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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

B4



FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **MAY 14 2009**
LIN 06 253 52901

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

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Florida limited liability company established in 2002, states that it operates a used automobile dealership. The petitioner seeks to employ the beneficiary as its general manager.

The director denied the petition on April 25, 2008 on two independent and alternative grounds. The director determined that the petitioner had not established: (1) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity; or (2) that the U.S. company has a qualifying relationship with the beneficiary's previous foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel objects to the director's conclusions and asserts that the petitioner submitted sufficient evidence to establish the petitioner's and beneficiary's eligibility. In addition, counsel asserts that the petitioner has recently opened a new car dealership. Counsel submits a brief and additional evidence in support of the appeal.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

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-140, Immigrant Petition for Alien Worker, on August 29, 2006. The petitioner stated that it operates a used car dealership with four employees. In a letter dated August 17, 2006, the petitioner described the beneficiary's duties as general manager as follows:

The beneficiary . . . will continue to be responsible for planning, directing and coordinating all management operations for [the petitioner]. His duties and responsibilities include:

- formulating sales trading policies, managing daily business sales operations
- supervising personnel,
- analyzing and planning sales activities
- establishing sales strategies using marketing and sales methods,
- overseeing monthly sales goals and purchase inventory.
- Responsible for the hiring, firing, training and control personnel tasks as well as contractors or subcontracts employees and their induction to the company's regulations.
- He will continue executing the company's financial and investment policies
- This position requires exercising wide latitude of discretionary decision-making applying an extensive knowledge in the automobile sales industry.

Although the petitioner stated that the petitioner has four employees, its Florida Form UCT-6, Employer's Quarterly Report, for the second quarter of 2006 indicated only three employees, including the beneficiary. The other two employees, according to the report, received wages of \$600 per month and appear to have been employed on a part-time basis.

The petitioner submitted an organizational chart which depicts the beneficiary as general manager, a sales department employee (██████████), and a purchase department employee (██████████). The chart also depicts subcontractors and a financial department, but does not identify any additional employees or contractors by name.

The director issued a request for additional evidence (RFE) on July 30, 2007. The director requested, *inter alia*, a statement from the petitioner describing the beneficiary's job title, specific job duties, types of employees supervised and level of authority. The director also requested an updated organizational chart for the U.S. company identifying the individuals the beneficiary supervises, including their specific job duties and level of education. Finally, the director requested evidence of the petitioner's use of contracted employees.

In response, the petitioner submitted a letter dated August 11, 2007, which included the position description that was previously provided for the beneficiary. The petitioner submitted a revised organizational chart which depicts the beneficiary as manager, a financial department employee, ██████████, and a "purchaser manager," ██████████. The petitioner provided evidence that ██████████ were employed at a monthly salary of \$600. The petitioner did not provide the requested job descriptions or educational levels for the beneficiary's subordinates.

The petitioner also provided a list of contractors used by the petitioner. The contractors include towing companies, various automobile mechanics, detailers and body shops, a locksmith, a credit card processing service, a tire seller, and automobile audio equipment sellers. The petitioner submitted evidence of payments to contractors in the form of invoices issued by the external service providers.

The AAO notes that the record includes a number of "Used Car Orders" submitted as evidence of the petitioner's business activities. The order forms identify the beneficiary as the "salesman."

The director denied the petition on April 25, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director noted that the petitioner described the beneficiary's duties in only broad and general terms and failed to provide sufficient detail regarding his actual duties. The director emphasized that, according to the evidence submitted, the beneficiary supervises only two part-time employees who would not relieve him from performing the day-to-day operational functions of the business.

On appeal, counsel reiterates the job description previously provided by the petitioner and asserts that such duties clearly fall within the definitions of managerial or executive capacity pursuant to 8 C.F.R. § 204.5(j)(2). Counsel asserts that the beneficiary qualifies as a manager because he: (1) makes the final decisions regarding which cars to purchase and at what price cars should be sold; (2) supervises and directs all employees and 24 different subcontractors; and (3) has the authority to hire and fire employees and control their work schedules, hours, quotas and goals. Furthermore, counsel asserts that the beneficiary qualifies as an executive because he: (1) establishes sales goals to eliminate inventory; (2) exercises discretion in decision making by having the final say regarding any purchase, pricing or discounts; and (3) receives no direct supervision.

Counsel claims that the beneficiary manages two professionals, namely, business consultants in the fields of accounting and general office management. Counsel objects to the director's conclusion that the beneficiary is engaged in the day-to-day activities of the business, noting that the beneficiary "is responsible for managing 2 staff members who are office clerks and who are responsible for handling the day-to-day operations of the business." Finally, counsel states that the four staff supervised by the beneficiary includes "two accountants and two clerks."

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner has repeatedly provided only a general outline of the beneficiary's responsibilities that fails to specify the actual managerial or executive duties he would perform on a day-to-day basis. Most of the duties described pertain to the sales function, and include formulating sales policies, establishing sales strategies,

analyzing and planning sales activities, managing daily sales operations and overseeing monthly sales goals. Based on the petitioner's representations, the beneficiary primarily manages sales activities; however, a review of the totality of the evidence reveals that the beneficiary himself performs all duties associated with the company's automobile sales, including acting as a salesperson. 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).

At the time of filing, the petitioner claimed to employ [REDACTED] as a sales department employee. The petitioner later identified this same employee in its "financial department" on the organizational chart submitted in response to the RFE. The updated organizational chart did not include a sales department or employees, notwithstanding the fact that the company's primary business is the sale of automobiles. On appeal, counsel asserts that the beneficiary's two part-time subordinates are actually "office clerks." 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). Therefore, even though the petitioner claims that the beneficiary directs and manages sales activities, it does not claim to have anyone on its staff to actually perform the sales function.

Similarly, the petitioner indicates that the beneficiary's duties include purchasing inventory. Again, the petitioner previously indicated that [REDACTED] is employed as "purchaser manager," but on appeal, counsel states that the beneficiary's subordinates are office clerks. The petitioner has not established that the beneficiary would be relieved by direct subordinates or by contractors, from identifying and purchasing used vehicles to be sold by the petitioner's dealership. The petitioner has not established how sales and purchasing activities, which appear to constitute the beneficiary's' primary tasks, qualify as managerial or executive under the statutory definitions.

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). The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In the case of a function manager, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It

is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. Here, although the petitioner indicates that the beneficiary manages the sales and purchasing functions, it has not identified any other employees to perform non-qualifying duties associated with these functions. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as selling the petitioner's products to customers, do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In view of the size and nature of the petitioner's purported business, it appears that the beneficiary will more likely than not perform the tasks related to the sales and purchasing "functions" rather than truly "manage" these function. See generally *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006).

On appeal, counsel for the petitioner indicates that the beneficiary carries out his duties through two professional consultants (an accountant and an office management consultant), two office clerks, and more than 20 contractors. 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).

The evidence of record establishes that the beneficiary supervises two part-time payroll employees. The petitioner has failed to provide requested job descriptions and educational levels for either employee and has changed one employee's job title three times without explanation. There is no credible evidence to support a finding that these employees are professionals, supervisors or managers. While the record shows that the petitioning company uses a number of external service providers and suppliers, the petitioner has not established that the beneficiary acts as a supervisor to these businesses or their employees. In order to be a supervisor, an employee must be shown to possess some significant degree of control or authority over the employment of a subordinate. See generally *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*Cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)).

Although counsel states on appeal that the petitioner has contractual employees in the areas of accounting and office management, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees would obviate the need for the beneficiary to primarily conduct the petitioner's business as its sole full-time employee. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). 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).

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Here, the petitioner has not established how the beneficiary would be relieved of the day-to-day operations of the petitioner's business, such that he could focus the majority of his time on executive duties.

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). However, in reviewing the relevance of the number of employees a petitioner has, 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)). Furthermore, 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).

At the time of filing, the petitioner was a five-year-old company engaged in operating a used car dealership that is open for business for 46 hours per week. The petitioner claimed to employ four employees at the time of filing, but, based on the payroll documentation provided, the petitioner actually employed the beneficiary and two part-time employees. Based on counsel's assertions, these employees are office clerks whose duties have not been defined. The petitioner reasonably requires employees to purchase inventory, coordinate with outside service providers to ready vehicles for sale, sell automobiles to customers, and perform the day-to-day

administrative and financial tasks associated with operating any business. The petitioner has not established that a subordinate staff composed of two part-time office clerks could reasonably relieve the beneficiary from performing these non-qualifying tasks, such that he could primarily focus on performing managerial or executive duties.

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 or her time on non-qualifying duties. A review of the totality of the record fails to establish that the petitioner has a reasonable need for the beneficiary to perform primarily managerial or executive duties at its current stage of development.

The petitioner's arguments on appeal are primarily based upon an alleged expansion in the petitioner's business to include a second car dealership. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on the foregoing discussion, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will be in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issued addressed by the director is whether the petitioner established that the U.S. company has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) 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.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner indicates that both the U.S. entity and the foreign entity, [REDACTED] are wholly-owned by the beneficiary. The petitioner submitted a copy of its membership certificate number one, which was issued to the beneficiary in January 2002, as well as a copy of the U.S. company's operating agreement.

The petitioner states that the foreign entity is a sole proprietorship owned by the beneficiary. In support of this claim, it submitted a document described as "Internal Revenue Statement in reference of Sole Proprietorship Company," which explains the concept of a sole proprietorship under Argentine tax law. The petitioner also submitted what is described as a business license for the foreign entity known as "[REDACTED]." The document was not accompanied by an English translation. The initial evidence also included balance sheets for [REDACTED], and the beneficiary's foreign tax returns.

In the RFE issued on July 30, 2007, the director requested copies of all stock certificates and stock ledgers issued to date for both the U.S. and foreign entities, as well as detailed lists showing who owns each company and in what percentages. The director advised that any document in a foreign language must be submitted along with a certified English translation.

The director also requested evidence that the foreign entity continues to do business, including copies of sales invoices, bank statements, and sales contracts for the period January 2006 to June 2007, a list of major clients, copies of financial statements and a recent telephone directory listing for the company. Finally, the director requested evidence that the U.S. entity has been doing business, including a listing of all vehicles sold since January 2006, copies of its bank statements since 2006, and a copy of its 2006 corporate tax return.

In response, the petitioner submitted a letter from [REDACTED] who stated that she is the general manager of the foreign company. [REDACTED] stated that the beneficiary is the owner of the foreign entity, but that the company is currently listed in the phone book under her name. She explained "there is an extra cost to add a company name to the Argentinean phone book and most of the companies [*sic*] clients are by referral if not all." [REDACTED] further explained that the foreign entity closed its bank account in March 2002 soon after the Argentinean government froze all bank accounts. [REDACTED] stated that the company never reopened its account "in fear of another account freezing by the government." The petitioner did provide the foreign entity's balance sheets for 2005 and 2006, with translations, and copies of the foreign entity's invoices and other business documentation dated 2006 and 2007. In addition, the petitioner submitted the list of vehicles sold since 2006, its 2006 tax return, and the requested U.S. bank statements. The petitioner also submitted several state licenses, but all licenses were issued to "Newport Enterprise Corp."

The director denied the petition, determining that the record contained insufficient evidence of the ownership of the foreign entity, and insufficient evidence that the foreign entity has been doing business and will continue to do business. The director acknowledged the submission of the document described as "Internal

Revenue Statement in reference of Sole Proprietorship Company," but found that the petitioner "fails to state how this document relates to the overseas entity or its relationship to the U.S. entity." The director also found that the petitioner failed to establish how the foreign entity maintains its business accounts in light of its claim that it closed its bank accounts in 2002 and never re-opened them. Therefore, the director found the evidence submitted insufficient to establish that the foreign entity is doing business.

Finally, the director acknowledged the evidence submitted to establish that the petitioner is doing business, but noted that much of the documentation lists the name of the company as "Newport Enterprises Corporation." The director observed that the petitioner did not explain its relationship with this company. Accordingly, the director questioned whether the petitioner is a "viable entity."

On appeal, counsel states:

[The beneficiary] is the legal and sole proprietorship [sic] of R&M Distribuidora, a foreign entity in Argentina. The Adjudications Officer expressed concern about the enrolment [sic] of Newport Corporation, and this was never addressed or explained because it was never asked or addressed in the RFE. Nevertheless, Newport Corp. allowed [the petitioner] to use its license during the initial business transaction while [the petitioner] was able to obtain its own state license. [The beneficiary] is the sole stockholder and investor of [the petitioner] and therefore the required relationship between the foreign and the US entity is met.

Upon review, the petitioner has not submitted sufficient evidence to establish that the U.S. and foreign entities have a qualifying relationship.

Preliminarily, the petitioner has not adequately explained why Newport Enterprise Corp. appears on many of the documents submitted as evidence that the petitioner is doing business. While it appears that Newport Enterprise is the petitioner's landlord and that it owns the property on which the petitioner claims to operate its business, there is nothing in the petitioner's lease agreement to suggest that the petitioner has been granted the right to manage the business known as "Newport Auto Sales" for the owner. The explanation that Newport allowed the petitioner to utilize its state license has not been adequately supported by documentary evidence. 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).

Absent additional explanation and documentation regarding the nature of the relationship between the petitioner and Newport Enterprise Corp., the AAO cannot conclude that the petitioner is doing business as defined in the regulations.

In addition, the petitioner has not adequately documented that the foreign entity continues to do business as a sole proprietorship owned by the beneficiary. While it is true that a sole proprietorship does not issue stock certificates or membership certificates like a corporation or limited liability company, it is reasonable to expect the petitioner to provide some clear evidence that the beneficiary has registered the foreign entity with the proper Argentine authorities as a sole proprietorship and that he continues to be the owner of the entity.

Although the petitioner submitted a document claimed to be a business registration, the petitioner did not submit a certified English translation of the document. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Moreover, the petitioner has not addressed on appeal how the foreign entity is able to operate without a bank account, or otherwise explained the non-availability of such evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Based on the foregoing discussion, the petitioner has submitted insufficient evidence of the qualifying relationship between the U.S. company and the foreign entity. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for at least one year in the three years preceding his entry to the United States as a nonimmigrant, as required by 8 C.F.R. § 204.5(j)(2)(3)(i)(B).

At the time the petition was filed, the petitioner indicated that the beneficiary served as general manager of the foreign entity, but did not provide a description of his duties. Accordingly, the director requested a statement from the foreign entity clearly describing the duties the beneficiary performed as general manager, and an organizational chart for the overseas entity, including the job titles, duties and educational level of the beneficiary's subordinates, if any.

In response, the petitioner submitted a letter from the foreign entity's general manager, [REDACTED] dated August 11, 2007. [REDACTED] stated that the foreign entity is "in the business of manufacturing paper products for book compositions, binders and other paper products. . . .as well as sale and distribution of first aid kits to doctors." [REDACTED] indicated that the foreign entity "buys the prime material, sends them to a factory who produces the first aid kits, and then these are sold and distributed thru [the foreign entity]."

[REDACTED] provided a position description for the beneficiary that was identical to his job description with the U.S. entity, and included "exercising discretionary decision-making applying an extensive knowledge in the automobile sales industry." Since the foreign entity is not engaged in the automobile industry or a similar industry, the AAO does not find this description of the beneficiary's duties to be credible, and is left without any meaningful description of what duties the beneficiary performed as general manager of the foreign entity's paper product manufacturing and first aid kit distribution business. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also provided an organizational chart for the foreign entity which identifies a general manager responsible for "production, purchases, special sales," an administrative employee responsible for "invoicing, distribution, liquidator of salary," and a head of sales employee responsible for "sales, collector, quality control." The beneficiary is identified as the "president" on the chart. Based on payroll records provided by the petitioner, the organizational chart appears to represent the staffing of the foreign entity as of 2007. The beneficiary has been in the United States since 2002 and therefore the relevant time period is the three years preceding his transfer to the United States as a nonimmigrant. The record as presently constituted contains no information regarding the staffing structure in place at the foreign entity during this period. 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*, 22 I&N Dec. at 165.

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 section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercised discretion over the foreign entity's day-to-day operations and had the appropriate level of authority, the petitioner has failed to show that his actual duties were primarily in a managerial or executive capacity. For this additional reason, the petition will be denied.

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). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO acknowledges that USCIS has previously approved three L-1A petitions filed by the petitioner on behalf of the instant beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(i)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity).

Despite any number of previously approved petitions, USCIS does not have any authority to confer an *immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition*. See section 291 of the Act. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approvals by denying the instant petition.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.