

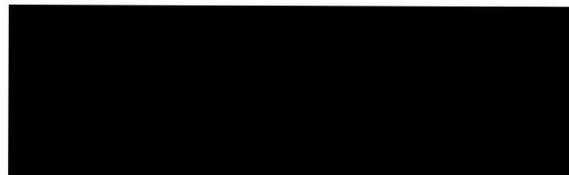
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 06 2009  
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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:



**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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

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

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 California corporation, states that it provides computer software development and programming services and also operates a bakery under a fictitious name, "Royal Baker." It claims to be a subsidiary of Sharmahd Computing GmbH, located in Germany. The petitioner seeks to employ the beneficiary in the position of president.

The director denied the petition on three independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity; (2) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity; and (3) that the petitioner and the foreign entity have a qualifying relationship.

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 addresses the director's finding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, but does not acknowledge or discuss the remaining two grounds for denial of the petition. Counsel asserts that the director placed undue emphasis on the size and staffing levels of the petitioning company without considering its current stage of development and "completely ignored the fact that clearly beneficiary's activities can be considered those of a 'functional manager.'" The appeal includes counsel's brief and additional documentary evidence.

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 or 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, which 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.

#### I. Managerial or Executive Duties with the United States Employer

The first issue to be addressed is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;

- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on February 13, 2009. The petitioner indicated on Form I-140 that the beneficiary would be employed as president and indicated that would perform the following duties:

[M]anage customer and technical services, oversees and finalizes the negotiations with major software vendors, manages all marketing activities and contacts manufacturers for strategical partnerships with a number of software companies, oversee the entire operation of the companies, setting goals and procedures.

In a letter dated February 10, 2009, counsel for the petitioner stated that the petitioner's "principal business is computer software development and applications and custom computer programming services." Counsel further stated that the petitioner acquired a pastry business known as "Royal Baker" in 2007 and has spent over \$100,000 upgrading the facilities since the acquisition. Counsel stated that the beneficiary's duties as president would include the following:

Beneficiary will continue to manage customer and technical services particularly Customers who purchased a larger number of software licenses. He manages new products, projects in software and industry automation, such as solutions for messaging systems and solution for water treatment industry. [The beneficiary] oversees and finalizes negotiations with major software vendors for [the petitioner]. He manages all marketing activities and contacts manufacturers for strategical [sic] partnerships with a number of software companies to incorporate our product as part of broader software solutions. For Royal Baker, Beneficiary will oversee the entire operation of the companies, setting goals and procedures. He has final say in the hiring and firing of employees, determination of advancements and salary increases. As President of both companies, he sets organizational structure, policies and functions. He heads the decision making in business matters specifically in client issues and purchases.

For both companies, [the beneficiary] visits and develops business relationships with current and potential clients. He establishes professional relationship with banking institutions to ensure smooth running of operations. He creates and implements the business plan and its future plans for expansion.

The petitioner submitted a copy of its 2007 IRS Form 1120, U.S. Corporation Income Tax Return, which indicated that the petitioner reported no salaries, wages, payments to contractors, or cost of labor in 2007. The petitioner also provided copies of its IRS Forms 941 and 940, and its California Forms DE-6, Quarterly Wage and Withholding Report, for the years 2005 through 2008. The petitioner paid \$20,250 to the beneficiary in

2006, \$28,500 to the beneficiary in 2005, and no salaries or wages in 2007 or during the first three quarters of 2008. In the fourth quarter of 2008, the petitioner paid \$6,000 to the beneficiary and \$1,950 to [REDACTED]

The petitioner submitted a copy of its lease agreement signed on November 28, 2008. According to the terms of the agreement, the petitioner leases a portion of an office or office suite from Mitra Automation, Inc. The agreed use of the premises is: "To implement and closely coordinate programming functions of [the petitioner] for Mitra Automation software development projects."

The petitioner also submitted a letter dated March 24, 2005 from [REDACTED], managing director of its claimed parent company, Sharmahd Computing, GmbH. [REDACTED] explains that the company's product "SC UniPad," is mainly sold in the United States and therefore requires the ongoing operation of the U.S. office. Specifically, he mentions that the U.S. customers expect a telephone hotline for sales and technical support issues during normal business hours, prompt response to electronic mail inquiries, and a clear understanding of U.S. business conventions. [REDACTED] further notes that customers who have purchased a larger number of software licenses may require 24/7 support from a service technician, while other customers expect integrated hardware-software solutions that must be developed through the cooperation of hardware vendors and dealers in the United States. Finally, [REDACTED] stated that the U.S. office was established, in part, to aid the company in locating strategic partnerships with other software companies who may be willing to incorporate the petitioner's product into a larger software solution.

Finally, the petitioner provided a copy of a fictitious business name statement indicating that the petitioning company registered the name "[REDACTED]" in July 2007. The petitioner provided evidence that the beneficiary passed a "Food Safety Manager Certification Examination" on November 6, 2007, and submitted copies of current licenses for the bakery.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, on March 6, 2009, the director issued a request for evidence (RFE), in which he instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed position of the beneficiary's duties which explains the actual specific day-to-day tasks he will perform, supplemented by an estimate of the amount of time the beneficiary will dedicate to each specific duty; (2) a detailed organizational chart for the U.S. company which includes the names and a detailed description of job duties for all employees subordinate to the beneficiary; (3) copies of IRS Form W-2 for all employees for 2007 and 2008; and (4) a copy of the petitioner's 2008 corporate tax return, if available.

In a response dated March 30, 2009, counsel for the petitioner restated verbatim the position description for the beneficiary that was included in his letter dated February 10, 2009. The petitioner submitted a list of the U.S. company's employees as follows:

Operations Manager (\$30,000; Full time)

Duties: Reports directly to the president. Handles sales transactions, use professional accounting background to supervise overall financial and related issues. Supervises kitchen activities, as well as product development.

Kitchen Supervisor (Commissioned; Full time)

Duties: Reports directly to the Operations Manager. Is in charge of the kitchen. Reports inventory status. Directs the workers. Determines Kitchen Workers work hours. Also in charge of new product development.

Kitchen Worker (\$8.00 per hour)

Duties: Works in the kitchen, seals products, restocks inventory, helps prepare the dough.

Kitchen Worker/Dish washer (\$8.00 per hour)

Duties: Works in the kitchen, washes dishes, cleans equipment, packages product.

The director denied the petition on June 21, 2009, 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 noted that the petitioner submitted a vague and non-specific job description that was insufficient to establish that his primarily duties would be managerial or executive in nature. The director noted that, despite the petitioner's claim that it employs an operations manager, a supervisor and two kitchen workers, the record contains no evidence of wages paid to three of these employees, and evidence of only minimal wages paid to the operations manager. The director concluded that, absent evidence of a subordinate staff, it is reasonable to conclude that the beneficiary is in fact involved in the day-to-day operations of the business, rather than performing primarily managerial or executive duties. The director emphasized that it was not the size of the business, but rather the lack of a detailed position description for the beneficiary and the lack of evidence that other employees are available to operate the business, which were the determining factors in the denial of the petition.

On appeal, counsel for the petitioner once again reiterates the position description for the beneficiary that was included in his letters dated February 10 and March 30, 2009. Counsel states:

Petitioner has submitted a statement on its letterhead reflecting the duties of the beneficiary, as president and Chief Executive Officer, at the time of filing the petition. This letter discusses the job descriptions of his subordinates. Finally, the letter describes a typical, not an eventful day for the executive. The nature and scope of the duties described in this letter, the status and activities of his subordinates [*sic*] staff and his responsibilities and obligations clearly demonstrate that substantially all of his activities are at the managerial or executive level.

Counsel further states that, pursuant to 8 C.F.R. §204.5(j)(4)(ii), the director is required to take into account the reasonable needs of the petitioning organization in light of its overall purpose and stage of development when considering the petitioner's staffing levels as a factor in determining whether the beneficiary will be employed in a primarily managerial or executive capacity. Counsel asserts that the petitioner "was a little over two years old when it submitted the present petition," and clearly requires a president to run the business "at this critical stage in development." The AAO notes that the petitioner was in fact incorporated in California in

2002, seven years prior to the filing of the instant petition, and the petitioner indicates that the beneficiary has served as the president of the U.S. company since that time.

Counsel further alleges that "the staffing of the company is composed primarily of companies under contract with Petitioner," and asserts that the director erred by finding "that the petitioner cannot show the necessary staffing levels to support the executive nature of Beneficiary's position." Counsel asserts "the number of actual employees, as opposed to other staffing arrangements, should not be considered dispositive in disqualifying Beneficiary as an executive or manager." In addition, counsel states that "the definition for executive capacity does not make any reference to the supervision of other employees, especially subordinate managers." Counsel claims that "it should not be of greater significance that there are few if any actual employees" as long as the beneficiary performs the duties outlined in the statutory definition. Counsel states that "all of the activities are demonstrated either directly by contract or by inference in the nature of the business relationships established and underscore the basic executive duties of the beneficiary."

Counsel further contends that the beneficiary's managerial and executive capacity is demonstrated by the fact that the petitioner has been able to "maintain its staff and modestly increase its sales" during an economic recession. Counsel states that the beneficiary "is needed in a executive/managerial capacity to 'stay the course' until the economy improves enough to support further growth."

Finally, counsel argues that the director "fails to consider the obvious fact that beneficiary's activities can be characterized as a 'functional manager.'" Counsel asserts that the regulations "seem to imply that if the employer/Petitioner can show that the same employee manages an 'essential function' of the company, however, the percentage of the employee's managerial duties or the number of employees supervised is irrelevant." Counsel cites unpublished AAO decisions in support of his claim that it is unnecessary for functional managers to be employees of large organizations.

In support of the appeal, the petitioner submits copies of IRS Forms W-4, Wage and Tax Statement (2009) and Form I-9, Employment Eligibility Verification (Rev. 02/02/09), for the beneficiary, and the individuals previously identified as the operations manager, kitchen supervisor and kitchen workers.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

Prior to addressing this issue, the AAO must emphasize that the critical facts to be examined are those that were in existence at the actual time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

A. *Employer's Position Description*

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.* In addition, 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 petitioner's initial description of the beneficiary's duties offered little insight into what he does on a day-to-day basis as president of a company that operates a computer software development business and wholesale bakery. The beneficiary's job description includes vague duties such as "manages customer and technical services for Customers who purchased a larger number of software licenses"; "manages new products, projects in software and industry automation"; and "manages marketing activities and contacts to manufacturers for strategical [*sic*] partnerships." Based on this brief description, the beneficiary's exact role in marketing, selling, designing the petitioner's products and providing the petitioner's services could not be discerned. The petitioner did not indicate how the beneficiary would carry out his responsibilities or clearly indicate that subordinate employees would relieve him from performing non-qualifying duties associated with his assigned functions. 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).

The beneficiary's duties with respect to the "[REDACTED]" business were described in even vaguer terms. For example, counsel indicated that the beneficiary will "oversee the entire operation," set goals and procedures, "head the decision making in business matters," and "set organizational structure, policies and functions." These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. 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 has 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. at 1108. The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

Furthermore, upon review of the initial position description, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties and the percentage of time the beneficiary would allocate to each duty. The petitioner did not submit the requested job description as requested by the director. Instead, counsel reiterated verbatim the initial job description, which was already reviewed and deemed to be insufficient. Therefore, the petitioner's claim fails on an evidentiary basis. 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).

Although the director specifically cited the lack of a detailed position description as a determining factor in the denial of the petition, neither counsel nor the petitioner has sought to clarify the beneficiary's actual duties on appeal, or to provide a breakdown of the percentage of time the beneficiary devotes to managerial and executive duties as opposed to operational functions. Rather, counsel reiterates the initial position description and suggests that, since the beneficiary is a function manager "the percentage of the employee's managerial duties. . . . is irrelevant."

Counsel's argument is unpersuasive. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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 AAO notes that there is little concrete evidence in the record regarding the U.S. company's activities in the computer software development sector. The foreign entity's managing director indicates that the U.S. company was established to ensure the availability of telephone and e-mail support for customers with sales and technical support inquiries, to provide 24/7 technical support for major customers, to provide integrated hardware-software solutions by developing relationships with U.S. hardware vendors, and to seek strategic partnerships. The petitioner's lease agreement signed in November 2008 indicates that the petitioner is required "to implement and closely coordinate programming functions . . . for Mitra Automation software development projects," while occupying a portion of Mitra Automation's premises. The petitioner does not claim to have any personnel in the United States subordinate to the beneficiary to perform non-qualifying duties associated with customer and technical support activities, or to perform the "programming functions" referenced in the lease agreement. There are various unsubstantiated claims regarding the petitioner's use of contracted staff, but no probative evidence that the petitioner utilizes the services of contractors to conduct the technical and customer support aspect of the business.

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)).

Therefore, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary performs all managerial and non-managerial functions associated with the petitioner's computer software business. The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary, and failed to establish that anyone besides the beneficiary is available to perform customer and technical support, marketing and other non-qualifying functions associated with operating this aspect of the U.S. business. Collectively, this brings into question how much of the beneficiary's time can realistically be devoted to managerial or executive duties. The statute requires that the beneficiary primarily perform duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d at 177. Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

#### B. *Personnel Manager*

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).

With respect to the bakery operations, the petitioner claims that the beneficiary manages a staff of four workers responsible for operating the petitioner's bakery, including an operations manager, a kitchen supervisor, and two kitchen workers. The petitioner submitted evidence that it employed the operations manager during the last quarter of 2008; however, she received wages that were significantly lower than her stated salary of \$30,000. The wages of \$1,950 paid over a three-month period would be commensurate with part-time employment. As noted by the director, the petitioner has not submitted evidence that it employs the kitchen supervisor or the two kitchen workers.

Counsel does not directly address this deficiency in his brief, but the petitioner does submit copies of IRS Forms W-4, Wage and Tax Statement (2009), and DHS Forms I-9, Employment Eligibility Verification (Rev. 02/02/09), for all claimed employees of the company, including the beneficiary. Any USCIS Forms I-9 presented by a petitioner must be accompanied by other evidence to show that these employees have commenced work activities. Forms I-9 verify, at best, that a business has made an effort to ascertain whether particular individuals are authorized to work; they do not verify that those individuals have actually begun working. *See Matter of Ho*, 22 I&N Dec. 206, 212 (Assoc. Comm. 1998). Similarly, Forms W-4 are insufficient as evidence that an employee has actually been receiving wages.

Furthermore, in this matter, it appears that the petitioner's employees have backdated their Forms W-4 and Forms I-9. For example, the submitted documents indicate that the beneficiary and the operations manager purportedly signed the 2009 versions of the Forms W-4 in September 2008, when the form was not released to the public until December 2008. See <http://www.irs.gov/app/picklist/list/formsInstructions.html?value=w-4&criteria=formNumber> (noting a posted date of December 22, 2008). The AAO also notes that the purported kitchen workers signed the DHS Forms I-9 on September 30, 2008, prior to the form's date of publication – "Form I-9 (Rev. 02/02/09) N Page 4" – that is annotated at the bottom of the page. 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). 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. *Id.* at 591.

In the absence of such evidence as pay stubs and payroll records for 2009, the petitioner has not established that the petitioner, as of the date of filing, employs a subordinate staff who would relieve the beneficiary from performing non-qualifying duties associated with operating the petitioner's bakery other than one part-time operations manager. Furthermore, the record indicates that the beneficiary himself undertook the required training and examination to become a food safety manager, which further suggests that he has been directly involved in the operation of the bakery. The petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support a "personnel manager." In the present matter, the totality of the record does not support a conclusion that the beneficiary's one documented subordinate is a supervisor, manager, or professional, notwithstanding her stated job title of "operations manager." Rather, the evidence suggests that the beneficiary and the operations manager would both be required to perform the non-managerial duties associated with operating a bakery in order for that business to remain productive.

### C. *Function Manager*

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. However, 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, 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. 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 this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

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. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages. Even if the beneficiary does not directly supervise employees, it is the petitioner's obligation to establish that someone other than the beneficiary performs the day-to-day non-managerial tasks of the function managed.

Counsel's unsupported assertion that the beneficiary manages all the essential functions of the corporation is insufficient to meet the petitioner's burden of proof. Even if it were proven, the fact that the beneficiary manages a business would not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meanings of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738,5739 (Feb. 27, 1987). The record must establish that the majority of the beneficiary's actual duties are managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. v. Sava*, 724 F. Supp. at 1108.

As discussed above, the beneficiary's job description appears to include non-qualifying duties associated with the petitioner's day-to-day functions, and the petitioner has not sufficiently identified a subordinate staff who would relieve the beneficiary from performing routine duties inherent to operating the company on a day-to-day basis. The fact that the beneficiary has been given a managerial job title and is the sole full-time employee of the company is insufficient to elevate his position to that of a "function manager" as contemplated by the governing statute and regulations. The petitioner has not articulated with any specificity what function or functions are managed by the beneficiary, or what percentage of his time is devoted to managing such functions. 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.

#### D. Executive Capacity

On appeal, counsel also asserts that the beneficiary will serve in an executive capacity based on his job duties, and that there is no requirement that an executive supervise subordinate staff.

The AAO notes that 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.*

In this matter the petitioner has not demonstrated that the beneficiary will primarily direct the management of or establish the goals and policies of the organization. As of February 2009, the petitioner had not attained the organizational complexity wherein hiring/firing personnel, discretionary decision-making, and setting company goals and policies would constitute significant components of the beneficiary's duties performed on a day-to-day basis. The petitioner has offered no evidence that when the petition was filed it employed or otherwise utilized the services of individuals who would carry out the petitioner's operational tasks, thereby relieving the beneficiary from performing primarily non-qualifying duties.

#### E. *Reasonable Needs*

Finally, on appeal, counsel for the petitioner asserts that the "service failed to take into account the reasonable needs of petitioner in light of its overall purpose and stage of development." Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

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 (9<sup>th</sup> 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 seven-year-old company that claimed to have four employees and a gross annual income of \$100,000. The petitioner provided evidence that it employs the beneficiary and one part-time operations manager who works in the petitioner's bakery. The AAO notes that the petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the two distinct business operated by the U.S. company. The petitioner reasonably requires employees to market and promote its software products and services, respond to telephone and electronic mail inquiries from customers, regarding sales and technical issues, maintain relationships with vendors, and handle the company's day-to-day financial and administrative tasks, in addition to performing the various non-managerial tasks associated with operating a wholesale bakery.

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and one part-time employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On appeal, counsel refers to several unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has not established that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based upon evidence submitted, it is reasonable to conclude, and has not been show otherwise, that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its president. 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. 1988). The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

## II. Managerial or Executive Duties with the Overseas Employer

The second issue to be address is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

At the time of filing, counsel for the petitioner stated that the beneficiary was employed as managing director of the foreign entity from 1997 until 2002. The petitioner did not submit a detailed description of the beneficiary's duties. In the RFE issued on March 6, 2009, the director requested that the petitioner describe the duties for the beneficiary's foreign position and explain the specific day-to-day tasks that were involved with the completion of each duty. The director also requested a detailed organizational chart for the foreign entity that corresponds with the dates of the beneficiary's employment abroad.

In response, counsel for the petitioner provided the following position description:

In his capacity as the Managing Director of [the foreign entity], [the beneficiary] oversaw and coordinated the development of software systems for marketing and sales support in industry, including systems for product presentation using electronic media and for product selection such as projection software and ordering assistance. Under his guidance, the company

developed the SC Unipad, a multilingual software solution that was marketed internationally. . . . Specifically, he oversaw the 5 employees, all of whom had advanced degrees in computer science or engineering (except [REDACTED] who is a qualified accountant.) He directed capital expenditures, designated product parameters and directed employees in all aspects.

The petitioner submitted a list of the foreign employees dated December 18, 2008. The list includes a chief executive officer, a part-time employee in the accounting and law department (paid by commission), and three part-time software development employees, also paid by commission.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. The director observed that the failed to submit the requested detailed description of the beneficiary's duties and the requested organizational chart for the foreign employer.

On appeal, counsel for the petitioner does not address this issue or otherwise acknowledge this ground for denial of the petition. Consequently, the AAO affirms the director's determination and will dismiss the appeal.

The AAO concurs that the brief position description provided in response to the RFE fell significantly short of providing the level of detail and specificity requested. Again, 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 has 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. at 1108.

Furthermore, the director specifically requested an organizational chart reflecting the staff of the foreign entity during the beneficiary's period of employment abroad. Based on the petitioner's representations, the beneficiary was employed by the foreign entity in Germany from 1997 until 2002. Rather than providing the requested organizational chart depicting the staff of the foreign entity during the relevant time period, the petitioner provided a list of the foreign entity's employees as of December 2008. 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).

### III. Qualifying Relationship

The third and final issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign entity. 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 petitioner claims to be a wholly-owned subsidiary of Sharmahd Computing GmbH, a German company. At the time of filing, the petitioner submitted copies of the U.S. company's articles of incorporation, by-laws,

and minutes of the first meeting of incorporators and directors held on February 24, 2002. The meeting minutes indicate that the company issued 1,000 common shares with no par value to the foreign entity in exchange for an unidentified amount of cash. The same document also indicates that the company directors agreed to issue 100, rather than 1,000, shares of stock.

The petitioner also submitted a copy of its stock certificate #2, issued on May 15, 2002. The stock certificate, which was not signed by the company's officers, indicates that 10,000 shares, all of the petitioner's authorized shares, were issued to the foreign entity.

In the request for evidence issued on March 6, 2009, the director noted that the stock certificate submitted was unsigned and that the petitioner had failed to provide a copy of its stock certificate number 1. The director instructed the petitioner to provide further documentary evidence to establish the claimed qualifying relationship between the petitioner and the foreign entity including, but not limited to, the stock ledger and copies of all issued stock certificates for the U.S. company.

In his letter dated March 30, 2009, counsel for the petitioner explained that the U.S. company's stock certificate #1 was voided due to typographical errors, and that share certificate #2 is the only certificate currently issued. The petitioner re-submits the company's organizational minutes, indicating that 1,000 shares were issued to the foreign entity, and re-submitted a copy of its stock certificate #2. The newly submitted copy of stock certificate #2 was signed by the beneficiary in his capacity as president of the petitioner.

The petitioner also submitted a copy of its stock transfer ledger. The first entry in the ledger states "Void by errors." It does not indicate when or to whom the shares were issued or when it was voided. The second entry on the stock ledger indicates that 10,000 shares were issued to the foreign entity on stock certificate #2 in exchange for \$50,000. The date of issuance is not completed on the ledger. Counsel stated in his letter that the petitioner was also submitting "Form 25102(f) Notice of Issuance of Shares," but the AAO notes that this document was not included in the petitioner's response.

The petitioner's response to the RFE included a copy of the company's IRS Form 1120, U.S. Corporation Income Tax Return, for 2008. At Form 1120, Schedule K, the petitioner responded "No" when asked if any foreign or domestic corporation, partnership or trust owned directly 20% or more, or owned, directly or indirectly, 50% or more of the total voting power of all classes of the corporations' stock. The petitioner responded "Yes" where asked whether one foreign person owns, directly or indirectly at least 25% of the petitioner's stock or voting stock. The petitioner indicated that it has a German owner who holds 100% of the company's stock, but it there is no supplemental information to identifying the owner. According to Form 1120, Schedule L, the value of the petitioner's issued common stock is \$10,000, not the \$50,000 sum indicated on the petitioner's stock ledger.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner and the foreign entity have a qualifying relationship. The director noted the unresolved discrepancy between the organizational minutes, which indicate that 1,000 shares would be issued to the foreign entity, and the petitioner's stock certificate #2, which indicated that 10,000 shares were issued. The director concluded that the evidence as a whole was insufficient to establish the claimed qualifying relationship.

On appeal, counsel does not acknowledge, much less attempt to overcome, the director's finding that the petitioner submitted insufficient evidence to establish the claimed parent-subsidary relationship. Counsel's arguments on appeal are limited to a discussion of the beneficiary's employment with the U.S. company. Accordingly, the AAO will affirm the director's decision and dismiss the appeal.

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.

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 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, USCIS is unable to determine the elements of ownership and control.

As noted by the director, the record contains an unresolved discrepancy with regard to the number of shares actually issued to the foreign entity. The company's organizational meeting minutes indicate that the petitioner's directors agreed to issue either 100 or 1,000 shares to the foreign entity on February 24, 2002, while the only submitted stock certificate indicates that the foreign entity was issued 10,000 shares on May 15, 2002. There is also an unresolved discrepancy with respect to the amount paid in exchange for the issuance of the petitioner's stock. The petitioner indicates in its stock transfer ledger that the foreign entity paid \$50,000 for the issued shares, but reports on its corporate tax returns that its issued stock has a value of \$10,000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Finally, the AAO finds the incomplete entry in the petitioner's stock transfer ledger with respect to stock certificate #1 insufficient to establish that the certificate was in fact voided. It is reasonable to expect the petitioner to have available a copy of the voided certificates to substantiate its claim that it was in fact canceled due to a typographical error. 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.

Based on the foregoing discussion and the petitioner's failure to contest this issue on appeal, the petition will be denied for this additional reason.

#### IV. Ability to Pay

Beyond the decision of the director, the remaining issue in this matter is whether the petitioner established that it has the ability to pay the beneficiary's proffered annual salary of \$50,000 as required in the regulation at section 204.5(g)(2). The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. The record shows that the petitioner paid the beneficiary wages of \$6,000 in 2008. The petitioner has not provided evidence that it was paying the beneficiary the proffered salary of \$1,000 per week as of February 2009 when the petition was filed.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now USCIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on February 13, 2009, USCIS should examine the petitioner's tax return for 2009. However, the petitioner will not be required to file its 2009 tax return until after January 2010 and the document remains unavailable. Therefore, the AAO will review the petitioner's 2008 corporate tax return. The petitioner's Form 1120 presents a net loss of \$10,847.00. The petitioner does not have sufficient net income to pay the proffered salary.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. The petitioner's IRS Form 1120 for calendar year 2008 presents net assets of \$3,452. The petitioner could not pay a proffered wage of \$52,000 per year out of these current assets.

Based on the foregoing, the petitioner has not established that it has the ability to pay the beneficiary's proffered wage. 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). 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 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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 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.