



U.S. Citizenship
and Immigration
Services

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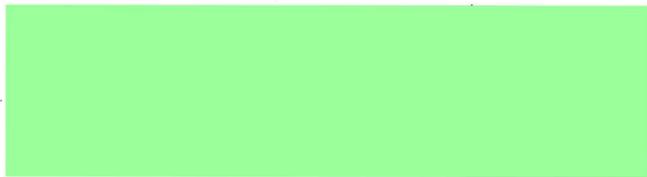


DATE: **APR 29 2013** Office: VERMONT SERVICE CENTER FILE:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office.

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DISCUSSION: The Director, Vermont Service Center, ("the director") denied the nonimmigrant visa petition and dismissed the petitioner's subsequent motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

This nonimmigrant petition was filed seeking to classify the beneficiary 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 was organized under the laws of the State of New York in June 2010 and registered to do business in Texas effective July 13, 2011. On the Form I-129 (Petition for a Nonimmigrant Worker), filed August 24, 2011, the petitioner claimed that it employed ten individuals. The petitioner did not indicate that it had earned any gross annual income as of the date the petition was filed. The Form I-129 lists the petitioner's type of business as "investment and restaurant operations." The Form I-129 Supplement L indicates that the petitioner is an affiliate of [REDACTED], an Indian company solely owned by the beneficiary. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in either a managerial or executive capacity. The director also found that the petitioner had not provided sufficient evidence of its financial status and had not established that it had secured physical premises for its business.

The petitioner subsequently filed a motion to reopen the decision. Upon review, the director determined that the petitioner had not submitted new facts or reasons for reconsideration and dismissed the motion. The petitioner subsequently filed an appeal which the director forwarded to the AAO. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes that the beneficiary would be employed in a primarily managerial or executive position and that the petitioner is doing business and has established physical premises.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of the foreign employer.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

The regulation at 8 C.F.R. § 214.2(l)(3) provides 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) 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 Issues on Appeal

A. Managerial and Executive Capacity

The first issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a 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.

Facts and Procedural History

The petitioner filed the Form I-129 on August 24, 2011. In a letter appended to the petition, the petitioner stated that it initially intended to conduct business in New York, the state in which it was incorporated, but that it had moved its focus to the State of Texas where it is authorized to do business. The petitioner noted that it "both invests in and maintains operational interests in restaurant franchises." The petitioner indicated that the beneficiary "is overall Senior Manager for

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the investment operation and operations management for the two current [REDACTED] locations." The petitioner stated further:

[The beneficiary] has been Senior Manager of the U.S. Company operation since arriving in the United States in 2010. She has been responsible for operations and start up of the US operation. She has hired senior staff, established relationships with vendors, engaged with bank officers for the attainment of appropriate accounts and lines of credit and has hired staff to conduct retail operations. In particular she was active in negotiating the purchase of the franchise interest in the two restaurant properties described above.

[The beneficiary] has been in the process of formulating plans for analyzing operations to evaluate performance of the company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change as the business develops. She also is directing, planning, and implementing policies, objectives, and activities in order to ensure continuing operations after she has returned to India. As the U.S. Company grows, she will also begin plans for a successor to head U.S. operations.

The petitioner also provided a job description for the managers of the two [REDACTED], as well as job descriptions for shift managers, senior sandwich artists and sandwich artists.

The petitioner also submitted its authorization to do business in Texas effective July 13, 2011 and provided a copy of a purchase agreement dated July 1, 2011 between the petitioner and [REDACTED] for the petitioner's purchase of two [REDACTED]. The purchase agreement indicated the petitioner would pay \$210,000 with \$5,000 down and that the seller [REDACTED] would finance \$100,000 of the purchase price. In addition, the petitioner agreed to transfer 49 percent of its stock to the seller. The record does not include evidence of the transfer of stock and does not include evidence that any monies have been paid to the seller.¹

The record also includes a July 1, 2011 assignment from the seller to the petitioner of "such premises" and identifies the purpose of the assignment is to enable the assignee (the petitioner) to operate a [REDACTED] sandwich shop.² Although the assignment references a contract and a licensor, the document does not identify these entities. The record does not include evidence that [REDACTED] authorized the assignment.³ The record further includes a letter from the leasing

¹ The record includes a copy of a check issued to "[REDACTED]" in the amount of \$5,000; however, the record does not include evidence that the check was cashed. Moreover, a check issued to "[REDACTED]" does not reflect a purchase of the two [REDACTED] shops subleased by [REDACTED] under the legal names [REDACTED] and [REDACTED].

² The premises are not identified.

³ The record includes a copy of two additional notarized assignments: (1) An assignment dated July 27, 2010 between [REDACTED] and [REDACTED] authorized by a representative of [REDACTED]; and (2) An assignment dated June 29, 2005 between [REDACTED] and [REDACTED] as transferors to [REDACTED] as transferee authorized by a representative of [REDACTED].

representative of [REDACTED] LC to [REDACTED] requiring that Mr. [REDACTED] sign two "assignments of contracts" for his new [REDACTED] locations and notifying him that until the documents are signed Mr. [REDACTED] may not have possession of the premises. The record does not include similar documentation from the leasing representative of [REDACTED] LLC to the petitioner. The petitioner provided copies of several letters from the petitioner, signed by both [REDACTED] and the beneficiary, to various vendors dated June 29, 2011 notifying them that two [REDACTED] shops have been sold to the petitioner and advising that the same credit cards should be charged but that the new bills need to reflect the petitioner's name as the new company name.

The director issued a request for evidence (RFE) instructing the petitioner to submit additional evidence establishing that the beneficiary will be employed in a managerial or executive capacity with the U.S. company. The director noted that the petitioner had not sufficiently described the beneficiary's duties at either the New York or Texas location and requested evidence regarding the duties performed by the beneficiary the past year and the duties she would perform if the petition was extended.

In response, the petitioner stated: "[a]t this point, the beneficiary works in an executive capacity, overseeing the operations of the two restaurants (each of which have their own managers) while also seeking out and developing new investment opportunities." The petitioner added that the beneficiary "is responsible for overseeing the executive operations of the Company from its offices in Texas" and "[g]enerally speaking, she oversees a staff of eleven people at the two restaurants owned by the company." The petitioner indicated:

She is in charge of the company's profitability and long range growth while meeting overall business objectives. Further, she seeks new business opportunities, primarily ways by which the Company's growing core business can be expanded to new locations.

That said, the beneficiary oversees at an executive level all operations of the business, from the hiring and firing of staff, to financial concerns, supply issues, and marketing.

The petitioner noted that it currently employs a staff of eleven and that the beneficiary as senior manager oversees two store managers, who in turn supervise shift managers and other staff. The petitioner confirmed that its employees were in Texas and that it was not operating in New York. The petitioner explained further that it did not hire additional employees in New York but had maintained a bank account and an office location in New York. The petitioner claimed that while in New York, the company's activities consisted primarily of locating a suitable location and business to maximize the Indian Company's investment and the beneficiary's managerial skills.

The petitioner provided its organizational chart depicting the beneficiary and [REDACTED] as partners and general managers over two [REDACTED] shops, each with five to six employees in the positions of store manager, shift manager, senior sandwich artist and sandwich artist. The petitioner provided payroll summary charts for several pay periods. The August 19, 2011 summary showed nine employees including the beneficiary, the September 2, 2011 and September 16, 2011

summaries listed seven employees including the beneficiary, and the September 30, 2011 summary listed eight employees including the beneficiary. The petitioner also submitted a copy of an unsigned, uncertified Internal Revenue Service (IRS) Form 941, Employer's Quarterly Tax Return for the third quarter of 2011.

The director denied the petition concluding that the petitioner 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 U.S. company is not operating at a level that requires the services of an individual serving in a primarily managerial or executive capacity.

On motion, counsel for the petitioner asserted that the beneficiary is employed in both an executive and managerial capacity. Counsel noted that the organizational chart showed that there are eight employees subordinate to the beneficiary and two of the employees manage the two [REDACTED] shops. Counsel claimed that when the beneficiary commenced operations in the Texas there were no employees and that the beneficiary was responsible for hiring the employees and was the sole party capable of doing so. Counsel provided copies of ten employment agreements between the petitioner and its employees. Seven of the employment agreements are dated prior to the petition being filed and three are dated after the petition is filed. Of the seven employment agreements dated prior to the petition being filed, three are dated prior to the petitioner's authorization to conduct business in Texas.

Counsel claims further that the beneficiary supervises the work of subordinate staff but that the beneficiary does not perform the day-to-day activities of the restaurant. Counsel avers that the beneficiary's primary duties revolve around financial responsibilities associated with the petitioner's operations and searching for additional investment opportunities. As observed above, the director dismissed the motion concluding that the petitioner had not provided additional argument or evidence sufficient to reopen the matter.

On appeal, counsel reiterates the claims made in the motion to reopen and adds that the beneficiary's authorization to sign and purchase the two [REDACTED] restaurants are indicative of executive-level tasks. Counsel further emphasizes that the beneficiary's duties are both managerial and executive in nature.

Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in the United States in a managerial or executive capacity as defined at 101(a)(44)(A) or (B) of the Act. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.* In this matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial

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duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Merely asserting or referencing that the beneficiary is a manager or an executive does not meet the petitioner's burden of proof. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. In this matter, the record does not provide probative descriptions of the job duties sufficient to satisfy either the executive or manager definition.

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.

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).

Preliminarily, we observe that 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 United States Citizenship and Immigration Services (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. Furthermore, after one year, USCIS will extend the validity of the new office petition *only if* the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "*for the previous year.*" 8 C.F.R. § 214.2(l)(14)(ii)(B). (Emphasis added.) In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. 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).

Although counsel on appeal references eligibility for this classification based on both executive and managerial capacity, neither counsel nor the petitioner identifies specific duties as managerial duties or executive duties. As referenced above, the petitioner may not claim to employ a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner

chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Again, the petitioner has not satisfied either definition in this matter.

The petitioner's attempt to establish the beneficiary's position as executive in nature is not persuasive. The initial description of the beneficiary's job duties presented a broad overview of the beneficiary's job duties. The petitioner stated generally that the beneficiary as the senior manager had been responsible for the startup of the U.S. operation and had hired senior staff, established relationships with vendors, engaged with bank officers and hired staff to conduct retail operations. However, the petitioner acknowledged that other than opening a bank account and an office in New York, the petitioner had been inactive in New York. Although the petitioner references the beneficiary's involvement in negotiating the purchase of a franchise interest in two properties, the petitioner does not provide probative information regarding the beneficiary's actual daily involvement in this endeavor. Vague references to negotiating this purchase are insufficient to establish the beneficiary was performing the duties of an executive; rather at most, the beneficiary was performing duties of an investor, not an executive overseeing an operating business.

Moreover, the first hiring allegedly performed by the beneficiary was in July 2011, only a few weeks prior to filing the instant petition. In that regard, the beneficiary was allegedly hiring all the employees, including low level employees to operate the [REDACTED] shops, not senior level employees.⁴ In addition, the beneficiary's direct involvement with vendors and hiring all employees is not indicative of an executive directing the operations of an enterprise but rather of an individual who is performing the routine and necessary tasks to operate the enterprise. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Referencing broadly-cast business objectives such as formulating plans for analyzing operations and directing, planning and implementing policies, objectives and activities, likewise is not sufficient to establish the beneficiary's actual role in the organization. The regulations require a detailed description of the beneficiary's daily job 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, Id.* The petitioner's response to the director's RFE also failed to enlighten as to the specific nature of the beneficiary's duties. Generally referring to the beneficiary's oversight of the two recently purchased [REDACTED] shops and continuing to seek new business opportunities does not describe the beneficiary's

⁴ The petitioner does not explain why it was necessary for the beneficiary to hire employees for already operating [REDACTED] shops. Counsel's assertion on motion and on appeal that the beneficiary was the only person capable of hiring these employees is also unsupported. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). In fact, the record reflects that the previous owners of the [REDACTED] shops, [REDACTED] and [REDACTED] reported combined sales of approximately \$90,000 on their Texas Sales and Use tax returns for the month of June 2011, and presumably, the restaurants did not achieve these results without employing staff.

actual executive duties for the year prior to filing the extension petition. Nor does the limited information in the record reveal her actual duties occurring after the alleged purchase of the [REDACTED] shops. For example, the petitioner indicated that the beneficiary oversees financial concerns, supply issues, and marketing. The record, however, does not include evidence that the petitioner employs individuals who perform these duties.⁵ Accordingly, the record does not support the claim that the beneficiary would be relieved from performing routine tasks associated with marketing, finances, and supply issues. Similarly, the record does not detail specific tasks related to directing the management of the operation. The record does not evidence that the beneficiary will focus primarily on the broad goals and policies of the organization rather than the day-to-day operations of the two [REDACTED] shops. The record does not support counsel's assertion that the beneficiary will be engaged primarily in executive duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *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).

The record also fails to support a claim that the beneficiary's duties are primarily managerial in nature. First, the petitioner does not include any evidence that the beneficiary performed any managerial duties during the first eleven months of the new office petition. Second, the petitioner presents inconsistent information regarding hiring employees for the [REDACTED] shops beginning in July 2011. The petitioner emphasizes that the beneficiary is involved in the hiring of all employees including low-level employees as outlined in the employment agreements signed by the beneficiary but also indicates that the hiring and firing of employees is the duty of the manager of the [REDACTED] shop. 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).

Next, the record lacks probative details regarding the actual daily duties of the claimed subordinate managerial employees. The petitioner provides a broad overview of the managers' duties for each [REDACTED] shop. Although the petitioner attempts to show that the managers of the [REDACTED] shops are not first-line supervisors on its organizational chart, 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 the [REDACTED] shops. 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. Further, although indicating that the seller of the [REDACTED] shops and the petitioner's claimed minority shareholder is also a general manager and partner, the petitioner does not specify this individual's duties. Accordingly, it is not clear what role if any this individual has in managing or directing the management of the [REDACTED] shops. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in

⁵ The description of the manager position for each [REDACTED] shop refers only generally to supporting local and national marketing initiatives and promoting sales and events and does not reference any duties relating to supply issues or financial concerns.

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these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Finally, the petitioner does not provide consistent documentary evidence of its number of employees when the petition was filed.

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. While several of the overbroad duties described by the petitioner may fall generally under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual primary responsibilities. Moreover, the petitioner's late additions of employees to relieve the beneficiary from supervising the operations of the [REDACTED] shops and the hiring of employees prior to the effective date the petitioner was authorized to do business in Texas, raise concern regarding the legitimacy of the petitioner's actual operations. Again, doubt cast on any aspect of the petitioner's proof may 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 this matter, the petitioner failed to provide probative and consistent evidence regarding the beneficiary's duties. Accordingly, the AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary will be employed in a bona fide manager or executive position for the U.S. business entity. For this reason, the appeal will be dismissed.

B. Physical Premises

The director in this matter found that the petitioner had not provided evidence that it had established physical premises. Regarding the petitioner's physical premises, the petitioner provided invoices from [REDACTED] for fixed fees for the months of October and November 2010 and January 2011 and for Additional Fees for the months of August, September, and November 2010. The invoices are addressed to the petitioner at counsel's office. The petitioner's 2010 IRS Form 1120 also identifies the petitioner's address as counsel's office. Although the invoices issued by [REDACTED] show the petitioner's use of an office center, the evidence does not support a claim that the petitioner paid for or occupied physical premises while located in New York. The petitioner, in response to the director's RFE claims that [REDACTED], its minority shareholder, provided space to the petitioner free of charge. The petitioner also references its Texas State Tax Return for August 2011 which lists the [REDACTED], Texas address. The record further included unidentified photographs of a small office space. On appeal, counsel provides a copy of the petitioner's unfiled, uncertified 2011 IRS Form 1120 which also shows a [REDACTED], Texas address. In addition, the petitioner provides a statement on appeal signed by [REDACTED] indicating that he has provided office space to the petitioner in [REDACTED] Texas since July 1, 2011 free of charge as he is a minority shareholder in the petitioner. The statement from [REDACTED], is sufficient to confirm that the petitioner has limited but viable access to physical premises. The director's conclusion to the contrary is withdrawn.

C. Financial Status

The director also determined that the petitioner had not provided sufficient documentary evidence of its financial status. The director specifically observed that there are no income tax returns or audited financial statements to verify the petitioner's financial status. On appeal counsel for the petitioner asserts that the petitioner's bank statements show that the petitioner has sufficient funds to operate its business. Counsel also provides the petitioner's unsigned and uncertified 2011 IRS Form 1120, showing gross income of \$263,578 and gross profit of \$184,635.

Upon review, the petitioner's bank statements are not accompanied by explanations regarding the type of transactions conducted. For example, the petitioner's bank statement submitted for the period between July 22, 2011 and July 31, 2011 shows the petitioner doing business as [REDACTED] and shows eight deposits and no withdrawals. The petitioner's August and September 2011 bank statements for the same account show a total of 71 deposits and only three withdrawals, two of which are transfers to another account. The bank statements provided for the same account on appeal show regular deposits as well as transfers between two different checking accounts for the first three quarters of 2012. The bank statements are not supported by any invoices or other information describing the funds received and expended, and the petitioner has not provided any statements for the second checking account referenced in the submitted statements. The bank statements do not include accompanying evidence establishing that the funds were obtained and used for the operation of two [REDACTED] sandwich shops. Accordingly, the record does not include probative evidence that the U.S. company is generating income through the operation of two [REDACTED] sandwich shops or any other business activity. The petitioner's 2011 IRS Form 1120 is unsigned and uncertified. Certified copies of the tax returns would demonstrate the amount of gross receipts the petitioner reported to the IRS and further reveal that it had actually filed tax returns in the course of doing business. As is further discussed below, the bank statements provided are insufficient to establish the petitioner's financial status and therefore fail to establish the petitioner has been doing business the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

D. Doing Business During the First Year of the New Office

Beyond the decision of the director, the petitioner has not established that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

As observed above, the petitioner filed the Form I-129 on August 24, 2011. The petitioner acknowledged that it did not operate a business while in New York and claimed it only had an office and a bank account. The petitioner's first attempt to conduct business as reflected in the record occurred in July 2011 when the petitioner claims that it purchased two [REDACTED] sandwich shops. However, as noted above, 8 C.F.R. § 214.2(l)(14)(ii) requires specific evidence to be submitted when requesting an extension of a new office petition. In pertinent part, this regulation requires that a new Form I-129, be accompanied by evidence that the United States entity has been doing business

for the previous year and evidence of the financial status of the United States operation. The petitioner provided no evidence that it conducted any business in a regular, systematic and continuous way for the first ten or more months of the new office petition. For this reason, alone the petition must be denied.

In addition, the record does not include sufficient evidence that the petitioner actually purchased an interest in the [REDACTED] shops. The record does not include evidence of the transfer of 49% of its stock to [REDACTED] and does not include documentary evidence that the petitioner paid the initial \$5,000 deposit or paid any subsequent funds to the seller. The record also does not include documentary evidence that the claimed assignment of the [REDACTED] premises or any interest in the franchise has been approved by the [REDACTED] or [REDACTED] LLC. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*.

The record is also deficient in establishing that the petitioner actually operated the [REDACTED] franchises. The record does not include filed and certified copies of the petitioner's quarterly tax returns or of its 2011 IRS Form 1120. The letters provided to vendors dated June 29, 2011, advise the vendors that the same credit cards should be charged but that the new bills need to reflect the petitioner's name as the new company name. Again, the petitioner does not identify the name on the credit cards or any evidence that the credit cards are owned by the petitioner. 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).

Upon review of the totality of the record, the petitioner has not established that it was conducting business during the previous year. Other than changing the name of the owner of the [REDACTED] shops and reporting the name change to the IRS, the petitioner has not provided probative evidence that it was doing business even for the first few weeks prior to filing the petition. 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).

IV. 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.