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FILE: EAC 06 224 50778 Office: VERMONT SERVICE CENTER Date: JAN 03 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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, 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 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 Florida limited liability company, intends to engage in the manufacture, sale, installation and service of hurricane protection shutters. The petitioner states that it is a subsidiary of Transporte ANCO 900 C.A., located in Venezuela. The petitioner seeks to employ the beneficiary as the managing director of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal.<sup>1</sup> On appeal, counsel for the petitioner asserts that the director erroneously failed to consider that the petitioner is a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) and therefore did not properly apply the regulations at 8 C.F.R. § 214.2(l)(3)(v) to the facts of this case. Counsel asserts that the petitioner submitted sufficient evidence to establish that the petitioner will employ the beneficiary in a primarily managerial or executive capacity within one year. Counsel further contends that the director mischaracterized the petitioner as a shutter manufacturer when in fact "it intends to do much more than manufacture shutters." Counsel submits a brief and additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

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<sup>1</sup> The appeal of the director's decision dated October 31, 2006 was initially filed on November 29, 2006. On March 26, 2007, the director rejected the appeal on the basis that it was not signed by the affected party, pursuant to 8 C.F.R. § 103.3(a)(2)(v). The director's decision dated March 26, 2007 is hereby withdrawn, as the director does not have appellate jurisdiction over this matter. Upon review, the AAO notes that the petitioner's appeal was both timely and properly filed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides 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 in the United States, 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;
- (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 sole issue addressed by the director is whether the petitioner established that the United States operation will support an executive or managerial position, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low-level 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 that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and

commence doing business in the United States. *Id.* 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.

The nonimmigrant visa petition was filed on July 31, 2006. In an undated letter submitted in support of the petition, the petitioner indicated that the U.S. company intends to manufacture, sell and service hurricane protection shutters. The petitioner described the beneficiary's proposed duties as managing director as follows:

- Develop, establish and direct the subsidiary's mission, financial goals, and budget.
- Oversee hiring of senior staff, eventually including a General Manager, a Warehouse Manager, and sales staff and warehouse laborers, and ensure proper training procedures and policies.
- Establish organizational structure and delegate authority to subordinates.
- Represent organization as necessary to the financial community, major potential clients, local and state government agencies, and the public.
- Oversee investment of resources with the stock holders and accounting firm by reviewing financial statements and making projections according to current conditions.
- Determine and oversee further investment in the subsidiary, including equipment, staffing levels, marketing and publicity expenses, and the like.
- Analyze costs and determine pricing and profit margins, and report to parent company and stockholders on fluctuations.

[The beneficiary], as Managing Director of the U.S. entity, will have day-to-day control of the operation and will confer with [the petitioner's] Board of Director's and the two stockholders, [REDACTED] and [REDACTED] on matters that have a material effect on fundamental corporate issues, such as pricing and profitability. [The beneficiary] is expected to fully manage the U.S. entity and will have discretionary authority to hire, promote and fire all employees. He will be a signatory on the corporate [company] bank account and will have decision-making authority over all elements that relate to the management of the operation. We anticipate hiring a general manager, as well as sales and support staff, during the course of this first year of business activity, including a warehouse/stock supervisor, warehouse workers, and a secretary.

The petitioner stated in its letter that it initially intends to purchase prefabricated shutters and sell them wholesale to shutter installation companies. The petitioner further stated that the company intends to hire "as many as four workers to prefabricate an average of 20 accordion shutter systems per week for the first six months." In support of the petition, the petitioner provided an organizational chart which depicts the beneficiary as managing director, responsible for supervising a marketing and sales manager, [REDACTED] an operations manager, [REDACTED], and an outsourced accountant. The chart shows that [REDACTED] would supervise three warehouse employees, including an assembly line operator, a cutting machine operator, and a packing operator.

The petitioner provided evidence that it had leased a 300 square foot warehouse space to be used for "shutter storage and for no other purposes."

The petitioner provided a three-page business plan which highlights the petitioner's objective of "manufacturing our own merchandize [sic]" to guarantee quality and on-time delivery of its hurricane protection shutter systems. The plan indicates that the petitioner's short-term goal is to open a 2,000 square foot warehouse to pre-fabricate 20 accordion systems per week for the first six months, and later expand to a 10,000 square foot shop operating a "state of the art manufacturing business." The petitioner also submitted its month-by-month financial analysis and projections through 2008. Neither the business plan nor the financial projections contained information regarding the petitioner's hiring plans and projected salary expenses for the first year of operations.

On August 10, 2006, the director issued a request for additional evidence. In part, the director requested evidence to show how the new company would grow to be of sufficient size to support a managerial or executive position. The director emphasized that the evidence must demonstrate that the beneficiary would be relieved from performing the non-managerial, day-to-day operations involved in producing a product or providing a service. The director also acknowledged the organizational chart submitted with the petition, but questioned whether the beneficiary's subordinates would be bona fide managers or professionals. The director therefore requested evidence of the educational credentials of the subordinate employees, and instructed the petitioner to provide an in-depth description of the subordinate employees' positions, including a breakdown of the duties to be performed by each employee. Finally, the director requested information regarding the salary or wages to be paid to each proposed employee.

In a response dated October 14, 2006, the petitioner emphasized that the petitioner "cannot help but grow in the first year of operation because, as a manufacturer and installer of hurricane shutters, we are located in a hurricane battered region that also happens to be the nation's top residential housing construction market." The petitioner further emphasized that state building codes and insurance policy guidelines often require builders and homeowners to install hurricane shutters. The petitioner provided a detailed overview of hurricane activity and the hurricane shutter industry in south Florida.

As evidence of its business activities, the petitioner submitted invoices for its purchase of materials from suppliers, and indicated that the company had begun to fill orders for accordion shutters as of June 2006. The petitioner stated that the company is "confident that within a year the company will not only comfortably support a full-time management position, but will also have hired other staff, and entered into several contracts especially with construction companies building residential properties all over South Florida." The petitioner further indicated that the beneficiary "will certainly be relieved from performing any of the non-managerial, day-to-day functions that he may need to handle in the next few months."

The petitioner, referencing its previously provided organizational chart, stated that it intends to employ a sales/marketing manager, an operations manager and three warehouse employees as payroll employees, as well as a subcontracted "installation crew," who would eventually be hired as full-time workers.

The petitioner indicated that the operations manager and sales/marketing manager positions would both be sufficiently complex to require the services of professionals, and would also be managerial in nature. The petitioner provided evidence that both employees have a bachelor's degree in civil engineering.

The petitioner provided position descriptions for both lower-level managers. In summary, the petitioner indicated that the operations manager would: manage and coordinate the integrated operation of the company;

assist in the development and implementation of policies and procedures; oversee the supervision of subordinate personnel and make recommendations; review financial and operating information, participate in the preparation of contract proposals for review by the managing director; assist the managing director in planning, implementing and evaluating existing operations, systems and procedures; and represent the company at zoning, building and licensing meetings and hearings.

The petitioner stated that the sales/marketing manager would: develop the company's marketing strategy, including advertising, direct mailing of brochures, and trade show participation; direct the company's sales strategy; research the market; determine sales potential and inventory requirements; build customer relationships, organize and conduct marketing activities; establish and maintain a client and products database; create marketing materials; and report marketing information to the managing director. The petitioner indicated that this position would be that of a function manager until business growth requires the hiring of sales staff.

The director denied the petition on October 31, 2006, concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director acknowledged that the beneficiary's proposed subordinates have both attained bachelor's degrees and found that the duties outlined for the operations manager and sales/marketing manager included tasks that would require the skills of bona fide professionals. However, the director concluded that a "modest-sized, relatively new manufacturing company" would not require managers or professionals in these positions. The director found insufficient evidence to establish that the petitioner could "currently support" the beneficiary in an executive or managerial capacity, and noted that the evidence failed to demonstrate that he would actually be carrying out the claimed managerial or executive duties. The director concluded that the beneficiary would likely be carrying out the non-managerial, day-to-day operations of the business.

On appeal, counsel for the petitioner asserts that the director erred in determining that the petitioner, as a new office, must show that the company can currently support a managerial position. Counsel asserts that the petitioner presented ample evidence as to why it anticipates significant growth during the first year of operations. Counsel claims that the petitioner, due to the nature of its industry and location in a booming residential construction market with significant hurricane concerns, can expect "potentially exponential growth," which would require "hiring laborers, supervisors, as well as support the work of a marketing manager and an operations manager."

Upon review, the petitioner has not established that the U.S. company would support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition. However, counsel correctly states that the director's decision did not reference the regulations governing "new office" petitions. The director acknowledged in the request for evidence dated August 10, 2006 that the petitioner is a "new company," and requested that the petitioner submit additional evidence to establish that it would support the beneficiary in a primarily managerial or executive capacity within one year. The AAO notes for the record that the petitioner, although established in June 2005, appears to have commenced operations in June 2006, therefore, it meets the criteria for a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility pursuant to the "new office" regulations. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.*

Here, the petitioner's description of the beneficiary's duties is particularly vague and general and thus fails to convey any understanding of what duties he will perform on a day-to-day basis as managing director of the U.S. company. The petitioner's statements that the beneficiary will "develop, establish and direct the company's mission," "establish organizational structure," manage and direct the daily activities, and "oversee the investment of resources," are insufficient, as they offer little insight into the actual tasks the beneficiary will perform. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). As noted above, the petitioner has not enumerated the specific managerial or executive job duties to be performed by the beneficiary on a daily basis as the company's managing director. While the AAO does not doubt that the beneficiary would exercise authority over the company as its managing director, the petitioner still has the burden of establishing that a majority of his actual duties would be managerial or executive in nature within one year. This determination cannot be based on the beneficiary's job title, his management of subordinates, the fact that the petitioner is involved in an industry with high growth potential, or a job description that fails to clarify the beneficiary's specific daily tasks. The record does not include a sufficiently detailed description of the beneficiary's proposed day-to-day duties, which is germane to a determination regarding the beneficiary's employment capacity in the United States.

Therefore, the beneficiary's position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on such factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

Upon review, the supporting evidence does not provide a clear explanation of the petitioner's proposed hiring plan. The organizational chart submitted by the petitioner suggests that the company already employs an operations manager and sales/marketing manager, and intends to hire three warehouse workers and an outside accountant. The petitioner's letter referenced proposed positions for a general manager, a warehouse manager,

sales staff, warehouse laborers, a warehouse/stock supervisor and a secretary. In response to the request for evidence, the petitioner appeared to rely on the staffing structure described in the organizational chart, adding that the company would also utilize subcontractors for installation projects. Furthermore, the petitioner stated that the company was already engaged in purchasing materials and fulfilling orders as of June 2006, thus implying that at least some staff had been hired. However, the petitioner did not offer evidence of payments to employees or contractors in response to the request for evidence. As noted above, the petitioner's business plan was silent on the issue of management and staffing structure, while the company's financial projections for the first year of operations did not specify the company's projected salary expenses. However, the financial projections do indicate anticipated monthly "costs" of only \$2,000 to \$3,754 through August 2007, and monthly operating expenses of \$194 to \$852 for the same period. Considering that the petitioner indicated that its two subordinate managers alone would each receive annual salaries of \$35,000, there appears to be an inconsistency between the company's anticipated salary expenses and its hiring plan.

Based on the above discrepancies, it is impossible to determine the number or types of employees the petitioner would employ at the end of the first year of operations, or whether those employees will be employed on a full-time or part-time basis. 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). The AAO will nevertheless rely on the proposed organizational chart, which was submitted with the initial petition and again referenced in response to the request for evidence, as the more consistent account of the petitioner's proposed organizational structure. Based on the organizational chart, the beneficiary will manage one sales/marketing manager and one operations manager.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

Therefore, although the beneficiary is not required to supervise personnel, if it is claimed that his managerial duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, while both of the beneficiary's proposed subordinates possess baccalaureate-level degree in civil engineering, the petitioner has not, in fact, established that a bachelor's degree in that field is actually necessary to perform their job duties in the areas of sales, marketing, and operations management. The petitioner emphasizes that the subordinate managers would need to be "fully cognizant of state building codes," and "local permitting and licensing," have a "thorough understanding of the shutter systems," and "the ability to understand the needs of engineers, architects and other professionals;" however, these requirements are not consistent with the duties described by the petitioner and do not clearly require the services of a civil engineer.

Nor has the petitioner established that the beneficiary would primarily be managing a staff of supervisory or management-level subordinates. Although the petitioner indicates that the sales/marketing manager would be a "function manager," the fact remains that he would be solely responsible for sales and marketing activities of the company, which would reasonably include primarily non-managerial tasks for the foreseeable future. The petitioner has not provided a timeline for the hiring of additional sales staff and the AAO will not assume that the sales/marketing manager would be acting as a supervisor within one year. The position description submitted for the operations manager is not entirely credible, as it overlaps significantly with the beneficiary's position description. It is unclear that a newly-formed company with approximately six employees would require two managers to perform nearly identical duties. Finally, as noted above, the petitioner has not provided evidence that it actually employs the operations manager and sales/marketing manager. Although the petitioner, as a new office, is not required to have already hired employees, the fact that the company states that it was already making purchases and fulfilling orders as of June 2006 raises a reasonable expectation that the company can document its current staffing levels. Based on these deficiencies, the petitioner has not shown that the beneficiary would be primarily engaged in the supervision and control of a subordinate staff of supervisory, professional, or managerial employees, as required by section 101(a)(44)(A)(ii) of the Act.

Furthermore, the AAO questions whether a staff consisting of a sales/marketing manager, an operations manager, and three warehouse workers would reasonably relieve the beneficiary from involvement in the day-to-day non-managerial operations of the U.S. company. The petitioner has not indicated that it intends to hire workers to perform routine sales, purchasing, administrative or routine financial operations associated with operating its business within the first year of operations, and thus it is unclear that that the beneficiary would not participate in such activities. The absence of a subordinate staff sufficient to perform the non-qualifying duties of the petitioner's business is a proper consideration in the analysis of the beneficiary's employment capacity. *See Q Data Consulting, Inc. v. INS*, 293 F. Supp. 25, 29 (D.D.C. 2003).

The AAO acknowledges the evidence submitted in response to the request for evidence regarding the increasing demand for hurricane shutters in the southern Florida market. However, the fact that the petitioner seeks to start a business in a high-growth industry has little bearing on whether this particular U.S. company will grow to a point where it will support the beneficiary in a primarily managerial or executive position within one year. Such a determination, as required by the regulations, must be based upon the petitioner's evidence related to the beneficiary's job duties, the proposed nature and scope of the office, its organizational structure and financial goals, and the size of the United States investment, rather than on external industry

factors. Here, the totality of the evidence does not support a finding that the company will grow to a point where it will support the beneficiary in a primarily managerial or executive capacity within one year.

The AAO notes that the petitioner's submission of a vague job description for the beneficiary, a proposed organizational chart, a three-page business plan, a lease agreement for physical premises that appears to be insufficient for the petitioner's purposes, and evidence that the company has approximately \$20,000 in the bank falls significantly short of establishing that the company will be able to support a primarily managerial or executive position within a twelve-month period. The regulations require the petitioner to provide a clear picture of where the company will stand in exactly one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. 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)).

Overall, the minimal evidence submitted with this petition does not 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. Based on the foregoing discussion, the petitioner has not established that the U.S. entity would support the beneficiary in a managerial or executive capacity within one year of the approval of the petition. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record does not establish that the petitioner has secured sufficient physical premises to house the new office. At the time of filing on July 31, 2006, the petitioner indicated that the beneficiary would work at [REDACTED], in Pembroke Park, Florida. The petitioner provided a lease for this premises which identifies it as a 300 square foot warehouse space to be used for storage of shutters and for no other purpose. The petitioner has not established that it has secured premises for its proposed manufacturing activities, or sufficient office space to carry out the marketing, sales and administrative aspects of the business. Furthermore, the petitioner's business plan identifies an initial requirement of a 2,000 square foot facility for the pre-fabrication of shutters, activities that would not be permitted at the small storage space currently leased by the petitioner. For this additional reason, the petition cannot be approved.

Another issue not addressed by the director is whether the petitioner 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 U.S. 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). The petitioner claims to be a subsidiary of Transporte ANCO 900 C.A., located in Venezuela.

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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder 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.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

As ownership is a critical element of this visa classification, USCIS may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The petitioner is a Florida limited liability company organized on June 23, 2005. The petitioner claims that the current ownership of the U.S. company is as follows:

████████████████████	50%
████████████████████	25%
████████████████████	25%

In support of this claim, the petitioner submitted the following documents:

- (1) Membership certificate #1 for 500 units issued to the foreign entity on July 17, 2006.
- (2) Membership certificate #2 for 250 units issued to ██████████ on July 17, 2006.
- (3) Membership certificate #3 for 250 units issued to ██████████ on July 17, 2006.
- (4) Articles of amendment to the articles of organization of the petitioning company, dated June 27, 2006, indicating that Article V of the articles should be amended to reflect the membership of ██████████ and the foreign entity. This document is accompanied by a cover letter addressed to the Registration Section of the Florida Division of Corporations.
- (5) A previous articles of amendment to the articles of incorporation dated January 11, 2006, reflecting a change in company address, which was date stamped as received the Florida Secretary of State on January 23, 2006;
- (6) The petitioner's Electronic Articles of Organization for Florida Limited Liability Company, identifying the names of managing members/managers as: ██████████ and ██████████
- (7) The results of an inquiry of publicly available information regarding the petitioning company at the Florida Secretary of State, Division of Corporations Internet site,

<http://www.sunbiz.org>, which indicates that as of July 12, 2006, the company was active. The document provides a list of filings made by the corporation, including: an amendment filed on June 30, 2006; an annual report filed on May 1, 2006; an officer/director resignation filed on January 23, 2006; an amendment filed on January 23, 2006; and the articles of organization filed on June 23, 2005.

- (8) A notarized "Membership Agreement" executed on June 23, 2006, and signed by Jorge [REDACTED], and by the beneficiary as a representative of the foreign entity.

The document states:

We hereby certify that the Membership Certificates are distributed as follows;

25% [REDACTED]

25% [REDACTED]

50% [REDACTED]

Upon review of this evidence, the AAO noted that the most recent articles of amendment to the articles of organization for the United States company did not bear a filing receipt stamp from the Florida Department of State, Division of Corporations. All other corporate documents submitted by the petitioner bear either an electronic stamp indicating the date of filing, or were physically stamped as received by that office.

Accordingly, the AAO conducted its own inquiry at the Florida Secretary of State, Division of Corporations Internet site. The results of the inquiry revealed that the petitioner filed articles of amendment to its articles of incorporation dated June 27, 2006, which was date stamped as received on June 30, 2007. However, the public records show that the sole purpose for filing the articles was to amend Article II of the articles to reflect a new address for the U.S. company. There was no record that the petitioner had filed the articles of amendment to reflect the change in the membership of the U.S. company.

Because the above information did not derive from the record of proceeding for the instant nonimmigrant petition, the AAO issued a notice of intent to deny the petition on October 24, 2007, pursuant to 8 C.F.R. § 214.2(l)(8)(i), in which this office advised the petitioner that the public company records held by the Florida Secretary of State are not consistent with the evidence submitted in support of this petition.

The AAO instructed the petitioner to provide: (1) the petitioner's original articles of amendment to its articles of organization dated June 27, 2006, bearing a date stamp from the Florida Secretary of State and accompanied by that office's cover sheet bearing a bar code and indicating the fee paid; (2) evidence that the petitioner paid the \$25.00 filing fee for its amended articles of organization; (3) a copy of the petitioner's limited liability company operating agreement or equivalent document, identifying the total number of membership units authorized by the company and the identity of all members and managers to date; (4) evidence that the foreign entity paid for its claimed 50 percent ownership interest in the U.S. company; (5) an explanation as to why the petitioner did not issue membership certificates when it was organized in June 2005, specifically in reference to an original managing member [REDACTED] who resigned as a member in January 2006; and (6) a complete copy of the U.S. company's corporate tax return (IRS Form 1120 or Form 1065) with all required schedules and statements, for the 2006 tax year, as well as a copy of the company's 2005 tax return, if filed.

The petitioner filed a timely rebuttal to the AAO's notice of intent to deny on November 23, 2007. The petitioner's response includes an affidavit from [REDACTED] dated November 19, 2007, who attests that the petitioner issued a membership agreement showing that the foreign entity owns 50% of the petitioning company on June 23, 2006. Mr. [REDACTED] states that he "did forget to send via mail the amendment with the state, which is why the state does not have a filing of this document and that is why there is no date stamp of the state on the document." In a separate letter, also dated November 19, 2007, the petitioner indicates that [REDACTED] "was under the impression he had filed it, as he had filed other amendments previously, and then realized that he had forgotten to do so." The petitioner states that [REDACTED] had previously completed the appropriate forms and will file the articles of amendment with the Florida Secretary of State prior to November 30, 2007.

In response to the AAO's inquiry regarding the issuance of membership certificates to the original members at the time the company was organized in June 2005, the petitioner asserts that the company "decided not to issue membership certificates, instead waiting to determine whether the company would be successful in its effort to garner a \$19 million dollar real estate development project." The petitioner states that the project never gained financial support, the company remained inactive, and never issued membership certificates to [REDACTED] or to [REDACTED]. The petitioner indicates that the initial issuance of stock certificates therefore occurred on July 17, 2006.

The petitioner also submits previously submitted documents and the following: (1) the petitioner's 2006 limited liability company annual report filed with the Florida Secretary of State on May 1, 2006, which identifies [REDACTED] as the company's sole member; (2) the petitioner's articles of amendment to its articles of organization filed on June 30, 2006, amending the company's address; and (3) the original membership agreement executed on June 23, 2006, a copy of which was previously submitted.

The petitioner stated that all available company documentation has been submitted. The AAO notes that the documentation does not include an operating agreement or other documentation establishing the identify of its members or the contributions made in exchange for their membership in the company. The petitioner indicates that its 2006 income tax return is unavailable as of November 2007, but provides no further explanation as to why it is unavailable. 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).

As evidence of the foreign entity's claimed \$20,000 investment in the U.S. company, the petitioner submits two checks payable to the beneficiary from [REDACTED] a co-owner of the foreign entity, dated July 15, 2006 and July 20, 2006, both in the amount of \$5,000. One check is accompanied by a deposit receipt dated July 21, 2006, while the petitioner indicates that the other check, dated July 20, 2006, has not yet been deposited. The petitioner also provides bank account statements for the beneficiary's personal account, for the period June 12, 2006 to August 4, 2006, which verify deposits to his account in the amounts of \$5,000, \$5,000 and \$10,000. The petitioner provided evidence that that the beneficiary received a wire transfer in the amount of \$10,000 from "[REDACTED]." on June 29, 2006. The petitioner also provides a copy of a canceled check for \$20,000 issued from the beneficiary's account to the U.S. company on July 12, 2006.

Counsel explains that due to strict currency restrictions in Venezuela, the foreign entity was unable to directly wire transfer the investment funds to the beneficiary or to the U.S. Company and instead contracted with other entities to transfer U.S. funds from Venezuela to the United States. Counsel asserts that the petitioner was

unable to obtain documentary evidence of the foreign entity's purchase and transfer of these funds prior to its deadline for submitting its rebuttal to the notice of intent to deny the petition.

Upon review, the petitioner has not resolved the issues raised in the AAO's notice of intent to deny the petition.

The petitioner's claims that it simply forgot to file the articles of amendment to its articles of organization, and only recently discovered that the articles had never been filed are not credible. The documentation submitted at the time of filing was presented in such a way as to give the appearance that the amendment to the petitioner's membership structure was in fact filed, which is what led the AAO to question its validity. Specifically, the petitioner submitted a copy of the un-filed amendment to the petitioner's membership structure, dated June 27, 2006, and a printout from the Florida Department of State's website (<http://www.sunbiz.org>) indicating that an amendment was filed on June 30, 2006. The actual amendment filed on that date appears to have been a simple address change, and not a change in the membership of the company. Given that the petitioner appears to have consulted the Florida Department of State's website in preparation for filing the instant petition, it is reasonable to assume that it would have been known to the company at that time that the amendment was not in fact filed. If the documents have been prepared all along, and the failure to file them was a mere oversight, it is unclear why the petitioner did not file the articles of amendment immediately upon receipt of the AAO's notice advising the petitioner of this deficiency.

Furthermore, the Florida Department of State's website shows that the petitioning company filed a 2007 Limited Liability Company Reinstatement on October 17, 2007. Where required to state the names of the company's managers and members, the petitioner identified [REDACTED] only. The document does not list the foreign entity or [REDACTED] as members. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The AAO finds that the petitioner knowingly submitted documents containing false statements in an effort to mislead CIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States. *See* 18 U.S.C. §§ 1001, 1546. Accordingly, the AAO will enter a finding of fraud.

Additionally, the evidence is not credible and will not be given any weight in this proceeding. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. *See Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Moreover, the petitioner's submission of a fraudulent document brings into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

With respect to the foreign entity's claimed investment of \$20,000 in the U.S. company in exchange for its membership interest, the AAO notes several deficiencies in the record. First, the petitioner has submitted no operating agreement or other corporate records setting forth the total number of membership units authorized or the amount of the contributions to be made by its members. The AAO therefore has no basis for concluding that a \$20,000 monetary investment would actually compensate the U.S. company for the foreign entity's claimed 50 percent ownership in the company. Second, the petitioner has not adequately documented that the

\$20,000 paid by the beneficiary to the U.S. company originated with the foreign entity. Rather, the petitioner indicates that \$5,000 originated with a co-owner of the foreign company, while an additional \$10,000 was transferred to the beneficiary by an apparently unrelated company. The petitioner states that documentation showing that these monies originated with the foreign entity is not yet available. The petitioner has not explained the source of the remaining \$5,000 that constituted the beneficiary's \$20,000 deposit to the U.S. company's account. Based on the evidence of record, the \$20,000 investment in the U.S. entity cannot be clearly traced to the foreign entity. 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.

Finally, the AAO finds it questionable that the petitioner's 2006 corporate tax return remains unavailable as of November 2007. The petitioner has not submitted evidence that it has filed for an extension of time to file the return or provided any explanation for the delay. The corporate tax return would presumably clearly identify the members of the company, their capital contributions, and their ownership interests, and could possibly assist in supporting the petitioner's claims and resolving the issues discussed herein. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Based on the foregoing discussion, the petitioner has not submitted sufficient evidence to establish that the foreign entity and the U.S. company have a qualifying parent-subsidary relationship. For this additional reason, the petition cannot be approved.

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

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

**ORDER:** The appeal is dismissed.

**FURTHER ORDER:** The AAO finds that the petitioner knowingly submitted documents containing false statements in an effort to mislead CIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.