees as the business would be growing in 2009, but we could not do so due to the unexpected economic downturn in the United States and South Korea. We anticipate that [the petitioner] can hire more employees in early 2010 and the gross sales will be increased in the following fiscal years as our U.S. business is expected to expand.

The petitioner indicated that it has been selected as a vendor for retailer [REDACTED] and has entered into "huge contracts" with [REDACTED] a Korean company, and [REDACTED] a company based in California.

The petitioner submitted a copy of its 2008 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates gross receipts of \$46,776, \$6,000 in salaries and wages, and taxable income of \$1,819 for the year. In 2007, the petitioner indicated gross receipts of \$121,045 and salaries of \$7,500. The petitioner provided copies of recent bank statements, but offered no other evidence pertaining to the financial status of the U.S. company or evidence of wages paid to employees.

The director issued a request for additional evidence ("RFE") on October 23, 2009, in which he instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties with an explanation of how the duties will be managerial or executive in nature; (2) a list of United States employees by name and job title; (3) complete position descriptions for all U.S. employees including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; (4) evidence of educational credentials for the beneficiary's subordinates; and (5) evidence of wages paid to employees includes copies of IRS Forms 941 for the first three quarters of 2009 and IRS Forms 1099 and W-2 for 2008.

In response to the RFE, counsel for the petitioner submitted a letter dated November 24, 2009, along with additional documentary evidence. Counsel noted that the petitioning company, due to the global economic downturn, has experienced "difficulties in the operation of its business," and has been required to change its original business plan and downsize the company's structure and budget.

Counsel further noted that the beneficiary initially entered the United States in December 2008, and therefore the company cannot provide payroll documentation for 2008. Counsel referred to the beneficiary's "unintentional absence in most periods of 2008" and noted that "active management and operations were not possible." The AAO notes that while counsel refers to the beneficiary's "long absence," from the United States, the record shows that the beneficiary's initial L-1A petition was approved on October 31, 2008 and his L-1 visa was issued in Seoul on December 3, 2008, just 15 months after he was initially hired by the foreign entity.

Nevertheless, counsel indicates that "the Petitioner could not hire new employees in order to reduce the expenses due to long absence of [the beneficiary]" and states that the petitioner hired outside professional agencies [redacted] and [redacted] to work for the company. Counsel indicated that the petitioner still intends to hire full-time employees and expand its business.

In response to the director's request for a comprehensive description of the beneficiary's duties, counsel provided the following list of duties:

- Implement U.S. office policies and business strategies to develop the Petitioner's business. Specifically, make a key decisions [sic] on whether or not the Petitioner will enter into a new products' import and export;
- Make key decisions on how the Petitioner maintains financial feasibilities under ongoing economic downturn and for these decisions, discuss financial feasibility plans with the parent company [redacted] president in Korea from time to time and make final decisions pursuant to financial feasibility plans;
- Have regular meetings with the Petitioner's agencies' presidents and professionals and reviewed [sic] the marketing reports. Establish the marketing goals to expand the Petitioner's business. Supervise the entire negotiation process with the new local brands and establish the final terms and conditions which the Petitioner's agencies can offer for the Petitioner;
- Responsible for strategic management and planning of overseas operations;
- Monitor the Petitioner's agencies and make key decisions on the issues the petitioner agencies raise;
- Attend the meetings with supervisors of the nationwide wholesaler such as [redacted] [sic], and [redacted] [sic] in order for the Petitioner's imported goods to be sold;
- Exercise the discretion in selecting Petitioner's agencies to conduct the delegated Petitioner's duties;
- Participated in the new products exhibitions both in the United States and overseas with Petitioner's agencies. Decide what products the Petitioner will exam [sic] in detail as follow-up process; and
- Approve the measures suggested by the local attorneys or law firms when the problems occur related to import procedure.

The petitioner submitted a copy of its agency agreement with [redacted] which is dated March 15, 2009. The agreement authorizes [redacted] to act as the petitioner's agent for "marketing to the consumer goods sellers, trading the imported goods to the wholesaler, entering into contracts and conducting

administrative matters relating to the consumer goods" designated by the petitioner. The petitioner agreed to compensate the agent by paying 5% of the entire contract amounts arranged or conducted by the agent.

The petitioner submitted a second agreement dated September 20, 2009. This agreement specifies [REDACTED] as agent, but is signed by an individual identified as the president of [REDACTED]. Under the terms of the agreement, the agent will provide "any professional online marketing plan, online sales and online sale administrative matters," and will receive 15% of the petitioner's total net online income incurred by the agency.

The petitioner submitted an organizational chart identifying the beneficiary as executive director, supervising the president of [REDACTED] and the president of [REDACTED]. The chart indicates that [REDACTED] supervises a director, an accountant and a manager, while [REDACTED] supervises "staff." Finally, the chart indicates that the beneficiary supervises a certified public accountant who also serves as an advisor to the petitioning company.

In response to the director's request for a list of employees, counsel included the persons listed on the chart, as well as a manager. The petitioner provided a copy of an IRS Form W-2 indicating that the manager received a total of \$6,000 in wages in 2008, but did not provide evidence that he is still employed by the company. Counsel indicated that [REDACTED] devotes 17 hours per week to overseeing all company matters, reporting to the beneficiary, participating in meetings and phone conferences with major retailers, and monitoring marketing and negotiation status. Counsel further indicated that [REDACTED] is responsible for online marketing and sales and spends 13 hours per week supervising his staff to promote the sales of the petitioner's products, establishing online marketing plans for the beneficiary's approval, reviewing sales reports and incomes submitted by his staff, and participating in meetings. Other employees of [REDACTED] including the director, accountant and manager, are stated to devote approximately 10-13 hours per week to the petitioner's accounting, budgeting, communications, marketing and administrative matters.

The petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first last quarter of 2008 and first two quarters of 2009. The petitioner reported one employee during the fourth quarter of 2008, presumably the manager who received the only wages paid by the company that year. During the first and second quarters of 2009, the petitioner reported one employee who received wages of \$10,500. The record does not contain any evidence of commissions or other payments made by the petitioner to [REDACTED].

The director denied the petition on December 8, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director emphasized that the petitioner's quarterly tax returns reflect only one employee and questioned the staffing of the company, noting that most of the claimed workers are employed by other companies and devote limited hours to the petitioning company. The director further found that the petitioner's description of the beneficiary's duties identifies only general managerial functions and does not specify what the beneficiary would be doing on a day-to-day basis within the context of the petitioner's staffing arrangement. The director concluded that the petitioner failed to provide evidence of employees who would relieve the beneficiary from providing the sales and or services of the organization.

The director also questioned whether the beneficiary is employed as a professional or has a degree that is relevant to the type of business operated by the petitioner. The director's comments will be withdrawn, as neither the statute nor regulations specify any educational requirements for beneficiaries of L-1A petitions.

On appeal, counsel for the petitioner attempts to clarify the staffing of the U.S. entity and the beneficiary's role. Counsel notes that the petitioner's general manager resigned in January 2009, and the beneficiary has since "managed the entire operation of the Petitioner." Counsel emphasizes that the company hired the outside contractors to conduct marketing, accounting and general administration of the company, and that the beneficiary "has wide discretion to control the outside contractors." Counsel indicates that the petitioner has hired three employees in order to expand its business.

In addition, counsel asserts that the director ignored the petitioner's evidence that it utilizes the services of outside contractors to perform a portion of the company's work, and also mischaracterized the nature of the petitioner's business as a "retail electronics" business, rather than as an importer and distributor. Counsel contends that the petitioner met its burden to establish by a preponderance of the evidence that the beneficiary will be employed in a managerial or executive capacity, and asserts that the director "erroneously relied upon how many employees the U.S. entity hired and how many subordinate employees an individual in the managerial or executive position supervise." Counsel cites unpublished AAO decisions to stand for the proposition that an employee may be deemed a "functional manager" even if he or she is the sole employee of the company in cases where the manager supervises independent contractors, exercises wide discretionary authority, or if the business is complex. Counsel maintains that the beneficiary "is primarily performing essential function within Petitioner because the Beneficiary primarily manage[s] the Petitioner and the outside contractors," and contends that the director did not consider whether the beneficiary qualifies for the benefit sought as a function manager.

In support of the appeal, the petitioner submits copies of its [REDACTED] [REDACTED] for the third and fourth quarters of 2009. According to the information provided therein, the petitioner consistently employed four workers during the months of July through December 2009 and paid total wages of \$38,749.92 in each quarter. The petitioner also submits a copy of its IRS Form 941 for the fourth quarter of 2009, which also reflects four employees and total salaries and wages in the same amount. The attachment to the state quarterly report lists the beneficiary, [REDACTED] as the petitioner's employees.

2. Analysis

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary would be employed in the United States 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). 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 each 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 show 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 fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioning entity and had the appropriate level of authority as its sole employee, the petitioner has failed to show that his actual day-to-day duties would be managerial or executive in nature as of the date the petition was filed.

The petitioner's initial description of the beneficiary's duties was general and non-specific, borrowing liberally from the statutory definitions of managerial and executive capacity. For example, the petitioner stated that the beneficiary will "implement US office policies," "make key decisions," be "responsible for strategic management and planning," and "establish the goals and policies, exercising wide latitude in discretionary decision-making." While such responsibilities suggest that the beneficiary is responsible for oversight of the company, it provides little insight into how he would actually allocate his tasks on a day-to-day basis. 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 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 remainder of the beneficiary's duties, as described at the time of filing, suggested his direct involvement in the day-to-day operations of the company. Specifically, the petitioner stated that the beneficiary would be assisting the parent company to "search for cosmetic brands to be imported into India," contacting brands to make the importing business more effective, contacting local distributors in the United States for continued export of products to Japan, negotiating with local distributors to expand export operations, exporting [REDACTED] products for client [REDACTED] overseeing export procedures, and importing [REDACTED] products to the United States. The petitioner did not indicate that the beneficiary would oversee employees, contractors or outside agencies in performing these operational duties, which have not been shown to be managerial or executive in nature. Rather, the initial description of duties indicated that the beneficiary would be responsible for performing the daily functions of the company, in addition to holding authority to make decisions on behalf of the entity. The petitioner provided no evidence related to the company's use of outside agencies at the time of filing.

It was not until the response to the request for evidence that the petitioner claimed that the beneficiary delegates non-managerial duties associated with the company's sales, marketing, financial and administrative matters to outside agency personnel. The initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation. The petitioner provided no explanation for the considerable changes made to the initial position description, or its failure to identify the beneficiary's claimed supervisory authority over outside personnel at the time the petition was filed. The record shows that the agency agreements were in

place at the time the petition was filed and the petitioner has identified no substantial change in the company's operations that occurred between the filing of the petition on October 19, 2009 and the petitioner's response to the RFE submitted November 25, 2009.

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). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added duties which were inconsistent with the petitioner's initial claims. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the 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 sales, marketing, administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This failure of documentation is important because, as discussed above, several of the tasks attributed to the beneficiary at the time of filing do not fall directly under traditional managerial duties as defined in the statute. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008).

Beyond the required description of the job duties, USCIS 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 operational 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.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other

employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Therefore, 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. As noted above, the petitioner did not originally claim that the beneficiary supervises any employees. In response to the RFE, the petitioner claimed that the beneficiary exercises supervisory authority over personnel employed by [REDACTED]

[REDACTED] On appeal, counsel indicates that the beneficiary has hired three full-time employees, although he simultaneously maintains that the beneficiary was the sole payroll employee at the time the petition was filed.

However, the newly submitted state and federal quarterly reports indicate that the petitioning company had four full-time employees at the time the petition was filed in October 2009, and in fact as early as July 2009. Again, 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. It is reasonable to believe that if the petitioner actually employed four full-time workers throughout the second half of 2009, it would have claimed these workers and provided evidence of wages paid to them, their job titles, and their job duties, prior to the appeal. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. Again, despite submitting wage records indicating the petitioner's employment of four full-time staff at the time of filing, counsel continues to maintain that the beneficiary was the sole employee and carried out his duties with the assistance of outside professionals.

The AAO acknowledges that the agency agreements do appear to have been in place at the time of filing. However, there are no terms in either agreement that grant the beneficiary supervisory authority over the presidents and employees of the agent companies to the extent that he could be considered a personnel manager. This interpretation of the agreements is consistent with the petitioner's initial description of the job duties, which did not mention the beneficiary's control and supervision of any subordinate employees, contractors or outside personnel. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. See generally *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Thus, the petitioner has not shown that the beneficiary is primarily engaged in the supervision and control of a subordinate staff comprised of professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, counsel contends that the director erred by failing to consider whether the beneficiary will primarily manage an essential function of petitioning company. Specifically, counsel asserts that the beneficiary "is primarily performing [an] essential function within Petitioner because the Beneficiary primarily manages the Petitioner and the outside contractors." 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 detailed position description that clearly describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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, or other non-qualifying duties, 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'r. 1988).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner has not clearly articulated a claim that the beneficiary manages an essential function of the petitioning organization or identified the essential function and the duties the beneficiary performs related to such function. The claim consists solely of counsel's assertion on appeal that the beneficiary qualifies as a function manager. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel relies on unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, as discussed above, absent a clear, consistent and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, and thus 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).

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 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. 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.* While the petitioner has

established that the beneficiary maintains authority over the U.S. company, the record does not support a finding that the beneficiary's role is focused primarily on the broad goals and policies of the organization. Rather, the petitioner indicated at the time of filing that the beneficiary is directly involved in the company's sales, marketing, import and export operations and administrative aspects of the business, rather than delegating such functions to subordinate or external personnel.

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). It is appropriate, however, for USCIS 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

In addition, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS 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 carry out its business plan and support an executive or managerial position. There is no provision in USCIS 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. 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 determination that the beneficiary will not be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

B. Qualifying Relationship

Although not addressed by the director, another issue is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. 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 U.S. petitioner consistently claims to be a wholly-owned subsidiary of [REDACTED] a Korean company. According to the petitioner's stock transfer ledger, however, the petitioner issued all 1,000,000 of its authorized shares to an individual, [REDACTED] on March 14, 2007. The petitioning company's IRS Forms 1120 for the years 2007 and 2008 also identify this individual, and not the foreign entity, as the U.S. company's sole shareholder. Therefore, the evidence of record does not corroborate the claimed parent-subsidiary relationship between the companies. 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.

With respect to the ownership of the foreign company, the petitioner submitted a Korean document with English translation, titled "Stock Ledger Change." This document identifies the owners of the foreign entity as [REDACTED]

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'r 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.

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'r 1982). Here, while it appears that [REDACTED] has de jure control of the U.S. company through 100 percent ownership of its shares, the evidence of record does not show that this individual has de jure or de facto control of the foreign entity. The only evidence of ownership provided for the foreign entity is the above-referenced "stock ledger change" which is insufficient to establish that [REDACTED] controls the company.

The record does not support the petitioner's claim of a parent-subsidiary relationship between the foreign and U.S. companies, nor does it establish that the two entities are related as affiliates. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(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 it is shown 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 at 1043.

III. Conclusion

The petition will be denied and the appeal dismissed 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.