U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

87

[redacted]

File: WAC 08 010 50705 Office: CALIFORNIA SERVICE CENTER Date: AUG 29 2008

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, California 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 candy specialist" to be employed at 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 corporation organized under the laws of the State of Nevada, is allegedly in the business of manufacturing candy products.[1]

The director denied the petition concluding that the petitioner failed to establish (1) that it has a qualifying relationship with the foreign employer; or (2) that the beneficiary was employed abroad 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 asserts that the petitioner established that it has a qualifying relationship with the foreign employer and that the beneficiary primarily performed qualifying duties abroad. In support, counsel submits a brief and additional evidence.

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

[1]It is noted that, according to the records of the Nevada Department of State, the petitioner's proper corporate name is "Inovell Confectionery. Inc."

> 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.

The first issue in this matter is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). A "subsidiary" is defined in pertinent part as a corporation of which a parent "owns, directly or indirectly, half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

In this matter, the petitioner, Inovell Confectionery, Inc., a Nevada corporation, claims to be 50% owned by the foreign employer, Inovell Confectionery, a Korean business entity. In support, the petitioner submitted a

stock certificate representing the issuance of 3,750,000 shares of stock to "Inovell Confectionery, Inc." and a copy of the petitioner's "Minutes of Annual Meeting of Shareholders" indicating that its two shareholders on August 31, 2007 were Inovell Confectionery, Inc. (3,750,000 shares) and Kimmie Candy Co. (3,750,000 shares). The petitioner also submitted a copy of an October 16, 2006 document titled "Manufacturing Agreement" in which the petitioner "recognizes that [Inovell Confectionery] will provide all equipment and expertise to make [candy] in the U.S.A." However, the record does not clarify whether the foreign employer has in fact contributed equipment or anything of value to the petitioner in exchange for its claimed 50% ownership interest.

On October 19, 2007, the director requested additional evidence. The director requested, *inter alia*, evidence that the foreign employer purchased an interest in the petitioner and a copy of the petitioner's stock ledger recording the issuance of shares.

In response, the petitioner submitted a stock ledger indicating that 3,750,000 shares of stock, represented by stock certificate number one, were issued to Inovell Confectionery of Busan, Korea. The petitioner also submitted a letter from counsel dated October 30, 2007 in which counsel explains that the foreign employer has contributed "capital equipment" to the petitioner per the October 16, 2006 Manufacturing Agreement. However, counsel failed to corroborate his assertion with any evidence of this contribution of equipment.

On November 16, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that is has a qualifying relationship with the foreign employer. The director noted that the record is devoid of evidence that the foreign employer ever acquired its ownership interest in the petitioner through the contribution of equipment or other consideration. Furthermore, the director noted that the stock certificates in the record indicate that 50% of the shares were issued to the petitioner, Inovell Confectionery, Inc., and not to the foreign employer, Inovell Confectionery. Finally, the director noted that petitioner does not appear to meet the definition of a "joint venture" and, thus, it is not eligible for the benefit sought as a qualifying organization as a "joint venture."

On appeal, counsel submits, for the first time, six "commercial invoices" purportedly representing the contribution of equipment to the petitioner. Counsel also argues that the petitioner is not a "joint venture" but is a separate corporation which is 50% owned by the foreign employer. Finally, counsel submits a letter from the petitioner indicating that the party listed in stock certificate "number one" was erroneously identified as the petitioner and that the proper stockholder is Inovell Confectionery, the foreign employer. Counsel submits a corrected stock certificate and ledger on appeal.

Upon review, counsel's assertions are not persuasive in establishing that the petitioner has a qualifying relationship with the foreign employer, Inovell Confectionery.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of

possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director in this matter appropriately inquired beyond the issuance of the paper stock certificates into the means by which the foreign employer's purported stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

In this matter, the petitioner failed to establish that it has a qualifying relationship with the foreign employer, Inovell Confectionery. Although the petitioner claims that 50% of its stock is owned by the foreign employer, the petitioner failed to submit evidence that the foreign employer acquired this interest through the contribution of money or property even though this evidence was specifically requested by the director. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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).

Furthermore, counsel's attempt to supplement the record on appeal, for the first time, with evidence that the foreign employer contributed equipment to the petitioner even though the director sought this evidence in her Request for Evidence was inappropriate and will not be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533. Regardless, even if these "invoices" were considered on appeal, they would not serve to establish that the foreign employer truly contributed equipment to the petitioner in exchange for the stock. The six invoices appear to be internally generated documents, and the record is devoid of independent, credible evidence establishing the existence, actual delivery, or value of this claimed equipment. 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).

Accordingly, as the petitioner has failed to establish that the foreign employer contributed consideration in exchange for the issuance of stock, the record does not persuasively establish that the foreign employer truly owns and controls the petitioner and, thus, the petitioner has failed to establish that it and the foreign employer are qualifying organizations.[2]

[2]It is noted that the director also concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign employer because (1) the stock certificate lists "Inovell Confectionery, Inc." as the stockholder instead of the foreign employer, Inovell Confectionery; and (2) the petitioner fails to meet the

The second issue in this matter is whether the petitioner has established that the beneficiary was employed abroad 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:

---

definition of a "joint venture." The AAO will withdraw these determinations. First, it is noted that the petitioner also submitted a stock ledger in response to the Request for Evidence which lists a Busan, Korea, address for the owner of the 3,750,000 shares of stock represented by stock certificate number one. This evidence, when combined with the petitioner's explanation on appeal that the addition of "Inc." to the foreign employer's name in the stock certificate was a clerical error as well as the entities' obvious similarity in names, sufficiently resolves this inconsistency. Second, although the petitioner describes itself as a "joint venture," the petitioner is essentially claiming to be a "subsidiary" of the foreign employer. The fact that the petitioner chooses to use the legal phrase "joint venture" to factually describe its business strategy does not impose upon it a higher, or different, burden of proof. Instead, the petitioner only needs to establish facts which demonstrate that it has a "qualifying relationship," i.e., that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." For example, if a petitioner can establish facts which demonstrate that it is an "affiliate" of a foreign employer as defined by the regulations even though it erroneously refers to itself as a "subsidiary" in the petition, the petitioner may still carry its burden of proof. However, in this matter and as explained *supra*, as the petitioner failed to credibly establish that it has any qualifying relationship with the foreign employer, e.g., branch, subsidiary, or affiliate, the petition may not be approved.

(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 was primarily performing managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary was employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary was employed abroad as either an executive *or* a manager and will consider both classifications.

Counsel described the beneficiary's duties abroad in a letter dated October 3, 2007 as follows:

> [The beneficiary] has been employed by the Korean Company since August 20, 2004 .... He is employed in the capacity of Candy Specialist who is the supervisor of the Candy Department, which includes the production line, Recipe and blending department, and package department.

Furthermore, the foreign employer described the beneficiary's duties abroad in a letter dated August 25, 2007 as follows:

> [The beneficiary's] duties currently in Korea will be the same in the Nevada facility. As the Candy Specialist he supervises the entire candy manufacture [sic] process. He supervises the recipes and blending supervisors and oversees that the line personnel are complying with company policy in cleanliness and production methods. He also supervises the quality control department making sure that supervisors check for any problems most specifically health and sanitation compliance.

Finally, the petitioner submitted an organizational chart for the foreign employer. The chart shows the beneficiary reporting to a "chief production engineer" and supervising "production—chocolate coating" and "production—candy coating." The petitioner does not specifically explain how many workers, exactly, the beneficiary supervises or whether any of these workers supervises any subordinate employees. The petitioner further describes the beneficiary's duties in an attachment to the organizational chart as being "responsible for hands-on candy production, including but not limited to overseeing blending of the ingredients, production of products and the ordering of raw materials." The "production employees" are described as "manufacturing candy products."

On October 19, 2007, the director requested additional evidence. The director requested, *inter alia*, the number of workers employed by the foreign employer, a list of all employees under the beneficiary's supervision, a description of the duties of all of the beneficiary's subordinate employees, and a more detailed description of the beneficiary's duties abroad, including a breakdown of the amount of time devoted to each of his ascribed duties.

In response, counsel submitted a letter dated October 30, 2007 in which he indicates that the foreign employer has 12 employees and in which he further describes the beneficiary's duties abroad as follows:

> [The beneficiary] is employed in the capacity of Candy Specialist who is the supervisor of the Candy Department, which includes the production line, Recipe and blending department, and package department. His duties include complete control of manufacturing process including the direct supervision of the chocolate mixing supervisor and candy-coat mixing supervisor. In addition, he oversees the company's HACCP program and sanitation schedule, as well [as] supervising the manager's [sic] of each production process, who create the schedule of the production line employees.

The petitioner, however, did not list the employees under the beneficiary's direct, or indirect, control; did not further describe the beneficiary's duties; and did not describe the amount of time the beneficiary devotes to each of his ascribed duties.

On November 16, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

On appeal, counsel argues that the petitioner has established that the beneficiary was employed abroad in an executive or managerial capacity. In support, counsel submits a more detailed organizational chart for the foreign employer showing the beneficiary supervising a subordinate tier of managers or supervisors.

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)(iii)-(iv). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.*

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary was employed in a primarily "managerial" or "executive" capacity. In support of the petition, the petitioner submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary did on a day-to-day basis. For example, the petitioner claims that the beneficiary supervised subordinate workers in the production and packaging of candy and oversaw compliance with health and sanitation concerns. However, even though the director requested a more specific description of the beneficiary's duties as well as a breakdown of the amount of time devoted to each of his ascribed duties, the petitioner failed provide this evidence or to explain what, exactly, the beneficiary did not a day-to-day basis to "supervise" or

"oversee" these processes. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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). 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 actually performed managerial or executive duties. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Consequently, the record is not persuasive in establishing that the beneficiary primarily performed qualifying duties abroad.

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. As asserted in the record, the beneficiary directly supervised two processes, "production—chocolate coating" and "production—candy coating." However, even though specifically requested by the director, the petitioner failed to list all the employees under the beneficiary's supervision or describe the duties of these subordinate workers, if any. Once again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although counsel attempts on appeal to submit a more detailed, and materially different, organizational chart for the foreign employer, which characterizes the beneficiary as the "chief production engineer" in charge of two tiers of subordinate managers, this new organizational structure will not be considered by the AAO on appeal. On appeal, 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 the 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). 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, counsel's attempt to supplement the record on appeal with a more detailed organizational chart, even though the director sought this evidence in her Request for Evidence, was inappropriate and may not be considered on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *Matter of Obaigbena*, 19 I&N Dec. 533.

Accordingly, it appears that the beneficiary primarily performed the tasks necessary to the production of a product, performed the duties of a first-line supervisor, or performed tasks inherent to both of these non-qualifying roles. 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. at 604. 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. It does not appear as if any of the beneficiary's claimed subordinate workers were supervisory or managerial employees. Moreover, as the petitioner failed to

establish the skills and education required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary managed professional employees.[3] Accordingly, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.[4]

Similarly, the petitioner has failed to establish that the beneficiary acted 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

---

[3]In evaluating whether the beneficiary will manage 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).

[4]While the petitioner has not argued that the beneficiary managed 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 managed the function rather than performed the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary managed an essential function. The petitioner's vague job description fails to document that the beneficiary's duties were primarily managerial. Also, as explained above, the record indicates that it is more likely than not that the beneficiary primarily worked as a first-line supervisor of non-professional employees or primarily performed non-qualifying 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 were managerial, nor can it deduce whether the beneficiary primarily performed 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).

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 acted primarily in an executive capacity. As explained above, it appears instead that the beneficiary was primarily employed as a first-line supervisor and performed the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Counsel correctly notes that the size of a petitioner's workforce alone will not render a beneficiary ineligible for the benefit sought under this visa classification. *See generally Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52 (D.C. Ore. 1981). However, in reviewing the relevance of the number of employees a petitioner has, federal courts in more recent, appellate decisions have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for 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).

Accordingly, the petitioner has not established that the beneficiary has been employed abroad in a primarily managerial or executive capacity, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has not established that the proposed 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).

As indicated above, if the petition indicates that the beneficiary is coming to the United States as a manager or executive to be employed in a new office, the petitioner shall submit evidence that:

> (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.

In this matter, the petitioner has failed to establish eligibility under the above "new office" criteria, because the petitioner failed to establish that an adequate investment has been made in the United States operation. As noted above, the record is devoid of evidence establishing that the foreign employer has contributed the necessary equipment to the United States operation. Accordingly, the record is not persuasive in establishing 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 claims that the beneficiary's duties in the United States will be the same as his duties in Korea. As the petitioner has failed to establish that the beneficiary's duties in Korea were primarily managerial or executive in nature, *see supra*, the petitioner has likewise failed to establish that the beneficiary will more likely than not primarily perform qualifying duties in the United States within one year.

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 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.