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File: EAC 07 010 51733 Office: VERMONT SERVICE CENTER Date: APR 23 2008

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)

IN 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, 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 petition seeking to employ the beneficiary in the position of "chief marketing and financial officer" to open a new office in the United States 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, a limited liability company organized under the laws of the State of New Jersey, is allegedly in the apparel business.

The director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

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 asserts that the petitioner has established that the beneficiary will perform qualifying duties within one year of petition approval. In support of the appeal, counsel submits a brief, which further addresses the petitioner's future hiring plans and personnel structure.

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(i)(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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The primary issue in this matter is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

The petitioner describes the proposed United States operation, its proposed personnel structure, and the beneficiary's proposed duties in a letter dated October 2, 2006. The petitioner asserts that it will market and sell the petitioning organization's products, which primarily consist of imported garments, in the United States. The beneficiary will allegedly be tasked with establishing the "operations of the newly incorporated subsidiary" on behalf of the petitioning organization. The petitioner projects that it will need to hire six employees "in two or three years," that it will have \$200,000.00 in sales in its first year in operation, and that it "is anticipating an investment of \$100,000.00 to support its development expenses." The petitioner also claims that it will receive an initial investment of \$35,000.00 and "monthly investments" totaling \$120,000.00. Finally, the petitioner projects that it will have \$276,000.00 in operating expenses during its first year in operation, which includes \$8,500.00 budgeted for monthly salary obligations in months four through twelve. As the beneficiary will be paid \$5,000.00 per month, or \$60,000.00 per year, the petitioner is apparently projecting that it will be paying the other employees \$3,500.00 per month in the aggregate at the end of its first year in operation.

The petitioner describes the beneficiary's proposed duties in the October 2, 2006 letter as follows:

- To develop pricing strategies, balancing firm objectives and customer satisfaction.
- To identify, develop, and evaluate marketing strategy, based on knowledge of establishment objectives, market characteristics, and cost and markup factors.
- To evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections.

- Formulate, direct and coordinate marketing activities and policies to promote products and services.
- Direct the hiring, training, and performance evaluations of marketing and sales staff and oversee their daily activities.
- To use sales forecasting and strategic planning to ensure the sale and profitability of products, lines, or services, analyzing business developments and monitoring market trends.
- Coordinate and direct the financial planning, budgeting, procurement, or investment activities of all or part of an organization.
- Develop internal control policies, guidelines, and procedures for activities such as budget administration, cash and credit management, and accounting.
- Prepare or direct preparation of financial statements, business activity reports, financial position forecasts, annual budgets, and/or reports required by regulatory agencies.
- Analyze the financial details of past, present, and expected operations in order to identify development opportunities and areas where improvement is needed.
- Delegate authority for the receipt, disbursement, banking, protection, and custody of funds, securities, and financial instruments.
- Evaluate needs for procurement of funds and investment of surpluses, and make appropriate recommendations.
- Lead staff training and development in budgeting and financial management areas.
- Maintain current knowledge of organizational policies and procedures, federal and state policies and directives, and current accounting standards.
- Supervise employees performing financial reporting, accounting, billing, collections, payroll, and budgeting duties.

The petitioner also claims that it will hire an office administrator, a sales manager, a sales representative, and shipping clerks. While the petitioner's organizational chart indicates that the beneficiary will directly supervise the office administrator and the sales manager, the chart portrays the office manager as supervising the shipping clerks and the sales manager as supervising the sales representative.

Finally, the petitioner describes the proposed duties of its projected personnel. The office administrator is described generally as being responsible for the scheduling, communications, office inventory and equipment, receipts and records, accounts payable, and payroll. The sales manager is described generally as directing sales related activities by establishing sales territories, quotas, goals, and pricing. It is also claimed that the sales manager will plan advertising, prepare budgets, and interact directly with "dealers and distributors."

On November 29, 2006, the director requested additional evidence. The director requested, *inter alia*, evidence establishing that, within one year of commencing operations, the beneficiary will be relieved from performing non-qualifying tasks, and an explanation outlining how the duties of the proposed subordinate employees will truly be managerial or will require the services of professionals.

In response, the petitioner submitted a letter dated December 18, 2006 in which the petitioner explains that the beneficiary will primarily manage the proposed subordinates, that only the "sales manager" will be a managerial employee, and that the office manager will primarily be a clerical employee.

On May 2, 2007, the director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year.

On appeal, counsel asserts that the petitioner has established that the beneficiary will perform qualifying duties within one year of petition approval. Counsel attempts to supplement the record on appeal by providing additional details regarding the qualifications and duties of the proposed subordinate employees and by submitting greatly expanded and detailed proposed organizational charts for the United States operation. For example, counsel alleges on appeal that the office manager will be a "supervisory" position, even though this position was described as being primarily "secretarial" in the response to the Request for Evidence, and that, within six to twelve months, the petitioner will hire at least six additional employees instead of the four subordinate workers described in the original petition.

Upon review, the petitioner's and counsel's assertions are not persuasive.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the

business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

For several reasons, the petitioner in this matter has failed to establish that the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner has failed to specifically describe the beneficiary's proposed duties after the petitioner's first year in operation; has failed to establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to the operation of the business by a subordinate staff within the petitioner's first year in operation; has failed to establish that an investment has been made in the United States operation; and has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

As a threshold issue, it is noted that counsel's attempt on appeal to describe the petitioner's proposed organizational structure as being significantly more complex than what was described in the original petition was inappropriate and will not be considered by the AAO. On appeal, a petitioner cannot materially change a beneficiary's title, his or her level of authority within the organizational hierarchy, or the organizational complexity of the proposed business. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Furthermore, the director specifically requested additional evidence pertaining to the organization and staffing of the United States operation in the November 29, 2006 Request for Evidence. The petitioner chose not to provide this evidence and now submits on appeal. However, 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.

First, as correctly noted by the director, the record is not persuasive in establishing that the United States operation will support an executive of managerial position within one year. The job descriptions for both the beneficiary and his proposed subordinate workers fail to credibly establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after the petitioner's first year in

operation. For example, the petitioner states that the beneficiary will formulate, direct, and coordinate marketing activities and policies, develop pricing strategies, monitor market trends, and develop internal control policies and guidelines pertaining to financial matters. However, the petitioner fails to specifically describe these marketing activities, pricing strategies, or internal control policies, or to explain what, exactly, the beneficiary will do in performing these duties. The petitioner also fails to explain what the beneficiary will do in "monitoring" market trends. Overall, the petitioner has provided so few details regarding its proposed garment business that it cannot be discerned what the beneficiary will do on a day-to-day basis in performing any of the ascribed duties pertaining to the "management" of the business. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary will actually perform managerial duties after the first year in operation. Specifics are clearly an important indication of whether a beneficiary's duties will be 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, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to "primarily" perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. While the petitioner claims that the petitioner will hire four employees during its first year in business, the petitioner has failed to establish that it will truly be able to hire these workers and, even if it could, that these workers will relieve the beneficiary of the need to primarily perform non-qualifying tasks. The petitioner's "business plan" vaguely describes the proposed United States operation as a garment business which will market and sell the petitioning organization's clothing products. However, the plan and associated financial projections are entirely unsupported by any objective evidence. The record does not specifically describe the operation's marketing strategy and fails to identify any business relationships or potential customers. It is unclear what, exactly, the petitioner will import and in what quantities, where the products will be stored, how the products will be transported, and to whom the petitioner will market the products in the United States. Finally, the petitioner projects that it will be spending only \$3,500.00 on the subordinate workforce's salaries in the twelfth month of doing business. It is not credible that the petitioner will be able to employ a subordinate workforce, which will relieve the beneficiary of the need to perform primarily non-qualifying tasks, for only \$3,500.00 per month.

Accordingly, the petitioner's claim that its newly formed operation will hire four or more workers who will relieve the beneficiary of the need to primarily perform non-qualifying tasks is not credible and is not supported by any evidence. 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 Treasure Craft of California*, 14 I&N Dec. 190. Simply alleging that the petitioner will hire four employees who will perform all the non-qualifying tasks inherent to the business does not establish that the United States operation will truly grow and mature into an active business organization which will reasonably require the services of a beneficiary who will primarily perform managerial or executive duties. Rather, the petitioner must clearly define the scope and nature of a United States operation and establish that it has, and will continue to have, the financial ability to support the establishment and growth of the business. However, as the record in this

matter is devoid of any such evidence, the petitioner has failed to establish that the beneficiary will more likely than not perform "primarily" qualifying duties after the petitioner's first year in operation. 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. 593, 604 (Comm. 1988).

Furthermore, even assuming that the petitioner will have the ability to hire the workforce proposed in the petition, the record is not persuasive in establishing that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. As asserted in the record, the beneficiary will directly supervise an office administrator and a sales manager. The petitioner claims that the office administrator will supervise one or more shipping clerks and the sales manager will supervise one or more sales representatives. However, the petitioner has failed to establish that either the office administrator or the sales manager will truly be a supervisory or managerial employee. To the contrary, the job descriptions describe these two proposed employees as performing the tasks necessary to the provision of a service or the production of a product, e.g., secretarial and sales related tasks.

An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even 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. Given the size and nature of the vaguely described garment business, it is more likely than not that the beneficiary and his proposed subordinate employees will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity within one year, and the petition may not be approved for that reason.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to establish that a sufficient investment was made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). In this matter, the petitioner claims that it "is anticipating an investment of \$100,000.00 to support its development expenses." The petitioner also indicates that it expects to receive an initial investment of \$35,000.00 and "monthly investments" totaling \$120,000.00. However, the record is devoid of evidence that the petitioner has ever received any of these investments. 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 Treasure Craft of California*, 14 I&N Dec. 190. Absent evidence that the foreign entity has made an investment in the United States operation, it cannot be concluded that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Furthermore, the petitioner's "anticipation" that it will receive one or more investments in the future is not sufficient to establish eligibility for this visa classification under the regulations. 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; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Accordingly, as the petitioner has failed to establish that it has received a sufficient investment from the foreign entity, the petition may not be approved for this additional reason.

Third, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner has failed to sufficiently describe the nature, scope, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(I). As explained above, the petitioner vaguely describes the United States operation as a garment business which will market and sell the petitioning organization's clothing products. However, the plan and associated financial projections are entirely unsupported by independent, objective evidence. The record does not specifically describe the operation's marketing strategy and fails to identify any business relationships or potential customers. It is unclear what, exactly, the petitioner will import and in what quantities, where the products will be stored, how the products will be transported, and to whom the petitioner will market the products in the United States. The record does not contain any independent analysis, contracts, or list of business contacts. Absent a detailed, credible description of the petitioner's proposed United States business operation specifically addressing the petitioner's proposed products, marketing plan, and customers, it is impossible to conclude that the proposed enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above reasons.

Beyond the decision of the director, the petitioner has failed to establish that it has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(l)(3)(v)(A).

In support of its petition, the petitioner submitted a copy of a document titled "New Jersey Agreement to Sublease/Sublet" which allegedly governs the petitioner's lease of space at 669 Division Street, Elizabeth, New Jersey. This agreement fails to establish that the petitioner has secured sufficient physical premises to house its new office for two reasons. First, the agreement specifically incorporates the terms and conditions of the "original lease agreement between the sublessor and his lessor." However, the petitioner did not submit a copy of this original lease. In the absence of the original lease, it cannot be concluded that the leased space will be sufficient to house the new office. 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 Treasure Craft of California*, 14 I&N Dec. 190. Second, the agreement fails to disclose what, exactly, the petitioner is claiming to lease from the sublessor. The agreement does not state the square footage, location, or nature of the leased space. Absent such detailed information, it cannot be concluded that the leased space will be sufficient to house the new office.

Accordingly, as the petitioner has failed to establish that it has secured sufficient physical premises to house the new office, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has been "employed" in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years. 8 C.F.R. §§ 214.2(l)(3)(iii) and 214.2(l)(3)(v)(B).

First, the record indicates that the beneficiary has not been a full-time employee of the foreign entity in India for one year in the past three years. In support of its petition, the petitioner submitted copies of the beneficiary's Indian tax returns beginning in 2001. All of the tax returns indicate that the beneficiary did not receive a salary from the foreign employer at any time during the past three years. Instead, the returns indicate that the beneficiary received distributions from the foreign employer as a partner in the business. Accordingly, it does not appear that the beneficiary was actively employed by the foreign entity. In fact, it does not appear that the beneficiary has even been residing in India during the past three years. The beneficiary arrived in the United States as a visitor for pleasure on July 13, 2006. In traveling to the United States, the beneficiary used a nonimmigrant visa issued by the United States Embassy in Botswana on November 14, 2005, and an Indian passport issued by the Indian High Commission in Botswana on December 6, 2002. Accordingly, it has not been established that the beneficiary was employed in India by the foreign employer for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this additional reason.

Second, the petitioner provided a vague and non-specific description of the beneficiary's claimed duties abroad which fails to establish what, exactly, the beneficiary did on a day-to-day basis. Specifics are clearly an important indication of whether a beneficiary's duties were 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. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary has been employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be 100% owned and controlled by the foreign employer which is partly owned by the beneficiary. As a purported owner of the petitioning organization, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence

establishing that the beneficiary's services will be used temporarily. 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).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that it and the foreign employer are qualifying organizations.

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(l)(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" and "is or will be doing business." "Subsidiary" is defined in pertinent part as a limited liability company "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

In this matter, the petitioner claims to be 100% owned by the foreign employer, King Exports. However, in support of its petition, the petitioner submitted its New Jersey Certificate of Formation. This Certificate lists the petitioner's members, or owners, as King Exports and [REDACTED] an unrelated third party. While the petition includes a resolution purporting to authorize the sale of 100 of the petitioner's "shares" to the foreign employer, the record does not address Mr. [REDACTED]'s membership, or ownership, interest in the company. The petitioner offers no explanation for this inconsistency which undermines its claim to be owned and controlled by the foreign employer. 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 failed to establish that it and the foreign employer are qualifying organizations, and the petition may not be approved for this additional reason.

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, Inc.*, 229 F. Supp. 2d at 1043.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.