U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

File: EAC 07 010 52448 Office: VERMONT SERVICE CENTER Date: OCT 03 2007

IN RE: Petitioner:
Beneficiary: [redacted]

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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 visa petition seeking to extend the employment of its general manager 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 corporation organized under the laws of the State of California and is allegedly in the business of construction and renovation of residential and commercial buildings. The beneficiary was granted a one-year period of stay to open a new office in the United States as well as two two-year extensions of stay, and the petitioner now seeks to once again extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive.

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 primary issue in the present matter is whether 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 does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, although counsel on appeal appears to limit the beneficiary to an executive classification. Due to the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed in either an executive *or* a managerial capacity and will consider both classifications.

The petitioner described the beneficiary's job duties in a letter dated October 12, 2006 as follows:

1. Performing supervisory tasks of construction projects;
2. Direct financial activities of the organization;
3. Responsible for the day[-]to[-]day management of the company which includes tasks of hiring-firing an employee(s);
4. Directing workers with their respective construction tasks and responsible for sub contractor [sic] needs such as framers, painters, carpenters, etc.;
5. Interpreting plans, estimate costs, planning construction methods and procedures, coordinating the supply of labor and materials, studying building contract documents and negotiating with building owners and subcontractors, controlling preparation of cost estimates and payment of sub-contractors;
6. Providing general contractors and sub contractors [sic] specific directions about tasks, quantity, quality, schedules through contracts and contract administration;
7. Ensuring that subcontractors meet safety and regulatory standards. Requiring that specific performances standards and time sensitive contracts be in compliance;
8. Providing work directions, resolving problems, preparing schedules, and setting deadlines for timely completion;
9. Assessing performance on a regular basis by on-site inspections and review of plans and records, then immediately taking whatever actions are necessary to complete projects successfully;
10. Assuring that appropriate records and reports are prepared in a timely and accurate manner and those proper files are maintained and secured. In addition, he consults architects, engineers and other technical workers to make sure that designs are in conformity with the building specification;
11. Maintaining and renewing licenses and legal documents required by the government to run the business and to see that all taxes are filed in a timely manner;
12. Solely responsible for ordering, procuring the raw material and the tools required. [The beneficiary] ensures that projects are performed with efficiency and are fulfilled according to the satisfaction of clients; and
13. [The beneficiary] regularly meets with various development units who are looking for a construction company to build up their projects. In case there are any variation(s) required after the work has already started, [the beneficiary] makes a re-estimate of work, time and cost required.

The nature of this work requires a substantial amount of experience in single-family new homes, apartment and town homes construction, and building projects such as remodeling, infrastructure installation and site development including scattered site new home construction. Compliance with Building Code is another task performed by [the beneficiary]. In addition to the above mentioned skills, [the beneficiary] has extensive knowledge of various construction projects, familiarity with design/build construction practices, extensive experience reading and interpreting, engineering plans, diagrams, specifications, shop drawings, familiarity with mechanical, electrical, building codes and ordinances. He is the one who approves the release of payment, takes care of quality control and coordinates inspections with appropriate City/Council officials. Furthermore, he issues necessary notices/instructions to ensure that health & safety standards are adhered.

The petitioner also submitted a list identifying four full-time employees, including the beneficiary, and four part-time employees. In addition, the petitioner submitted an organizational chart showing the beneficiary reporting to the president/vice president and directly supervising a "chief financial officer," an "office manager," and an "operations manager." The "operations manager" is, in turn, portrayed as supervising a supervisor who, in turn, is portrayed as supervising three construction employees. While the petitioner submitted 2005 Forms 1099 for various independent contractors, the petitioner did not submit specific information regarding its engagement of independent contractors in 2006.

On November 24, 2006, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's duties; a list of all employees identifying each employee by name and title including complete position descriptions; a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis; payroll records; and wage reports.

In response, counsel to the petitioner submitted a letter dated January 30, 2007. The letter contains a job description for the beneficiary that is materially identical to the job description initially submitted in support of the petition. While counsel asserts that the beneficiary will manager "a subordinate staff of professional personnel who have a Master's in Business Administration and Bachelor's degrees," neither counsel nor the petitioner specifically describes the duties or skills associated with the subordinate positions. Finally, while counsel asserts that the beneficiary supervises other construction workers on an as-needed basis, counsel did not submit any evidence specifically describing this purported duty.

On March 1, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive.[1]

Upon review, the petitioner'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.*

As a threshold issue, the AAO notes that counsel to the petitioner attempted to supplement the beneficiary's job description in the appellate brief by including a breakdown of the beneficiary's duties. Counsel also attempted to describe the duties of the beneficiary's subordinates. However, the director specifically requested these job descriptions in the Request for Evidence, and the petitioner was given a reasonable

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[1]Counsel cited the Foreign Affairs Manual (FAM) in his brief as authority. It must be noted that the FAM is not binding upon CIS. *See Avena v. INS*, 989 F. Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

opportunity to provide them for the record before the visa petition was adjudicated. The petitioner failed to submit this requested evidence and now submits it on appeal. The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Moreover, as counsel failed to corroborate his assertions in the brief, these assertions would have no evidentiary value even if considered on appeal. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this matter, the petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will "[d]irect financial activities of the organization" and be "[r]esponsible for the day[-]to[-]day management of the company which includes tasks of hiring-firing an employee(s)." However, the petitioner does not explain what, exactly, the beneficiary will do in performing these duties. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, most of the duties ascribed to the beneficiary appear to be non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. In support of the petition, the petitioner provided a list of thirteen of the beneficiary's duties in the letter dated October 12, 2006. The petitioner also stated that the beneficiary is responsible for building code compliance and quality control, approving the release of payments, coordinating inspections by officials, and issuing notices and instructions addressing health and safety standards. However, based on the record as a whole, none of the listed duties rises to the level of being managerial or executive in nature. For example, duties such as preparing schedules, renewing licenses, ordering materials and the tools, and preparing estimates constitute non-qualifying administrative or operational tasks. Furthermore, as the petitioner has failed to establish that the subordinate workers are supervisory, managerial, or professional employees (*see infra*), the supervisory functions ascribed to the beneficiary would also be non-qualifying, first-line supervisory tasks. As the petitioner has not established how much time the beneficiary will devote to such non-qualifying tasks, it cannot be confirmed that he will "primarily" be employed as a manager or an executive. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization.

As alleged in the organizational chart, job description, and wage reports, the beneficiary will directly supervise a "chief financial officer," an "office manager," and an "operations manager." The "operations manager," in turn, allegedly supervises a "supervisor" who, in turn, supervises three construction employees. However, as the petitioner has not specifically described the duties of the subordinate employees, and has not provided a breakdown of their duties on a weekly basis, the petitioner has not established that these workers are truly supervisory or managerial employees. 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). In fact, the record is devoid of any job descriptions for the subordinate staff members. Inflated job titles and artificial tiers of subordinate employees are not probative and will not establish that an organization is sufficiently complex to support a managerial position. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, the petitioner has not established that the beneficiary will manage professional employees. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employees. The possession of a bachelor's, or even a master's, degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary to perform the duties of any of the beneficiary's subordinate positions. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.[2]

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[2]While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. 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. 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-day 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Also, as the beneficiary is described as reporting to the president/vice president, it appears that any realistic authority to direct the enterprise is vested in this individual and not in the beneficiary. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.[3]

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manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

[3]In addition to those issues addressed above, counsel to the petitioner also argues on appeal that the director failed to follow a 2004 internal Citizenship and Immigration Services (CIS) memorandum. Memo. From [redacted], to Service Center Directors, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (April 23, 2004). This memorandum provided guidance on the process by which an adjudicator, during the adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of a nonimmigrant petition where there has been no material change in the underlying facts. Specifically, this Memorandum states that adjudicators should give deference to prior approvals involving the same underlying facts except where: (1) it is determined that there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *Id.*

Beyond the decision of the director, the petitioner failed to establish that the beneficiary had been employed abroad for at least one continuous year in a position that was managerial, executive, or involved specialized knowledge. 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

The petitioner described the beneficiary's duties abroad in a letter dated October 12, 2006 as follows:

The memorandum also states that the adjudicator should clearly articulate the material error, changed circumstances, or new material information in his or her decision. *Id.*

This memorandum does not apply to this matter in that the petitioner failed to provide much of the documentary evidence requested by the director. Before the petitioner could argue that the director erred in not deferring to an interpretation of evidence provided in support of a prior approved petition, it would need to first provide the evidence appropriately requested by the director in this matter. *See* 8 C.F.R. § 214.2(l)(14)(i). It must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). Furthermore, the memorandum limits its authority on Page 4:

> This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or matter.

Courts have consistently supported this position. *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that CIS memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing an INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"); *Ponce-Gonzelez v. INS*, 775 F.2d 1342, 1346-47 (5th Cir. 1985) (finding that OIs are "only internal guidelines" for INS personnel, and that an apparent INS violation of an OI requiring investigation of an alien's eligibility for statutory relief from deportation was at worst "inaction not misconduct"). Therefore, the memorandum does not create any substantive rights in the petitioner, and a director's failure to follow the guidance in the Memorandum would not be grounds for a withdrawal of the decision.

Regardless, if CIS had based its approval of the earlier L-1A petitions on the same job description for the beneficiary and the same description of the petitioner's subordinate staff, such approvals would have constituted "material error" as described in this memorandum, and the director's denial of the instant petition would have been proper under the guidelines articulated in this CIS memorandum.

> [The beneficiary's] main activities for the Canadian company included but were not limited to coordinate the activities between workers and directing work amongst the workers. He also made sure that the construction meets the specific requirements of our clients. In addition, he was responsible for each phase of the [c]onstruction including the proper supervision of the work of the sub contractors [sic]. Also he would procure raw materials and the tools/machinery required for the various projects. While in Canada, he also supervised all the electrical work.

The petitioner also submitted an organizational chart for the foreign employer. The chart indicates that the foreign employer employs a president who supervises an office manager and a project manager. It is unclear how the beneficiary's former position abroad fits into this organizational chart.

In response to the director's Request for Evidence, counsel further described the beneficiary's duties abroad in a letter dated January 30, 2007 as follows:

> While working for [the foreign employer] as a Secretary and licensed builder, [the beneficiary] was responsible for managing and supervising all the field operations of the company in Canada, that included planning, directing, and coordinating a wide variety of construction projects. He would oversee and coordinate the activities of the frontline workers and direct and distribute work amongst them. He was responsible for ensuring that the work performed met all the client specifications and was also in compliance with the city building and construction codes. He remained in charge of all phases of construction and also coordinated and supervised the work of the various sub-contractors. Including scheduling and coordinating all design and construction processes, including the selection, hiring, and oversight of specialty contractors. In addition, [the beneficiary] supervised and oversaw all the electrical work undertaken by [the foreign employer].

Counsel also indicated that the beneficiary supervised between eight and ten workers including a construction supervisor, a foreman, and construction and electrical workers. Counsel described the construction supervisor as being "responsible for overseeing that the work was implemented according to the plan and specifications and would schedule and coordinate all design and construction processes." Counsel described the foreman as being "in charge of the construction crew, and ensured that the workers had work to do and the tools and materials required to perform the work." Counsel also asserts that the beneficiary spent between 55% and 65% of his time on "executive duties." The beneficiary devoted the rest of his time to non-qualifying duties including "hands on construction or electrical work."

Upon review, the petitioner has failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

As a threshold issue, counsel's uncorroborated description of the duties of the beneficiary and the other workers abroad does not constitute evidence and will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Therefore, the petitioner has failed to fully respond to the director's request for further evidence addressing the beneficiary's duties abroad. 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). 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). For this reason alone, the petitioner has failed to establish that the beneficiary was employed abroad in a primarily managerial or executive position, and the petition may not be approved.

Regardless, the petitioner has not described the beneficiary as performing "primarily" qualifying duties abroad. As indicated above, the beneficiary is described as overseeing and coordinating "the activities of the frontline workers and direct[ing] and distribut[ing] work amongst them" and as supervising "the work of the various sub-contractors." However, such duties are non-qualifying first-line supervisory tasks. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, duties such as procuring raw materials, tools, and machinery, and "hands on construction or electrical work" are non-qualifying administrative or operational tasks. While counsel stated without elaboration that "[t]he beneficiary spent 55% to 65% of his time on executive duties," this self-serving statement is without probative value, especially in view of the job description which fails to clearly and specifically define any executive or managerial duties. Once 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). 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, *aff'd*, 905 F.2d 41. In this matter, it appears that the beneficiary was more likely than not primarily performing non-qualifying electrical and construction tasks rather than performing qualifying managerial or executive duties. As indicated above, 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Furthermore, the petitioner also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees. As alleged in the record, the beneficiary supervised a "construction supervisor" and a "foreman." However, the petitioner failed to establish that these workers were truly supervisory or managerial employees. First, the vague job descriptions provided in counsel's letter do not establish that these workers truly had supervisory authority over the construction workers. An employee will not be considered to be a supervisor simply because of a job title or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. [redacted] E.D. Tenn. 2003) [redacted] *Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Second, it appears unlikely that these workers were even employees of the foreign employer. As indicated above, the foreign employer's organizational chart does not include a "construction supervisor" or a "foreman." It appears that these individuals were, at most, independent contractors. The supervision or management of independent contractors will not permit a beneficiary to be classified as a managerial employee as a matter of law. *See* section 101(a)(44)(A)(ii) of the

Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*). The Act is quite clear that only the management of *employees* may be considered a qualifying managerial duty for purposes of this visa classification.

Finally, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. As explained above, it appears that the beneficiary was primarily employed as a first-line supervisor and was performing tasks necessary to produce a product or to provide a service. Also, as the beneficiary is described as reporting to the president, it appears that any realistic authority to direct the enterprise was vested in this individual and not in the beneficiary. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner failed to establish that the beneficiary had been employed abroad for at least one continuous year in a position that was managerial, executive, or involved specialized knowledge, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." "Subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner asserts in the Form I-129 that the foreign employer "owns 100% of [the petitioner]." Counsel reiterates this claim in the letter dated October 13, 2006. However, the record contains several inconsistencies which undermine this claim. For example, the petitioner submitted organizational minutes which indicate that the petitioner initially issued 30,000 shares of stock in 2001 to three individuals: (1) 20,000 shares to [redacted] to the beneficiary, and (3) 5,000 shares to [redacted]. While this description is consistent with the ownership structure described in Schedule E of the petitioner's 2004 Form 1120, it is fundamentally inconsistent with the assertion in the current Form I-129. Furthermore, the petitioner's 2005 Form 1120, Schedule E, contains an entirely different, and inconsistent, description of the petitioner's ownership and control. The 2005 Form 1120 indicates that the beneficiary and [redacted]now each own 33% of the petitioner, thus altering the ownership and control of the petitioner from that described in the 2004 Form 1120. The petitioner offers no explanation for these fundamental inconsistencies in the record. 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).

Accordingly, the petitioner has not established that it and the foreign entity are qualifying organizations. For this additional reason, the petition may not be approved.

The previous approvals of L-1A petitions do not preclude CIS from denying an extension based on a

reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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 for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises,* [redacted]

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

Finally, based on the reasons for the denial of the instant petition, a review of the prior L-1 nonimmigrant petitions (WAC 01 288 51499, WAC 03 011 50681, and WAC 04 260 51648), and the immigrant petition (WAC 06 041 50102), all approved on behalf of the beneficiary, is warranted to determine if they were also approved in error. Therefore, the director shall review these prior petitions approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9) and 8 C.F.R. § 205.2.

ORDER: The appeal is dismissed.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petitions, and the immigration petition, approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9) and 8 C.F.R. § 205.2.