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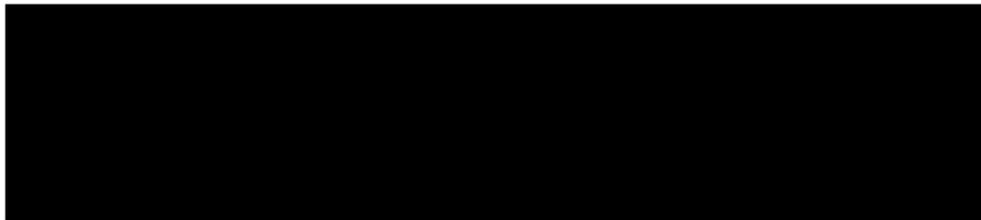
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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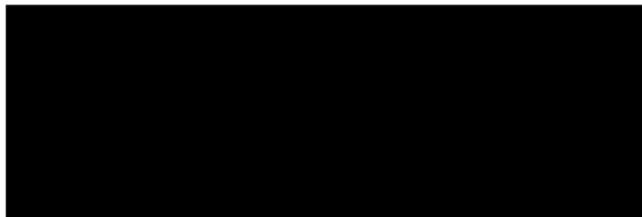


DATE: **JAN 30 2012** Office: VERMONT SERVICE CENTER FILE:

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 York corporation, states that it operates a perfume and cosmetics business.¹ It claims to be a branch office of Rozni Impex Pvt. Ltd, located in Mumbai, India. The petitioner has employed the beneficiary in L-1A status since November 2004 and now seeks to extend his status so that he may continue to serve in the position of managing director.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record establishes that all of the beneficiary's job duties are executive and managerial in nature. 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 record reflects that there are two United States entities with the same name as the petitioning entity. One entity was established in 2002 in New York and a second was established in 2006 in New Jersey. The petitioner submitted two sets of 2008 tax returns with different tax identification numbers and incorporation documents for each entity. The petitioner used the tax identification number for the New York corporation on the Form I-129.

- (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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 18, 2009. The petitioner indicated on the petition that it operates a perfume and cosmetics business with two employees and gross annual income of \$800,000. In a letter dated May 14, 2009, the petitioner stated that the beneficiary performs the following duties:

[G]eneral executive oversight over our organization as well as the development of sales and marketing programs, policies, international expansion import/export and expansion strategies, goal establishment. [The beneficiary] also has other substantial discretionary functions and authority over our organization's research and development operations. He also retains significant discretionary authority with respect to the hiring and termination of personnel, including managerial level individuals. Specifically, [the beneficiary] is responsible for the immediate supervision of our Manager and Assistant Manager. [The beneficiary] reports directly to our Chairman.

The petitioner indicated that in the capacity of managing director, the beneficiary has created policies and made business decisions for the venture, coordinated training for staff, engaged in strategic planning, target-setting, performance, development and cost control, among other tasks. The petitioner also stated that the beneficiary "manages all orders with manufacturers, negotiates prices with factories, directs all orders and finalizes all buying of perfume and cosmetics. [The beneficiary] also handles all banking and finance matters in our United States organization. In this capacity, [the beneficiary] allots more of his time to managerial duties."

The director issued a request for additional evidence ("RFE") on July 27, 2009 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the United States company's organizational chart, as well as complete position descriptions for the U.S. entity's employees; (2) a complete position description for all proposed employees in the United States, including the beneficiary's position, with a breakdown of hours shown for time devoted to each task on a weekly basis; (3) a list of United States employees that identifies each employee by name and position title; (4) additional evidence showing the management structure and personnel structure of the U.S. entity; and (5) copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of calendar year 2008 and the first quarter of calendar year 2009.

In a response dated July 15, 2009, counsel explained that the petitioner "has diversified into the Food Franchising business and acquired its first store at the Jersey Gardens Mall, in Elizabeth, NJ. This franchise would be under the name of Cold Stone Creamery and will start functioning as of July, 2009." Counsel further explained that by the end of 2009 the petitioner would open a second store in Rutherford. Counsel stated that the beneficiary is "working hand on hand [*sic*] with the petitioners' other executives" to get the project operating. Specifically, counsel noted that the "beneficiary is directly involved in the complete operation and management of the hiring process. He is also in charge of coordinating with the franchiser and their representatives based in New York, New Jersey, Pennsylvania and Connecticut. [The beneficiary] will coordinate with our accountants and vendors for [REDACTED]"

The petitioner, as stated by counsel, expects to hire approximately 25 to 30 employees to staff the two [REDACTED] locations. Counsel further stated that the beneficiary will be responsible for "supervising the duties of the Store Managers, Team Leaders, and Crew Members. Also the beneficiary will continue to work with our Marketing and Administration Executives." Counsel further explained the beneficiary's job duties as follows:

The beneficiary will direct the day-to-day operations of the facility. He will oversee the functions performed by the Store Managers, Team Leaders, and Crew Members. He will coordinate with the staff, develop and implement methods and procedures for monitoring the facility. Ultimately the beneficiary will be responsible for the smooth and profitable operation of the store.

Counsel for the petitioner further provided the following supplemental duties in response to the director's request for a comprehensive position description:

- Analyze the market conditions pertaining to the industry in order to design appropriate operational and managerial structures resulting in smooth operations and profitability of the company;
- Assume responsibilities for all aspects of operating the company. He will be responsible for supervising the job functions of the employees: Store Managers, Team Leaders, and Crew Members [sic] The beneficiary oversees the works of each position and assigns them related responsibilities
- Oversee and manage the finances of the company, including reviewing and determination of appropriate strategies to make the company profitable.
- Develop and implements plans for short-term and long-term growth, in accordance with the corporate policies, goals and objectives;
- Review the contracts proposed by the marketing team and negotiate with the third parties to obtain optimal advantage from these contracts and evaluate features, such as objective or purpose of project, applications from findings, costs of projects, and equipment and man power requirements;
- Analyze the contractual proposals to determine if the benefit derived and probable applications justify expenditures;
- Approve and submit proposals considered feasible to the top management for consideration and allocation of funds, from the department of the budget.

In response to the director's request relating to the amount of time spent by the beneficiary on executive duties, counsel states that the beneficiary "allots 95% of his time to executive-level duties, which include the management of the U.S. entity, practicing discretionary decision making skills, marketing trends, new corporate policies, and business goals."

The job duties for the proposed positions of Store Manager, Team Leader, and Crew Members were included in counsel's response to the RFE. The petitioner provided an organizational chart for the proposed operations of the new [REDACTED] business venture. As evidence of the new [REDACTED] venture, the petitioner provided a Franchise Agreement dated April 2, 2009, a lease for premises located in the Jersey [REDACTED] in Elizabeth, New Jersey, and a job application history. Counsel indicated that the

beneficiary would supervise one store manager, four team leaders, and 30 crew members once the store is opened and staffed.

The director denied the petition on August 7, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition. The director determined that the "evidence showing future business and job applications being reviewed is not sufficient evidence to show that the beneficiary is primarily acting in a managerial/executive function at this time or as of the date of filing, May 18, 2009." Furthermore, the director found that "[g]iven the size and scope of the perfume/cosmetics business and the fact that there are only two (2) employees, the evidence does not support the fact that the beneficiary's primary duties will be executive or managerial."

On appeal, counsel asserts that all of the beneficiary's duties involved in the opening of the franchise store are executive nature and do not involve any day-to-day functions of the company. Counsel asserts that the beneficiary "has been responsible for the entire development of the new franchise business. At the same time he has not neglected his duties at [the petitioning entity]." Counsel asserts that the beneficiary has performed the following tasks for the new franchise:

- Obtained the Federal Identification Number for the business and registered the business with the New Jersey Department of Revenue.
- Studied the competition and identified specific steps to take to gain ample customer support and to successfully compete with other businesses.
- Figured out ways to alert the media and the public about the business.
- Prepared the budget.
- Obtained the licenses and permits for running the business.
- Responsible for the purchase of the equipment and the furniture.
- Finalize the lease agreement.
- Dealt with the architects to make sure that all permits regulations would be met.
- Made sure that all utilities were available for the business (Water, electricity, phone, etc).
- Finally [the beneficiary] was responsible of organizing and completed all the details for the petitioner's grand opening.

Counsel provides a new breakdown of the beneficiary's duties as follows: Operational/Management of the Organization (30%); Sales Development of Local and International Business Network (40%); Planning and Analysis (20%); Study the Market Trend and Demand (5%); Inventory Control (5%). Each category is further broken down into two to six specific tasks.

In support of the appeal, the petitioner provides an organizational chart for [REDACTED] paystubs of the beneficiary and other employees of [REDACTED] dated after the petition filing date, and photographs of the two retail stores the petitioner claimed to operate at the time of filing, namely "Perfume Romance" and "Designer Boutique."

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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 in either an executive or a 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").

On appeal, counsel asserts that the beneficiary "has been responsible for the entire development of the new franchise business," a [REDACTED]. As a preliminary matter, the evidence contained in the record suggests that food franchising business is not operated by the petitioner, but by another entity [REDACTED] LLC." The record fails to establish that the entity operating the new food franchise business and the foreign entity have a qualifying relationship for L-1 purposes. 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 did not provide evidence of ownership for the U.S. company operating the food franchise business. In response to the RFE, the petitioner submitted a franchise agreement between [REDACTED] [REDACTED] for the rights to the establishment of a [REDACTED] is located at [REDACTED]. The petitioning company is not named as a party to the franchise agreement. The franchise is [REDACTED] whose managing member is [REDACTED], not the beneficiary. Additionally, the petitioner submitted a lease agreement for a location at Jersey Gardens Shopping Center in Elizabeth, New Jersey. The tenant is [REDACTED]. The record supports the conclusion that [REDACTED], and not the petitioning entity, [REDACTED] Perfume Romance Inc., is the entity operating the new food franchise business. The petitioner did not submit any evidence to establish that [REDACTED] has a qualifying relationship with the employer abroad, [REDACTED]. Therefore, any duties performed by the beneficiary for the food franchise operation cannot be considered as qualifying managerial duties for L-1 purposes.

Assuming *arguendo* that the petitioner established a qualifying relationship with [REDACTED], the petitioner's description of the beneficiary's duties fails to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. While the AAO does not doubt that the beneficiary exercises discretionary authority over the U.S. company, the petitioner has not submitted a consistent or credible breakdown of how the beneficiary will allocate his time among specific responsibilities. At the time of filing, the petitioner characterized the beneficiary's role as managing director of the U.S. company. The petitioner indicated that the beneficiary's duties include "general executive oversight over our organization as well as the development of sales and marketing programs, policies, international expansion

import/export expansion strategies, goal establishment." The petitioner briefly described plans by the [REDACTED] to acquire its first food franchise store at the Jersey Gardens Mall, in Elizabeth, New Jersey. The petitioner states that "[f]or these future business engagements we would definitely use the service, knowledge and expertise of [the beneficiary]." The petitioner did not further explain the specific duties that the beneficiary would perform with relation to the new food franchise business. Furthermore, 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'r 1978).

In response to the RFE, counsel for the petitioner stated that the beneficiary has "assumed responsibilities for all facets in operating the new company." Counsel did not clarify whether the beneficiary assumed such duties prior to the filing date of the petition. The initial petition did not include any specific job duties of the beneficiary that related to the management of the new food franchise business. In sum, the initial description appeared to have the beneficiary managing the perfume and cosmetics business, while the second iteration of the job has the beneficiary managing the food franchise operation.

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. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Regardless, the job duties submitted in response to the RFE do not establish that the beneficiary will be working in a managerial or executive position. Counsel for the petitioner described a new set of broadly-drawn job duties associated with operating the franchise business. Those job duties included analysis of the marketing conditions pertaining to the industry; responsibility for all aspects of operating the company; overseeing and managing the finances of the company; and developing and implementing plans for short-term and long-term growth. In response to a request for a percentage breakdown of time spent on each duty, counsel for the petitioner responded that the beneficiary "allots 95% of his time to executive-level duties, which include the management of the U.S. entity, practicing discretionary decision making skills, marketing trends, new corporate policies, and business goals." This description offered little insight into the nature of the beneficiary's duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

While such responsibilities generally 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).

While the petitioner has submitted a revised job description on appeal, the AAO notes that it diverges significantly from all prior descriptions provided, and references the beneficiary's supervision of subordinate employees. The job description on appeal provides a much more detailed list of job duties not presented before appeal. Additionally, a number of the job duties provided were not managerial in nature including: obtaining the Federal Identification Number for the business; purchasing all inventory equipment, and furniture; alerting the media and public about the business; and studying the competition to identify ways to successfully compete with other businesses. Counsel provides the list of duties the beneficiary performed for the new venture without an explanation as to why such a list was not available at the time of filing or in response to the request for evidence. 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'r. 1978).

Where, as here, 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 and does not consider the sufficiency of the evidence submitted on appeal.

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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.

According to the petitioner's statements on the petition and information contained in its quarterly tax returns, there are two employees working for the petitioning entity in the United States. Additionally, there appear to be two companies and two retail stores in the United States. The petitioner did not provide any quarterly returns for the New Jersey company and the company's tax return shows no salaries for 2008. In response to the request for additional evidence, the petitioner submitted IRS Forms 941 for the four quarter of 2008 and first quarter of 2009 showing two employees. The petitioner, however, failed to provide any job descriptions or information regarding employees working at the perfume and cosmetics business in New York. Therefore, to the extent that the petitioner company is doing business in New York, it is reasonable to conclude that the beneficiary is one of only two employees available to provide the services of the perfume and cosmetics business. 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'r 1988). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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.

Though requested by the director in the request for evidence, the petitioner did not provide the level of education required to perform the duties of the employees located at the perfume and cosmetics business in the New York location. The petitioner only provided information related to the prospective hiring of employees at the new [REDACTED] location. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that any existing employee(s) possess or require a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner provided evidence that the employee(s) supervised by the beneficiary in turn supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employee(s) as of the date of filing are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO notes 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). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate 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. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

To the extent that the petitioner plans to staff the new food franchise with additional employees, the record shows that those employees were not hired as of the date of filing the Form I-129. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*,

14 I&N Dec. 45, 49 (Comm'r. 1971). The AAO concurs with the director's determination that the petitioner has not grown to the point where the beneficiary is primarily engaged in managerial or executive duties.

At the time of filing, the petitioner was established for the purpose of operating a perfume and cosmetics business. The beneficiary, while charged with management of the company, is also one of only two employees working for the U.S. company. Thus, it is reasonable to conclude, and has not been shown otherwise, that he provides any services the company is retained to provide, and performs all other administrative and operational tasks associated with the operation of a perfume and cosmetics business. The petitioner has not established that it had a reasonable need for the beneficiary to perform primarily managerial or executive tasks as of the date of filing.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his time on non-qualifying duties. 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'r. 1988).

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

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.

III. Qualifying Relationship

Beyond the decision of the director, the record does not establish that United States and foreign entities have a qualifying relationship. 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).

At the time of filing, the petitioner claimed to have a qualifying relationship with "Rozni Impex Pvt. Ltd." and indicated that this company is located in Mumbai, India. The petitioner indicated that the U.S. company is a wholly-owned subsidiary of the foreign entity.

The petitioner did not provide documentary evidence of the ownership of the U.S. company. The petitioner provided two certificates of incorporation for the U.S. entities, one in New York and one in New Jersey. Neither certificate establishes ownership of the U.S. entities. In response to the RFE, the petitioner submitted a 2008 Forms 1120, U.S. Corporate Income Tax Return. The 2008 Schedule K to the returns state that [REDACTED] owns 100 percent of both the U.S. companies' voting stock.

With respect to Rozni Impex Pvt. Ltd., the petitioner provided a "Memorandum of Association and Article of Association." This document shows that the company had two owners at the time of formation, each owning 5,000 shares of the company-[REDACTED] and [REDACTED]. The petitioner did not submit any further documentation to show any changes in ownership to the foreign entity. Therefore, based on the evidence in the record, the two companies do not appear to be affiliated or owned by any of the same parties. Further, the record does not support the petitioner's assertions that it is a wholly-owned subsidiary of [REDACTED]

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).

Due to the inconsistencies and deficiencies catalogued above, the petitioner has not met its burden to establish that the U.S. and foreign entities have a qualifying relationship. 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 conducts appellate review 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.

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.