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

(b)(6)

DATE: JUN 2 5 2013 Office: VERMONT SERVICE CENTER

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

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 employ the beneficiary 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 Florida corporation, states that it operates a scientific consultancy and project management firm. It claims to be an affiliate of located in London, United Kingdom. The petitioner is requesting L-1A status for the beneficiary so that he may serve in the position of Principal Investigator/Senior Manager.

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 director made incorrect findings of fact and that the record supports the conclusion that the beneficiary would be working in managerial status. 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.

(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.

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.

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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 7, 2009. The petitioner indicated on the Form I-129 that it operates a scientific consultancy and project management firm with four

employees and gross annual income of $78,566. In a letter dated July 23, 2009, the petitioner stated that the beneficiary will perform the following duties:

> [The beneficiary] will manage staff recruitment and ongoing business development for [the petitioner] in Florida. He will serve as Senior Manager responsible for implementation of the (see attached contract for details). Some of his responsibilities as Senior Manager will entail supervision of a curriculum development team and managing direction between the educational content providers in the United States and a London-based development team. [The beneficiary's] responsibilities as Principal Investigator of the ' ' project with the Research will include scientific and technical management of a team of three senior contributing consultants based in Florida, and managing the preparation, drafting, and editing of major reports, publications, and presentations. Furthermore, [the beneficiary] will also supervise the technical and operational direction of demonstration projects using phosphogypsum in both agricultural and construction fields.
>
> Finally, [the beneficiary] will supervise the including direction and management of an on-site team consisting of a Project Manager and four consultant analysts. He will also coordinate meetings with the Metropolitan Sewer District and officials.

The initial evidence included a copy of a contract between the State of Florida, and the petitioner dated July 2005 . The contract was for the purpose of conducting a research project known as The contract terms state that the contract shall terminate 12 months after commencement. The petitioner included a second contract between the two parties for conducting a research project titled ' ' The contract commenced on May 16, 2005 and terminated 72 months after commencement. The petitioner provided an invoice dated April 16, 2009 which it issued to for services associated with the project. Finally, the petitioner included an invoice dated February 20, 2009 from Sewer District" for services rendered for the ' The petitioner's initial evidence included an corporate chart which indicated that is a U.S. company which is 49% owned by the beneficiary and his spouse and 51% owned by while all other companies are claimed to be wholly owned by the beneficiary and his spouse.

In its letter dated July 23, 2009, the petitioner noted that the U.S. company "currently does not have any employees on its own, but uses the United Kingdom employees from for management duties." The petitioner stated that the company also relies upon two U.S.-based consultants, The petitioner indicated that the foreign entity has four employees, including the beneficiary, and utilizes the services of "five retained experts."

The director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) evidence that the United States organization is engaged in the regular, systematic, and continuous prevision of goods or services; (2) evidence that shows that Inc. and the petitioner are affiliated; and (3) a copy of the United States organizational chart showing the

location of the beneficiary's current position and the levels of supervision and the number and types of positions the beneficiary will supervise (if any) along with payroll records substantiating the information contained in the chart.

In response, the petitioner included an organizational chart for the U.S. entity and a position description for the beneficiary. The petitioner's organizational chart shows the beneficiary as the "Executive Chairman" reporting to the Group CEO. Reporting to the beneficiary are a Senior Consultant, Geology and Mining; an open Developer Position; a Senior Consultant, Phosphate Sector and a Senior Consultant, Chemical Engineering The petitioner stated that all "the senior consulting staff working for are experienced PhDs with extension senior management experience in the phosphate sector." The petitioner further stated that there "are a number of other consultants who work occasionally for under the supervision of [thebeneficiary]." These positions were not reflected on the organizational chart. The petitioner submitted copies of recent invoices issued by for services performed on the " and by for services performed on an unidentified The petitioner also provided evidence that it issued invoices to requesting payment for the beneficiary's services as Project Director for the conducted for the

With respect to the beneficiaries duties, the petitioner anticipated that if granted, the beneficiary's time "will break out approximately 50/50 between [the petitioning company] and Inc." The petitioner further estimated "the some 10-20% of [the beneficiary's] time will be devoted to internal management of including day to day financial and executive responsibility." Approximately half the beneficiary's remaining time was to be spent executing "the Business Plan with the under the umbrella of the Memorandum of Understanding between

The petitioner further broke down the beneficiary's anticipated work week as follows:

US based work	
operational project work for the MSD project	12 hours
Executive duties for	4 hours
business development work	3 hours
US based work	
various projects	17 hours
General group strategic and business management work	4 hours

The details of the beneficiary's time allocation and responsibilities for were discussed in more detail in a letter from the President of The relationship between was also explained in the letter from the President of as follows:

> On establishment we authorized a founding shareholding of 100,000 penny shares of which 5,100 were allocated to myself and 4,900 to jointly. No further shares have been allocated since. Effective ownership is therefore, 51% in my control and 49% in the control of [the beneficiary] and [his spouse].

stated that the beneficiary has served as the Executive Chairman of since the company's founding and currently spends 55%-60% of his work time on behalf of the company. explained that the beneficiary divides his time between projects (45%-50% of the time) and general duties as Executive Chairman (10%-15% of his time). The letter included an organization chart, showing a total staff of 10 employees with the beneficiary as the head of the company. Under the beneficiary is the President and CEO, Director at Large/Director of Projects, a Senior Consultant, Training Officer, Finance Officer, Senior Consultant, Senior Developer, Chief Information Officer, and Office Manager.

In his letter, anticipated that the beneficiary's time would be needed on an increased basis in November of 2010 when the rollout of the current project began. He explained that the beneficiary acts as the Project Director for the project in which serves as prime contractor for the noted that the contract with currently requires the beneficiary to spend 3 to 5 days per month working on site for the project and to dedicate an additional two days per week to the project off-site, as well as participating in regular Friday management meetins and ongoing off-site supervision of the project team. The beneficiary's commitment was further explained as follows:

> is currently contracted to provide services to until May 2010 as part of Wave 2. [The beneficiary] has direct responsibility for this. Negotiations are well-advanced for Wave 3, which are expected to begin on completion of Wave 2, and to run through the end of 2011. [The beneficiary] will continue as Project Director.

In addition to the project-based work, stated that is "looking to [the beneficiary] to lead the next stage of our growth from his position as Executive Chairman."

As evidence of the relationship between and the petitioner, the petitioner provided a copy of the real estate sales contract entered into by both companies to purchase offices in GA. Additionally, the petitioner included copies of two contracts between and two contractors performing work for [The beneficiary] signed the contracts on behalf of and is supervising them during the projects. As stated by counsel, these "contracts are further proof of the relationship between and
As evidence of employees supervised by the beneficiary, the petitioner includes copies of invoices issued by contractors to for services performed on contracts. The invoices were dated between August and September of 2009. As additional evidence of the beneficiary's subordinates, the petitioner attached payroll records from July to September of 2009 for the President and CEO, as well as the office manager, of

The petitioner submitted a copy of the Memorandum of Understanding or project contract between and for the project and a letter from Executive Director. Dr. explained that the beneficiary is the petitioner's executive responsible for the day-to-day execution of the on a day to day basis, and will be required to allocate approximately 40 to 50% of his time on these responsibilities for pursuant to its agreement with Specifically, stated that the beneficiary will be responsible for: (1) editorial direction of the suite of on-line and in situ training programs for including daily supervision of scientific and IT staff; (2) continued responsibility as Co-Principal Investigator on the project, which is entering the

implementation phase; (3) development and implementation of a joint business plan for and as a member of the Joint Executive Committee; and (4) participation in ongoing series of technical and scientific collaboration meetings with national and international bodies.

The petitioner included evidence of current contracts for including six invoices pertaining to the ' and copies of the two contracts between as well as a letter from stating the current status and duration of the project.

The petitioner provided a copy of its 2008 IRS Form 1120, U.S. Corporation Income Tax Return. The Form 1120 shows that it paid "$0" in salaries and wages as well as "$0" in compensation of officers; however, the company paid $144,000 for "outside services."

The director denied the petition on October 22, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive position. The director found that the contracts for services from the petitioner were either unsigned, outdated, or showed no relationship to the company. The director also found that the tax return indicates few to no employees. Therefore, the record does not establish that the beneficiary has been or will be employed in a managerial capacity.

On appeal, counsel asserts that the record contains sufficient evidence of ongoing contracts between the petitioner and third parties to support a managerial position. With respect to the beneficiary's managerial duties, counsel asserts that the record demonstrates that "supervision and management of the Petitioner's various projects and companies is an essential function of the Beneficiary's duties." Furthermore, counsel states that "the Beneficiary supervises a large number of professional consultants and contractors that work with the Petitioner on the various ongoing projects described herein." Finally, counsel contends that the petitioner met its burden of proof to show that the beneficiary is qualified for L-1 status.

III. ANALYSIS

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").

A. Qualifying Relationship and the Claimed Duties

As a preliminary matter, the AAO finds that there is not a qualifying relationship between the petitioner and In the petitioner's description of the beneficiary's job duties, the petitioner stated that the beneficiary's time, upon approval of the petition, "will break out approximately 50/50" between While the record may show that the beneficiary serves as the Executive Chairman as well as a project supervisor for any duties performed on behalf of this company would not be considered qualifying managerial duties on behalf of the petitioner, as is not a related entity for L-1 purposes.[1]

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'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.

While it appears that the petitioner claims an affiliate relationship between the petitioner and a second United States entity, the petitioner failed to submit probative documentary evidence showing common ownership and control over both the petitioner and the second United States entity.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "affiliate" as follows:

> *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
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> *(2)* One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The

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[1] Approval of this visa petition would authorize the beneficiary's employment with the petitioning employer only. *See* 8 C.F.R. § 274a.12(b)(12). While the beneficiary could seek approval for concurrent employment in the same nonimmigrant classification, the situation would require to file a separate visa petition and still establish a qualifying relationship. *See* Instructions for Form I-129 Petition for Nonimmigrant Worker, page 3 (10/07/11).

corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, United States Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control.

Furthermore, any association between the entities that might be based on contracts, memoranda of understanding, or shared work would be insufficient to establish a qualifying relationship for L-1 purposes. *See* 8 C.F.R. § 214.2(l)(1)(ii) (defining the term "qualifying organization"); *see also Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm'r 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual").

In order to determine whether the petitioner and have a qualifying relationship, the relevant inquiry is what individual or entity controls both United States entities. First, the petitioner claims that the foreign entity is owned 50% by the beneficiary and 50% by the beneficiary's spouse. The petitioner did not submit any further evidence to substantiate this claim. Additionally, in response to the RFE, a letter submitted by the President of states with respect to ownership that "[e]ffective ownership is therefore, 51% in my control and 49% in the control of [the beneficiary] and This statement is further evidenced by a stock certificate submitted by the petitioner showing that 4,900 shares of stock were issued to the beneficiary and for 4,900 shares dated December 26, 2001.

In order for the United States companies to be considered affiliates for L-1 purposes, then either the same parent or individual, or same group of individuals with each individual owning and controlling approximately the same share or proportion of each entity, must own and control both companies. Here, the petitioner is claiming that the beneficiary and his wife have a minority ownership in and have majority control over the foreign entity, Based on the petitioner's claim, one individual, parent, or group of individuals does not have common control between the foreign entity and Infomediaries Inc. for the company to be considered an affiliate of the petitioning entity for L-1 purposes.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Here, the director requested evidence "that shows are affiliated." The petitioner provided one stock certificate, a letter from the President of and evidence of joint business activity between the two entities. The petitioner failed to fully document the

relationship between and the petitioning entity. Evidence of joint business activity does not evidence actual ownership of the companies. The stock certificate showed 4,900 shares of stock issued to the beneficiary and his wife, but there is no evidence in the file to substantiate the total amount of stock issued by the claimed affiliate, or, whether any other stock was issued to other parties. Without further evidence showing all parties having ownership or control over the entity, the affiliated relationship cannot be determined.

The AAO acknowledges that the record contains evidence that the foreign and U.S. companies are related in terms of their business name and officers. However, the regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Absent any additional evidence showing that the foreign entity and the claimed affiliate Inc. are owned and controlled by the same individual or group of individuals, any work for by the beneficiary does not qualify as managerial duties for L-1 purposes.

B. Managerial or Executive Duties

Furthermore, the petitioner's description of the beneficiary's duties for the petitioner fails to establish that the beneficiary would be engaged in primarily managerial or executive duties. While the AAO does not doubt that the beneficiary exercises discretionary authority over the U.S., 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 Senior Manager responsible for the implementation of two projects with the for the petitioner. His job duties included "supervision of a curriculum development team and managing direction between the educational content providers in the United States and London-based development team," as well as "scientific management of a team of three senior contributing consultants," and "managing the preparation, drafting, and editing of major reports, publications and presentations."

While such responsibilities generally suggest that the beneficiary is responsible for oversight of services the petitioner has been contracted to provide, 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).

In response to the RFE, a letter from Finance Officer of the petitioner, detailed the job duties of the beneficiary. In the letter, the petitioner stated that the beneficiary's time would be spent approximately 50% of the time with the petitioner and 50% of the time with a claimed affiliate,

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. 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.

The job duties as described by the petitioner at the time of filing generally stated that the beneficiary will direct the day-to-day operations of the facility and oversee the subordinate team members. 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 new generic duties to the job description.

While the petitioner has submitted a revised job description on appeal, the AAO notes that it diverges significantly from all prior descriptions provided as it includes 50% of the beneficiary's time to be spent performing work for a company other than the petitioner, namely Additionally, a number of the job duties provided were not clearly managerial in nature, including operational project work, business development work, and project work. Without further detail, these duties cannot be concluded to be managerial in nature. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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.

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 a claimed affiliate company, As a preliminary matter, and as stated above, work for does not qualify the beneficiary for L-1 status. Therefore, based on the petitioner's breakdown of the job duties for the beneficiary, only 50% of his time would consist of qualifying duties for managerial status. Therefore, 100% of the beneficiary's remaining duties for the petitioner must be managerial in nature. The general description provided by the petitioner of the beneficiary's U.S. based job duties were ' various projects" (17 hours) and "General group strategic and business management work" (4 hours). 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).

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 petitioner stated on the Form I-129 that there were currently four employees and five "retained consultants" at the time of filing. In a letter dated July 23, 2009, however, the petitioner explained that currently does not have any employees on its own, but uses the United Kingdom employees from for management duties." The petitioner further stated that the beneficiary will serve as Principal Investigator for the " project including scientific and technical management "of a team of three senior contributing consultants based in Florida." According to the 2007 tax returns, no salaries were paid.

In response to the request for additional evidence, the petitioner submitted copies of invoices submitted by two consultants "retained by copies of invoices issued from contractors working for "that are supervised by copies of payroll records; copies of two contracts between and two contractors performing work for supervised by the beneficiary; and a copy of the 2008 tax return showing no wages paid.

As previously discussed, the petitioner did not establish that has a qualifying relationship with the petitioner for purposes of this visa petition. Any employees supervised by the beneficiary for this entity are not qualifying managerial duties for L-1 purposes. The AAO will look to employees supervised by the beneficiary for the petitioning entity only. The only evidence submitted by the petitioner as to its own employees include invoices submitted by two consultants retained by the petitioner and a copy of the 2008 tax returns showing no wages paid. As stated by the petitioner, the two consultants were retained to provide services specifically related to the " " project. The petitioner did not provide any information as to who would be performing the administrative tasks associated with the business

Therefore, it is reasonable to conclude that the beneficiary is the only full-time employee available to provide the services of the consulting 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 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 beneficiary, while charged with management of the company, is the only full-time employee that will work for the U.S. company. The invoices suggest that the beneficiary works with contracted consultants to provide some of the services the company is retained to provide. As explained by the petitioner, the consultants are hired to work

on a particular project and are not involved in the day-to-day operations of the business. Thus, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary performs all other administrative and operational tasks associated with the consulting 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.

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. USCIS,* 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).

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 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 supervision and the types of positions the beneficiary will supervise. While the petitioner provided invoices from two contractors for service performed, the petitioner did not provide the job description or level of education required to perform the contractor position. 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 requires 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 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.

C. Qualifying Relationship with Foreign Employer

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 " " and indicated that this company is located in The petitioner indicated that the U.S. company was an affiliate of the foreign entity. The petitioner stated on the Form I-129 that the U.S. entity was 50% owned by the beneficiary and 50% owned by his spouse. The petitioner's Articles of Association establish that the United States entity has the authority to issue 10,000 shares of a single class of common stock. The petitioner did not submit evidence of stock issuance and has not otherwise established ownership of the U.S. entity.

The 2007 and 2008 Federal tax returns, however, show the beneficiary's spouse as the sole foreign shareholder. *See* 2007 IRS Forms 1120 and 5472 (listing as sole shareholder). Furthermore, a letter dated March 11, 1999 from what appears to be the petitioner's attorney for corporate formation, states that attached documents are "designed for a start-up general business corporation wholly owned by [the beneficiary's spouse]." These two documents indicate that only the beneficiary's spouse, and not the beneficiary and spouse, own the petitioning entity as stated in the initial petition.

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).

Furthermore, the petitioner failed to establish ownership of the foreign entity. The petitioner submitted a certificate of incorporation as well as the front page for the Memorandum and Articles of Association for the foreign company. Neither of these documents establishes who the owners are and what percentage ownership they have over the foreign entity.

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.

IV. CONCLUSION

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).

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.