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U.S. Citizenship
and Immigration
Services

D7



File: EAC 07 006 52919 Office: VERMONT SERVICE CENTER

Date: FEB 28 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 petitioner filed a motion to reopen and reconsider. The director granted the motion and affirmed his denial of the petition. 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 employ the beneficiary as "manager operation and marketing" 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 limited liability company organized under the laws of the State of Texas and allegedly operates a convenience store in Shreveport, Louisiana.¹

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the beneficiary was employed abroad in a primarily managerial or executive capacity. The petitioner filed a motion to reopen and reconsider. On May 9, 2007, the director granted the motion and affirmed his denial of the petition.

On June 4, 2007, the petitioner 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, that the beneficiary will be employed as an executive or manager in the United States, and that the beneficiary was employed in a managerial capacity abroad.

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.

¹It is noted that, according to the records of both the Texas and Louisiana Departments of State, the petitioner's correct company name is "██████████ Mart, LLC."

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue 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. A petitioner may not claim that a beneficiary will be 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 asserting that the beneficiary will be employed in a managerial *or* an executive capacity and will consider both classifications.

The foreign employer describes the beneficiary's proposed duties in a letter dated October 3, 2006 as follows:

With the U.S. Corporation, [the beneficiary] will serve as Manager Operation and Vice President of our company, which represents an expansion of the activities of our corporation. She will be overall in charge of the expansion of our company. She will develop and implement a marketing plan and will analyze various business opportunities. She will be the key participant in the company's decision regarding various business opportunities. He [sic] will hire, train, supervise and fire all of the Managers in our expanded business.

She will establish and maintain financial relations and will develop and implement an overall operating structure and marketing plan.

Although the petitioner asserts in the Form I-129 to have two employees, the petitioner submitted a "proposed" organizational chart showing the beneficiary reporting to a CEO and directly or indirectly supervising approximately nine subordinate employees organized into a three-tiered hierarchy. It is unclear which positions on the chart are occupied by the two current employees, if any, or what the current employees do on a day-to-day basis.

Finally, it appears from the record that the petitioner recently sold its interest in a business in Texas and thereafter acquired an interest in a Louisiana convenience store in September 2006, which is now its sole business enterprise.

On October 19, 2006, the director requested additional evidence. The director requested, *inter alia*, descriptions of the job duties for the positions subordinate to the beneficiary and a more detailed description of the beneficiary's proposed duties in the United States.

In response, the petitioner submitted an organizational chart showing the beneficiary reporting to a CEO and directly supervising an "Assistant Manager Operation," an "Assist Manager Accounting," and an "Asst Manager Ware House and Marketing." The petitioner also submitted job descriptions for these three positions. As these descriptions are in the record, they will not be repeated in their entirety here. Generally, the "Assistant Manager Operation" is described as supervising subordinate staff and the operation of the "retail locations." The "Assistant Manager Accounts" is described as performing and supervising tasks related to the business accounts, banking, and financial reporting. The "Assistant Manager Marketing and Warehouse" is described as administering inventory, warehousing, and marketing activities.

However, similar to the evidence submitted in support of the initial petition, the record does not explain which positions on the organizational chart are occupied by either of the two current employees, if any. The record does not establish that any employees are actually performing the duties ascribed to the various positions on the organizational chart or that these positions are anything other than prospective positions to be filled at a later date. The record is devoid of evidence connecting the two employees claimed to exist in the

Form I-129 with any specific set of duties.

The petitioner also further described the beneficiary's proposed job duties in an undated letter as follows:

To [p]lan, direct, or coordinate the operations of [the petitioner] in USA. To formulate company policies, manage daily operations of its retail and whole sale operations in USA, and plan the efficient and economic utilization of company resources materials as well as human resources. To organize the operations of entity in USA, including but not limited to hiring and firing of company employees working in USA which includes personnel management, purchasing of merchandise, or administrative services.

To [d]irect the actual distribution or movement of a product or service to the customer. Coordinate sales distribution by establishing sales territories, quotas, and goals and establish training programs for sales representatives. Analyze sales statistics gathered by staff to determine sales potential and inventory requirements and monitor the preferences of customers.

To [c]onfer with department heads to ensure coordination of activities with such activities as sales, records control, and purchasing, stock maintenance and accounting, inventory control. To [s]creen and [hire] personnel and issues work assignments.

Plan, direct, and coordinate the storage and distribution operations within an organization or the activities of organizations that are engaged in storing and distributing materials and products.

To [r]eport to [c]hief executive of company as to further expansion and acquisitions of assets and businesses in USA.

To Co ordinate [sic] with the Accountant and other governmental agencies for compliance of reporting requirements.

On December 11, 2006, 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 January 8, 2007, counsel filed a motion to reopen and reconsider. On May 9, 2007, the director granted the motion and affirmed his prior denial.

On appeal, counsel asserts that the beneficiary's duties are primarily those of an executive or a manager.

Upon review, counsel's assertions are not persuasive.

As a threshold issue, it must be emphasized that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In this matter, the petitioner, a fully formed entity that has been in operation for over one year,

must establish that the beneficiary will perform qualifying duties immediately upon petition approval. The petitioner's future hiring or expansion plans are not relevant to whether the beneficiary will immediately perform qualifying duties. A visa petition may not be approved based on speculation of future eligibility. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, Citizenship and Immigration Services (CIS) will consider whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity in her operation of a two-employee, single-location convenience store in Shreveport, Louisiana.

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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails 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 in her operation of the convenience store. For example, the petitioner states that the beneficiary will formulate company policies; develop and implement a marketing plan; confer with department heads; and establish sales territories, quotas, goals, and establish training programs for sales representatives. However, the petitioner does not specifically define these policies, plans, or goals, and fails to explain what, exactly, the beneficiary will do in establishing sales territories, quotas, and sales representative training programs given that these duties appear to be unrelated to the operation of a convenience store chain having three locations as described in the business plan. The petitioner also fails to explain what, exactly, the beneficiary will do in conferring with "department heads" given that the petitioner currently claims to employ two people whose duties have not been described. Furthermore, general managerial-sounding duties such as "plan, direct, or coordinate the operations" are not probative of the beneficiary performing qualifying 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, many 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. For example, the petitioner asserts that the beneficiary will "organize the operations" of the United States enterprise, purchase merchandise, perform "administrative services," and be "in charge of the expansion of [the] company." However, it has not been established that these duties are managerial or executive in nature. To the contrary, these duties appear to be non-qualifying administrative or operational tasks related to the start-up of the Louisiana and planned Texas convenience stores, and the petitioner has not explained how the two existing

employees will relieve the beneficiary of the need to perform these tasks. Moreover, as the petitioner has failed to specifically describe the duties of the two existing employees, the petitioner has failed to establish that the beneficiary will be relieved of the need to perform any of the non-qualifying tasks inherent to her duties and to the operation of a single-location convenience store in general. Therefore, it has not been established that she will be "primarily" 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 asserted in the record, the beneficiary will directly supervise two employees. However, as indicated above, the petitioner does not specifically describe the duties of these two employees. The record does not establish that any employees are actually performing the duties ascribed to the various positions listed on the organizational chart or that any of these positions is anything other than a prospective position to be filled at a later date. The record is devoid of evidence connecting the two employees claimed to exist in the Form I-129 with any specific set of duties. 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).

Regardless, even if job duties ascribed to the positions listed in the organizational chart could be attributed to one or both of the existing employees, the record does not establish that any of these positions is supervisory or managerial in nature. To the contrary, it appears that the "Assistant Manager Operation," the "Assistant Manager Accounts," and the "Assistant Manager Marketing and Warehouse" will all perform the tasks necessary to provide a service or to produce a product given that a subordinate staff is not present to relieve them of the need to perform such tasks. Therefore, in view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, 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, 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 will manage professional employees.² Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

²In 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).

³While the petitioner has not clearly argued that the beneficiary will manage an essential function of the

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. Finally, given that the beneficiary will report to a chief executive officer, it appears that any realistic authority to direct the organization will be vested in this person and not in the beneficiary. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts 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

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 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 that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees and will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her 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).

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 failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

The second issue in the present matter is whether the petitioner has established that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii)-(iv).

The foreign employer described the beneficiary's duties abroad in a letter dated October 3, 2006 as follows:

Currently, [the beneficiary] is the Manager Operation and Marketing of [the foreign employer]. In this capacity, she oversees the overall operation of the company. She hires, trains, supervises, and fires all managers in the company with the approval of CEO. She sets policy and makes all decisions regarding marketing strategy, pricing, and shipping. She establishes and maintains financial relations.

The petitioner also submitted an organizational chart for the foreign employer. The chart vaguely shows the beneficiary reporting to a general manager and supervising between three and seven employees.

On October 19, 2006, the director requested additional evidence. The director requested, *inter alia*, a more detailed organizational chart for the foreign employer and a description of the job titles and duties of all employees subordinate to the beneficiary.

In response, the foreign employer submitted an identical organizational chart and an undated letter in which the beneficiary's duties abroad were described as follows:

1. To [p]lan, direct, or coordinate the operations of [the] Business development and Marketing department.
2. To formulate company policies, manage daily operations in [the] head office.
3. To plan the efficient and economic utilization of company resources materials as well as human resources.
4. To organize the operations of Marketing and Business Development Department including but not limited to hiring and firing of employees working in Department.
5. To [d]irect the actual distribution or movement of a product or service to the customer.
6. Coordinate sales distribution by establishing sales territories, quotas, and goals and establish training programs for sales representatives.
7. Analyze sales statistics gathered by staff to determine sales potential and inventory requirements and monitor the preferences of customers.
8. To [c]onfer with department heads to ensure coordination of activities.
9. To report to Chief executive of company as to further expansion.

10. To Co ordinate [sic] with the Accountant and other governmental agencies.

The foreign employer also described the beneficiary's claimed subordinate staff as follows:

[The beneficiary's] immediate subordinate staff included following:

1. **Recovery Manager (██████████)** who was assigned responsibilities to work under supervision of [the beneficiary] for recovery of outstanding debts from customers and clients with out [sic] antagonizing and compromising future business contacts. He was assisted by Two Recovery Officers who were reporting to Recovery manager. The staff was required to provide time sheets and daily progress reports. [The beneficiary] was supervising through recovery manager the staff in recovery Wing. The recovery Wing has total staff strength of 10 Persons and were working under direct control of [the beneficiary] through [the recovery manager]. The company finances were in excellent shape because of excellent work of recovery wing of our entity which was working under guidance and control of [the beneficiary].
2. **Assistant Manager Marketing (██████████n).** The Marketing Manager was working under the supervision of [the beneficiary] for developing Marketing strategies and planning seminars and reaching out to customers. The seminars and workshops were organized and planned by [the beneficiary] and executed by [the assistant manager marketing] through his staff. The support staff included two business executive[s] and administrative staff. The company made excellent progress due to her marketing strategi[es].

On December 11, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary was employed abroad primarily in a managerial or executive capacity.

On January 8, 2007, counsel filed a motion to reopen and reconsider. On May 9, 2007, the director granted the motion and affirmed his prior denial.

On appeal, counsel asserts that the beneficiary's duties are primarily those of a manager.

Upon review, counsel's assertions are not persuasive.

Once again, 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) and (iv). 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.* While counsel appears to limit the beneficiary to the managerial classification on appeal, the record is not entirely clear on this point. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary was employed in either a managerial *or* an executive capacity and will consider both classifications.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary acted in a primarily "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 did on a day-to-day basis abroad. For example, the petitioner states that the beneficiary formulated company policies. However, the petitioner failed to specifically describe these policies. Furthermore, general managerial-sounding duties such as managed "daily operations in [the] head office" are not probative of the beneficiary performing qualifying duties. The fact that the petitioner gave 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. Once again, 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. 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.

Furthermore, the petitioner has failed to establish that the beneficiary was relieved of the need to perform the non-qualifying tasks inherent to her ascribed duties by a subordinate staff. For example, the petitioner states that the beneficiary directed "the actual distribution or movement of a product or service to the customer;" coordinated "sales distribution by establishing sales territories, quotas, and goals;" established "training programs for sales representatives;" analyzed "sales statistics gathered by staff to determine sales potential and inventory requirements;" and planned "the efficient and economic utilization of company resources." However, the petitioner asserts that the beneficiary supervises a "recovery" staff, which collects outstanding debts, and a marketing staff, which develops marketing strategies, plans seminars, and reaches out to customers. The beneficiary does not appear to have been aided by any subordinate employees in the performance of the non-qualifying tasks inherent to the above duties. As the petitioner fails to establish how much time the beneficiary devoted to performing such non-qualifying tasks, it has not been established that she was "primarily" 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

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 supervised a recovery manager and an assistant marketing manager who, in turn, each supervised a subordinate staff. However, the petitioner's vague descriptions of the two claimed subordinate supervisors do not clearly establish what these employees did on a day-to-day basis or that either of these employees was a managerial or supervisory worker. While the petitioner asserts that a subordinate staff reported to each of the supervisors, it has not been established that these employees truly had supervisory authority over subordinate employees. A worker 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. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. Simply put, the petitioner has failed to establish that the foreign business enterprise had an organizational complexity which truly required the employment of a subordinate tier of supervisors or managers. 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).

Therefore, in view of the above, the beneficiary would appear to have been primarily a first-line supervisor of non-professional workers, 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, 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. Therefore, the petitioner has not established that the beneficiary was employed primarily in a managerial capacity.⁴

Similarly, and for the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, it appears 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. Finally, given that the beneficiary reported to a general manager who reported to a director and a chief executive officer, it appears that any realistic authority to direct the organization would have been vested in one of these individuals and not in the beneficiary. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary was 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 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(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" and "is or will be doing business." "Subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or

⁴While the petitioner has not clearly argued that the beneficiary managed an essential function of the organization, the record nevertheless would not support this position even if taken. 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 the beneficiary was primarily a first-line supervisor of non-professional employees and performed non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties were managerial, nor can it deduce whether the beneficiary was primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

indirectly, more than half of the entity and controls the entity." "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services."

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; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock and membership certificates alone are not sufficient evidence to determine whether a stockholder or member maintains ownership and control of a corporate entity. The stock or membership certificate ledger, certificate registry, bylaws, and the minutes of relevant membership meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Furthermore, as ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper certificates into the means by which ownership interests were acquired. As requested by the director, the evidence of this nature should include documentation of monies, property, or other consideration invested in the United States operation in exchange for a membership interest. Additional supporting evidence would include membership purchase agreements, subscription agreements, bylaws, minutes of relevant meetings, or other legal documents governing the acquisition of the ownership interest. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this matter, the petitioner asserts in the Form I-129 that the foreign employer owns 100% of the petitioner's membership interests. In support of this assertion, the petitioner submitted a membership certificate purporting to represent the issuance of 1,000 units to the foreign employer. However, the petitioner also submitted a copy of its company minutes dated January 31, 2005 which indicate that 1,000 units were sold to the beneficiary in exchange for \$10,000.00. The petitioner does not address this inconsistency in the record which undermines its claim to have a qualifying relationship with 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).

Furthermore, the record is not persuasive in establishing that the foreign employer actually paid for the membership units purportedly issued to it. As evidence that the foreign employer invested money in the United States operation, the petitioner submitted a document from JPMorgan Chase Bank indicating that \$24,000.00 was deposited into the petitioner's bank account on September 25, 2006. However, not only was this money deposited almost two months after the purported issuance of membership units to the foreign employer, the record is devoid of evidence establishing the source of this deposit. Likewise, while a Washington Mutual "incoming wire transfer notice" indicates that \$24,975.00 was wired on September 14, 2006, these funds were wired to the

beneficiary by [REDACTED], not to the petitioner by the foreign employer. Overall, the record is not persuasive in establishing that the foreign employer owns and controls the petitioner through the genuine acquisition of membership units. To the contrary, it appears more likely than not that the beneficiary continues to own and control the petitioner.

Finally, the record is not persuasive in establishing that the foreign employer is actively "doing business" as defined by the regulations. The record is devoid of evidence establishing that the foreign employer is engaged in the regular, systematic, and continuous provision of goods and/or services as of October 2006. Virtually all of the evidence pertaining to the foreign employer appears to relate to business activity occurring in 2005 or earlier. 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, the petitioner has not established that it and the foreign entity are qualifying organizations. For this additional reason, the petition may not be approved.

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

The petition will be denied 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.