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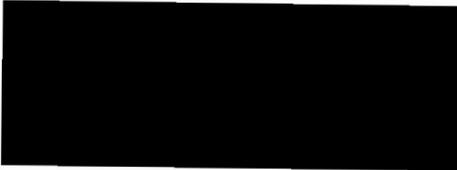


File: SRC 06 115 51888 Office: TEXAS SERVICE CENTER Date: **MAY 15 2007**

IN RE: Petitioner:   
Beneficiary: 

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Texas corporation **that claims to be engaged in the operation of a restaurant. The petitioner states that it is an affiliate of [REDACTED]** located in Caracas, Venezuela. The petitioner seeks to employ the beneficiary as its operations manager for a three-year period. The petitioner indicates that the beneficiary has been in the United States as a B-2 nonimmigrant visitor since September 19, 2003, and therefore also seeks a change and extension of status on her behalf.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity; or (2) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence previously submitted establishes that the beneficiary has been and would be employed in a managerial capacity. Counsel suggests that the director placed undue emphasis on the size of the foreign and U.S. entities without taking into consideration the overall purpose and stage of development of the companies. Counsel submits a brief and documentary evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue addressed by the director is whether the petitioner established that the beneficiary will 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 nonimmigrant petition on February 28, 2006 and indicated on Form I-129 that the beneficiary would serve as the operations manager of the U.S. company. The petitioner stated that it operates a restaurant with four employees. On Form I-129, the petitioner described the beneficiary's proposed duties as follows:

Plan, direct, or coordinate the operations of companies or public and private sector organization. Duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one functional area of management or administration, such as personnel, purchasing, or administrative services.

The petitioner, in a letter dated February 25, 2006, also provided the following description of the beneficiary's proposed duties:

As an Operations Manager, [the beneficiary] will be responsible for the company's overall management and expanding the Company's business in the United States. Her duties will include both, managing and directing the development of the company at the managerial level, and managing all professional and non professional employees in charge of the business progress. [The petitioner] is expected to provide services and to grow within the US market and reach an estimated sales value in excess of \$1 Million between 2006 and 2009.

Her duties shall also include planning and directing market strategy as per the Company's business plan; planning, directing and implementing the Company's business plan and profitability goals; managing and directing the Company's annual budget; authority to hire and fire all employees. Currently the Company has four employees in addition to [the beneficiary] who will serve as the Operations Manager. In general, [the beneficiary] will develop the Company's operations completely and have full discretionary authority over the day-to-day operations.

The petitioner submitted an organizational chart for the U.S. company which depicts the beneficiary's proposed position, and shows that she will report to the company president, and supervise an accounting and administration employee, one driver, one cashier, and one cook. According to the evidence of record, the petitioner operates a [REDACTED] restaurant, which appears to be a regional chain. The petitioner submitted advertisements and menus indicating that the restaurant is open for business at least ten hours daily, and offers dine-in, carry-out, delivery and catering options.

On April 21, 2006, the director issued a request for additional evidence, advising that the job description submitted was too general and vague to establish that the beneficiary would be employed in a managerial or executive capacity. Accordingly the director requested that the petitioner: (1) clearly state the duties and responsibilities of the beneficiary's position within the context of the petitioner's business; (2) indicate the number of employees who will report to the beneficiary and include a brief description of their job duties and educational background; and (3) explain how the beneficiary will not engage in the day-to-day operations of the business, and how she will be primarily engaged in managerial or executive duties. The director also requested copies of the petitioner's quarterly wage reports for all employees from January 2005 to the present.

In a response dated July 19, 2006, the petitioner submitted the following expanded description of the beneficiary's proposed duties as operations manager of the U.S. company:

- A. Administration and Business Managing: Direct and coordinate activities of business concerned with the production, pricing, sales, and/or distribution of products. Review

financial statements, sales and activity reports, and other performance data to measure productivity and goals achievement and to determine areas needing cost reduction and program improvement. Determine goods and services to be sold, and set prices and credit terms, based on forecasts of customer demand. (40%)

- B. Supervising Employees: Manage employees, preparing work schedules and assigning specific duties. Establish and implement departmental policies, goals, objectives and procedures, conferring with board members, organization officials, and staff members as necessary. (20%)
- C. General Supervision: Oversee activities directly related to making products or providing services. (20%)
- D. Training: Determine staffing requirements, and interview, hire and train new employees, or oversee those personnel processes (10%)
- E. Coordinate Marketing Strategies (10%)

The petitioner stated that the beneficiary's direct subordinates will include: (1) a store manager, who supervises sales and day-to-day operations, manages drivers/cashiers/cooks, places orders with suppliers, and ensures quality of the petitioner's products; and (2) an accounting/administration employee, who is responsible for general accounting, tax records, tax payment, state and federal government relationships, and accounts payable. The petitioner also indicated that the U.S. company employs one cashier, one cook, and two drivers, and provided brief job descriptions for each employee. The petitioner also provided the dates of employment for each employee, and indicated that the store manager and two drivers were hired in July 2006, the accounting/administration employee was hired in March 2006, while the other employees were working for the petitioner at the time the petition was filed.

The petitioner also submitted copies of partially completed, un-dated Forms I-9, Employment Eligibility Verification, for most employees, not including the accounting employee; copies of educational credentials for the beneficiary's two direct subordinates; a July 15, 2006 pay stub for the petitioner's cashier, who worked 18 hours over a two-week period; a July 15, 2006 pay stub for the cook, who worked approximately 15 hours over a two-week period; a June 15, 2006 pay stub for a driver, who worked roughly 11 hours in a two-week period; and a July 15, 2006 pay stub for the other driver, who worked 40 hours in a two-week period. The petitioner did not include evidence of any payments to the store manager or to the accounting/administration employee. The petitioner provided copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for [REDACTED], " the company which formerly operated the pizza restaurant purchased by the petitioner, for all four quarters of 2005. The petitioner did not include copies of any IRS Forms 941 filed by the beneficiary's proposed U.S. employer, Cortical Systems, Inc.

The director denied the petition on October 4, 2006, concluding that the petitioner had failed to establish that the U.S. company would employ the beneficiary in a primarily managerial or executive capacity. The director suggested that the petitioner had merely asserted that the beneficiary will be employed as a manager, but had failed to submit evidence to corroborate those claims.

Counsel for the petitioner filed the instant appeal on November 2, 2006. On appeal, counsel reiterates the job description submitted in response to the request for evidence and re-submits the petitioner's organizational chart. Counsel emphasizes that the beneficiary will supervise six employees, including two professionals and the store manager. Citing *Mars Jewelers, Inc. v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988) and *National Hand*

*Tool Corp. v. Pasquarell*, 889 F.2d. 1472, n.5 (5<sup>th</sup> Cir. 1989) in support of his assertion that the statute was not intended to limit managers or executives to persons who supervise a large number of persons or large enterprise. Counsel also cites an unpublished AAO decision to stand for the proposition that a person may be a manager or executive even if he/she is the sole employee of a company where the company utilizes outside independent contractors, or where the business is complex.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner has submitted a vague and nonspecific job description that fails to convey any understanding of the beneficiary's duties within the context of the petitioner's business. The petitioner's initial description of the beneficiary's duties consisted entirely of ambiguous statements including the beneficiary's responsibility for "the Company's overall management and expansion," "managing and directing the development of the company at a managerial level," and "managing and directing the Company's annual budget." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Accordingly, the director advised the petitioner that the submitted job description was too broad to establish the beneficiary's employment in a managerial or executive capacity and requested a clear statement of the beneficiary's duties and responsibilities. The petitioner's response did not assist in establishing the beneficiary's actual duties or her proposed employment in a qualifying capacity, as the description submitted was equally vague, and not entirely credible when considered in the context of the nature of the petitioner's business. The petitioner operates a pizza restaurant that is part of a franchise or chain with a standard menu, therefore raising doubts regarding the beneficiary's responsibility to "determine goods and services to be sold, set prices and credit terms," to "coordinate activities . . . concerned with production, pricing, sales and/or distribution," or to "establish departmental policies" for an organization with no defined departments. Given the disconnect between the stated duties and the type of business operated, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner's response to the director's request for evidence failed to clearly describe the beneficiary's role in managing or overseeing the day-to-day operations of the petitioner's restaurant. 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). For this additional reason, the petition may not be approved.

Although the beneficiary is not required to supervise personnel, if it is claimed that her managerial duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, **professional, or managerial**. *See* § 101(a)(44)(A)(ii) of the Act. **On appeal, the petitioner claims that the beneficiary's direct subordinates, a store manager and an accounting/administration employee, are both**

professionals, while the store manager is also a managerial or supervisory employee. However, the record contains no evidence of wages paid to these employees, nor does the petitioner indicate that they were employed by the U.S. company as of February 2006, when the petition was filed. Rather, at the time the petition was filed, it appears that the beneficiary would have supervised, at most, a part-time cashier, a part-time driver, and a part-time cook, none of whom are claimed to be employed as professionals, managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Beyond the required description of the job duties, CIS 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 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 an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

At the time of filing, the petitioner indicated that the beneficiary would be supervising one cashier, one driver, one cook, and an accounting and administration employee, with no intervening level of supervisory personnel. The record contains no documentary evidence to substantiate the petitioner's claims that these employees were working for the petitioner when the petition was filed, as the petitioner did not provide the requested quarterly wage reports or any other payroll records for February 2006. 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. Even if the AAO accepts the petitioner's assertion that these employees were working for the petitioner at the time the petition was filed, as noted above, the evidence does not support the conclusion that the beneficiary would be employed in a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

The AAO acknowledges the petitioner's claim that the company hired a store manager, a cook, and two new drivers subsequent to the filing of the petition. The minimal evidence submitted indicates that the cashier, cook and drivers were employed on a part-time basis in June and July 2006, working between 6 and 20 hours per week. The record is devoid of evidence of any wages paid to the claimed store manager. Regardless, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, and the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). As previously discussed, a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Finally, even if the petitioner employed every employee depicted on its most recent organizational chart, the record does not support a conclusion that a store manager, a part-time cook, a part-time cashier and two part-time drivers could reasonably relieve the beneficiary from performing non-qualifying duties associated with operating a restaurant that, according to an advertisement submitted, is open daily for a total of 78 hours per week. 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. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Based on the petitioner's description of its business, it is reasonable to assume that it requires at least one cook, one driver, one cashier, and one store manager or supervisor working in the restaurant during its operating hours in order to handle the basic functions of preparing, selling and delivering food to customers. At the time of filing, the petitioner employed, at most, a president whose involvement in the business has not been described, as well as a cashier, a cook and driver who appear to have been employed on a part-time basis. Accordingly, it is evident that given the proposed staffing levels, the beneficiary and her subordinates would all be required to participate in the routine day-to-day activities of operating the restaurant in order for it to remain open during operating hours. Further, given the minimal staffing levels and the nature of the business, it is reasonable to assume, and has not been shown to be otherwise, that these would be the beneficiary's primary duties. 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 AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Moreover, to establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not established the basic eligibility requirement in this matter, that the beneficiary would be primarily performing managerial or executive duties.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.2 (5<sup>th</sup> Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp. v. Pasquarell* or *Mars Jewelers, Inc. v. INS*. It is noted that both of the cases cited by counsel relate to immigrant visa petitions, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business

activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. As counsel has not discussed the facts of any of the cited matters, they will not be considered in this proceeding.

Counsel further refers to an 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 furnished no evidence to establish 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 CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

As noted above, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. The record does not demonstrate that the petitioner has a sufficient number of employees in the United States employed full-time who could provide the day-to-day services required to operate a restaurant. The lack of subordinate staff, considered with the beneficiary's overly general position description, support a conclusion that the beneficiary would not be employed in a primarily managerial or executive capacity, other than in position title. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv).

The petitioner indicated on Form I-129 that the beneficiary has been employed as events manager for the foreign entity since January 2000, with no interruptions in employment. The petitioner stated in its letter dated February 25, 2006 that the beneficiary's current duties as event manager for the foreign entity include the following:

Determine the demand for products and services offered by a firm and its competitors and identify potential customers. Develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied. Oversee product development or monitor trends that indicate the need for new products and services.

Her duties include managing and directing a team of 6+ employees, including professional employees with full authority to hire and fire such employees, managed and directed annual budgets, managing and directing negotiation of all contractual matters. In general, [the beneficiary] had developed [the foreign entity's] operations and has had full discretionary authority over such day-to-day operations.

The petitioner submitted an organizational chart for the foreign entity, which indicates that the beneficiary holds the position of events manager ("*gerente eventos*"), reports to the executive vice president, and does not

supervise any subordinate employees. The chart shows that the foreign entity employs a total of eight employees. The petitioner also submitted what appear to be year-end payroll records for the foreign entity, for the years 2000 through 2005, on which the beneficiary is identified as event manager, as well as the beneficiary's monthly pay receipts for January and December of the years 2000 through 2005.

The petitioner stated that the foreign entity is engaged in "import, export, purchase, sales, distribution, represent [sic] and consign [sic] any type of legal products and services." The petitioner also submitted a business overview of the foreign entity, summarizing the company's history, management and activities. The AAO notes that the beneficiary is not identified as a member of the foreign entity's management team in this document.

In the request for evidence issued on April 21, 2006, the director requested that the petitioner submit a definitive statement describing the foreign employment of the beneficiary, including her position title, a list of all duties, the percentage of time spent on each duty, and the number of subordinate managers, supervisors or other employees who report directly to her, with a brief description of their job duties.

In response, the petitioner stated that the beneficiary is employed by the foreign entity as its "commercial manager" and indicated that the beneficiary performs the following duties:

- **Administration and Business Managing:** Direct and coordinate activities to determine the demand for products and services offered by a firm and its competitors and identify potential customers. Develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied. Oversee product development or monitor trends that indicate the need for new products and services. (20%)
- **Supervising Employees:** Establish and implement departmental policies, goals, objectives, and procedure, conferring with board members, organization officials, and staff members as necessary. (20%)
- **General Supervision:** Oversee activities directly related to making products or providing services. (20%)
- **Training:** Determine staffing requirements, and interview, hire and train new employees, or oversee those personnel processes.
- **Coordinate Marketing Strategies** (30%)

The petitioner stated that the beneficiary supervises two branch managers, but did not provide job descriptions for these employees as requested by the director. The petitioner re-submitted the foreign entity's organizational chart, which indicates that the branch managers report to [REDACTED], the general director of the foreign entity, rather than to the beneficiary.

Finally, the petitioner submitted copies of the beneficiary's monthly pay stubs issued by the foreign entity dating from January 2005 through June 2006.

The director denied the petition on October 4, 2006, concluding that the petitioner failed to establish that the beneficiary was employed in a primarily managerial or executive capacity. The director noted that notwithstanding the petitioner's claim that the beneficiary supervises two employees, the foreign company's

organizational chart shows that she has no subordinates, and indicates that her claimed subordinates report to a different individual. The director found the description of the beneficiary's duties abroad insufficient to demonstrate that she is employed in a managerial or executive capacity with the foreign entity.

On appeal, counsel for the petitioner re-iterates the beneficiary's job duties and asserts that her position as "Commercial/Event Manager" was at a managerial level within the foreign organization. The petitioner asserts that the beneficiary supervised two professional employees who manage subdivisions of the foreign company. Counsel further states: "Although there was no line drawn on the organizational chart to illustrate such subordination, it was mentioned on the definite [sic] statement and detailed description of the foreign employment submitted with the RFE response, that Mr. [REDACTED] & Mr. [REDACTED] were subordinated to the beneficiary." The petitioner submits a revised organizational chart that is identical to that previously submitted, but now includes a hand-drawn line indicating that the beneficiary supervises the two branch managers.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that foreign entity employed the beneficiary 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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner has not adequately described the beneficiary's role as "events manager" for the foreign entity, nor clearly explained the business activities of the foreign company, which appears to be engaged in logistics and transportation services. In response to the director's request for evidence, the petitioner changed the beneficiary's job title from "events manager" to "commercial manager" without providing any explanation for the change. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

Further, the petitioner submitted a vague, generalized job description that essentially mirrors the insufficient job description provided for her proposed employment in the U.S., which, as discussed above, has been found to be insufficient to establish the beneficiary's employment in a primarily managerial or executive capacity. For example, the petitioner described the beneficiary's duties as: "establishes and implements departmental policies, goals, objectives, and procedures"; "oversee activities directly related to making products or providing services"; "coordinating marketing strategies"; "direct and coordinate activities of business to determine the demand for products and services offered by a firm and its competitors"; and "oversee product development." However, the director specifically requested a detailed description of the beneficiary's day-to-day duties. The fact that the petitioner submitted essentially the same job description for an "events manager" position within an international logistics company and an "operations manager" position within a restaurant raises questions as to the credibility of the listed job duties. Regardless, 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 her 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.

Without a detailed position description, the director reasonably looked to the foreign entity's staffing levels to determine whether the record as a whole supports the petitioner's assertion that the beneficiary has been employed by the foreign entity in a managerial or executive capacity. As noted by the director, the petitioner stated that the beneficiary supervises two branch managers, but did not provide a job description for these positions as requested by the director, and there is thus no evidence to support the petitioner's assertion that they are professional employees and managers of subdivisions. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, the petitioner twice submitted an organizational chart for the foreign entity that clearly indicates that both branch managers report to the director general of the foreign entity, not to the beneficiary. 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). On appeal, the petitioner submits a revised organizational chart with a hand-drawn line between the beneficiary's position and the branch managers' positions, although the chart still indicates that these employees report to the director general. The revised organizational chart submitted on appeal cannot be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

The petitioner has not persuasively established that the beneficiary supervised any subordinate employees while employed by the foreign entity.

Nor does the record establish that the beneficiary was employed as a function manager with the foreign entity. 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 detailed position description that clearly describes the duties performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). 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. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, CIS 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. As discussed above, the petitioner has neither described the beneficiary's duties, or the nature of the foreign entity's business, in sufficient detail to establish that she is primarily engaged in the management of an essential function with the foreign entity, nor has the petitioner identified a specific function managed by the beneficiary. 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, the petitioner has failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has been employed by the foreign entity on a full time basis for one continuous year within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

The petition was filed on February 28, 2006. The petitioner indicated on Form I-129 that the beneficiary has been employed as events manager for the foreign entity since January 2000, with no interruptions in employment. However, the petitioner indicates that the beneficiary was last admitted to the United States on September 19, 2003, more than 29 months prior to the filing of the petition. USCIS records confirm that the beneficiary had applied for and received five extensions of her B-2 nonimmigrant status since her last admission to the United States.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. *Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.*

Emphasis added.

While the petitioner has submitted pay stubs which ostensibly indicate that the foreign entity has continued to pay the beneficiary's salary up to the present time, any payments she received from the foreign entity while residing in the United States as a visitor over a period of two and one half years cannot be considered qualifying full-time employment with the foreign entity. Further, a 29-month stay in the United States goes beyond what could be deemed a "brief visit to the United States for business or pleasure." The AAO

therefore finds that the beneficiary's period of stay in the United States since September 2003 has in fact interrupted her employment with the foreign entity, such that she cannot be considered to have one year of qualifying employment within the required three-year time frame. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.