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U.S. Citizenship
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Services

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File: EAC 07 141 52405 Office: VERMONT SERVICE CENTER Date: JUN 08 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

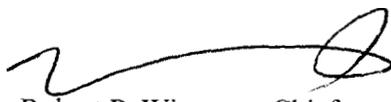
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, states that it is engaged in the import and export of textile products. The petitioner claims that it is a subsidiary of Services Connections, S.A., located in Peru. The beneficiary was initially granted L-1A classification from March 24, 2005 until March 23, 2006, and was subsequently granted a one-year extension of stay. The petitioner now seeks to employ the beneficiary for two additional years.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, the petitioner's representative asserts that the director's decision was based on an incorrect application of law, and that the director failed to properly consider all evidence submitted by the petitioner. The petitioner's representative claims that the petitioner erroneously presented itself as a fully realized business when it should still be considered a new office "according to immigration and business standards," and thus is not required to hire full-time employees. The petitioner submits 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.
- (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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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 nonimmigrant petition was filed on April 6, 2007. The petitioner indicated on Form I-129 that the U.S. import and export company was established in 2005 and has one employee. Although the petitioner indicated that a support letter containing the beneficiary's job description and the beneficiary's resume were attached, the AAO can locate no such documents among the supporting evidence submitted at the time of filing. The petitioner did submit a copy of its 2006 IRS Form 1120, U.S. Corporation Income Tax Return, which shows that the petitioner paid total salaries and wages of \$27,600. The record shows that the beneficiary was paid a total of \$27,600 in 2006 in Form W-2 and Form 1099 wages. The petitioner reported payments of \$2,000 for "professional services" but no other payments to outside employees on its Form 1120 for 2006.

On May 16, 2007, the director issued a request for additional evidence. In part, the petitioner requested a comprehensive description of the beneficiary's proposed duties, with an explanation as to how such duties would be managerial or executive in nature. The director also requested an organizational chart for the U.S. company, a list of U.S. employees identifying each employee by name and job title, and a complete position description for each employee. The director indicated that the position descriptions should provide a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary.

In a response received on August 6, 2007, the petitioner stated that the beneficiary's duties as general manager are as follows:

- Elaborate and to execute strategic commercial plans for each article that is offered. Finding their suitable commercial niches according to the quality and the amount produced by the Peruvian suppliers.

- Strategically find the necessary commercial alliances for the sale and distribution of the products.
- Supervise schedules, ensuring that accounting is up to date, inspect books, revise documents and operations of the company and dictate dispositions for all operations.
- Conduct commercial operations, add or remove employees as needed. Fix or adjust their salaries and schedules, act in behalf of the company's assets.
- Prepare business reports.
- Represent the corporation before civil authorities, municipalities, fiscal, or any other institution that demands a voice of our company including immigration.
- Arrange sales, rentals, payments, donations, permutates, purchases or any other modality for the good of the company.
- Continually and effectively be up to date with legislation and treaties related to international trade.
- Represent and attend national and international fairs and expositions.

The petitioner indicated that the company has “the guidance and support of qualified professionals and specialists in Peru.” The petitioner further indicated that the U.S. company “relies on the support and services of companies here in the United States such as Hispano Americano de Servicios, Inc.” The petitioner explained that this company has carried out “thorough services,” and was paid in terms of “completed assignments,” with no hours documented. The petitioner further stated that it “will fulfill your requirements of contracting efficient personal [sic] to work in our premises.” The petitioner indicated that it has hired “vendors” during weekends and special events to reach its clients, and that such vendors work seven hours per day per weekend.

In addition, the petitioner submitted the following description for the beneficiary's U.S. position:

[The beneficiary] will fill the position of President and General Manager, and as such, will be responsible for acting as a liaison between the board of Directors of the affiliated company in Peru and the company in the United States. He shall be directly responsible for delegating the responsibility of implementing marketing strategies in the business ventures as desired by [the foreign entity's] Board of Directors.

He shall be responsible for ensuring that the new manager for the company acts consistent with the parent company's strategies. Lastly, he shall be responsible for the evaluation of financial statements, and based on his experience and expertise, he will also contribute in the marketing of new products, as desired by the parent company's Board of Directors.

Even though the corporation was formed since February 2005, we have been unable to achieve full operation of the company. It is impossible to implement our ideas in the United States without [the beneficiary's] background and expertise. Our success depends on his availability to continue as the manager and frontal figure of the company in the United States.

The petitioner submitted two organizational charts that appear to have been taken from the petitioner's initial business plan. The chart for the "first operative year" shows the beneficiary as president and general manager above an "executive director" and the general manager of the foreign entity. The petitioner did not provide job descriptions for these employees. The proposed structure for the petitioner's "third operative year" shows these same employees as well as two proposed sales staff who would interact directly with U.S. buyers. Again, there is no evidence that any staff had been hired as of the date the petition was filed.

Finally, the petitioner submitted a letter from its executive director dated June 2007 in which it further addressed its current staffing levels:

To date, our company does not count on a great number of employees and/or salesmen because this was not rendered necessary within our growth and development plan. In fact, during the first part of the exercise, [the beneficiary] has been and is the person in charge of organizing the activities, making the contacts, executing a plan for positioning in the market and realizing a strategic marketing plan to find suitable commercial niches for products supplied in quality and amount. This was also contemplated in the organizational chart initially presented for the first phase of operations, where hiring employees is not considered, but they are in the organizational chart for the third year of exercise. For that reason we did not discard the possibility of contracting different personnel of different levels before the term established, according to the necessities of the company, they can be professionals or technicians in the areas that are required to solve.

Within this time our company has not only contacted and arranged showcases and negotiated with potential clients in Florida (those of which we await prompt replies) but also in other states such as Kansas and Virginia, with whom we maintain constant communication.

As a result of these visits, reunions and trips we have found some necessities in the American Market that can be covered by Peruvian producers. For that reason [the beneficiary] has obtained the representation of a group of Peruvian exporting companies interested in entering the American Market to cover these necessities.

The petitioner further stated that beneficiary's physical presence in the United States is necessary for the following reasons:

1. Boarding supervision – subjects of financial order, since the clients are required to pay for merchandise in 4 or up to 6 months, a facility that the suppliers cannot grant, reason for why the banking finance is necessary for the clients.
2. The promotion, presentation and sales of our products.

In general we speak of logistical support so that the business takes shape, as we'll carry out the pursuit of the merchandise and documentation until it's in the client's hands.

The director denied the petition on September 27, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director acknowledged the position description submitted in response to the petitioner's request for evidence, but found that the stated duties, such as "arranging sales," are not managerial or executive in nature. The director also acknowledged the submitted organizational charts, but noted that the petitioner indicated on its Form I-129 that it has only one employee. The director emphasized that since the petitioner is no longer a new office it is expected to have a "fully realized business," and that the petitioner failed to show which positions have been filled or to provide position descriptions, as requested. The director concluded that, given the size of the company, the beneficiary would act as a first-line supervisor and/or as a productive employee responsible for performing duties necessary to provide the petitioner's products and services, rather than performing primarily managerial or executive duties.

On appeal, the petitioner's representative asserts that the director's decision was based on an incorrect application of law and an improper review of the evidence submitted. Specifically, the petitioner claims that the director failed to understand the nature of the petitioner's business, failed to fully consider the beneficiary's duties, and placed undue emphasis on the petitioner's small staff size. The petitioner emphasizes that the petitioner represents "more than two million artisans, small business and associations in its home country" and "manages an extremely complex business representing and marketing many suppliers from Peru."

The petitioner's representative further asserts that "due to cultural reasons, Petitioner is erroneously declaring its Company as a fully realized business, when in reality it is still considered a 'new office' according to immigration and business standards." The petitioner's representative emphasizes that the beneficiary's duties are in fact executive or managerial because he is responsible for the entire operation of the company, has the authority to establish goals and policies for the company, exercises wide latitude in discretionary decision-making, and only reports to the Board of Directors of the parent company. The petitioner states that the director focused on just one of the nine duties listed for the beneficiary and failed to explain why the other duties were not found to be managerial or executive in nature. In addition, the petitioner states that the beneficiary's responsibility to "arrange sales, rentals, payments, donations, permute, purchases" involves coordinating such activities, as "bills, invoices and statements" are processed by an accounting firm.

The petitioner's representative further contends that the director placed undue emphasis on the petitioner's small staff size in denying the petition. The petitioner asserts that "due to the type of business and its 'new office' condition, Beneficiary is not obligated to hire full-time employees, as is a tradition with managers in U.S. companies or as it required to fully realized businesses." The petitioner asserts that the beneficiary has hired the services of specialized companies and contractors to perform the non-managerial, day-to-day operations of the U.S. company.

In support of the appeal, the petitioner submits letters of support from the Peruvian Consulate General in Miami and the Peruvian Ministry of Commerce and Tourism, confirming that the U.S. company is engaged in promoting Peruvian products and artisans in the United States market. The petitioner also submits letters from five Peruvian clients, who state that the beneficiary is authorized to act as their commercial or sales representative for export products.

Finally, the petitioner submits letters from three companies which claim to provide various services to the U.S. company. Specifically, Hispano Americana de Servicios, Inc., claims to provide accounting and immigration services; Hart Worldwide Logistics, Inc. states that it provides logistics services and is a licensed custom broker; and Copy Service confirms that it supports the petitioning company “in the areas of design, advertising, typing, e-mail management, printing in general, notary service, fax service, and finishing.”

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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). Here, while the beneficiary would evidently exercise discretion over the business as its general manager and apparently its only employee, the petitioner has not established that his actual duties will be primarily managerial or executive in nature.

The majority of the beneficiary’s job description is too general to convey any understanding of what he will do on a day-to-day basis. The petitioner provided a list of nine job duties in response to the director’s request for a comprehensive description, but the majority of these do not clearly rise to the level of managerial or executive capacity. For example, the petitioner indicated that the beneficiary will “elaborate and execute strategic commercial plans” for products marketed by the petitioning company, and find “suitable market niches.” Given that the purpose of the U.S. company is to locate potential buyers for Peruvian products, these duties suggest that he will actually be performing non-qualifying duties related to market research and sales. Similarly, the beneficiary’s responsibility for finding “necessary commercial alliances for the sale and distribution of products,” conducting “commercial operations,” preparing business reports, and arranging “sales, rentals, payments, donations, permutates, purchases” for the company, and attending fairs and expositions, without further explanation, cannot be classified as managerial or executive in nature, and further suggest that the beneficiary is involved in the company’s day-to-day operational tasks. 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).

Furthermore, in a separate statement dated June 2007, the petitioner stated that the beneficiary’s physical presence in the United States is necessary to maintain “subjects of financial order,” and for “the promotion, presentation and sales of our products.” These stated responsibilities further confirm that beneficiary’s involvement in the day-to-day operational and financial activities of the U.S. company. 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 Intn’l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover, as discussed further below, the petitioner has not established that it has retained direct employees or independent contractors to assist in many of the essential operational functions of the business.

It must be noted that the director specifically requested a complete position description for each employee of the U.S. company, and a breakdown of the number of hours devoted to each of the employee’s job duties on a weekly basis. The director clearly stated that the petitioner should include the detailed breakdown for the beneficiary; however, the petitioner failed to provide this critical information in response. Any 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).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Finally, on appeal, rather than clarifying the beneficiary’s actual duties, the petitioner has simply indicated that the beneficiary “is responsible for the entire operation of the company,” “has the authority and has established goals and policies” and “exercises wide latitude in discretionary decision-making and only reports to the Board of Directors of parent company.” These duties merely paraphrase the statutory definition of “executive capacity.” *See section 101(a)(44)(B) of the Act.* Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Overall, the position descriptions provided fall significantly short of articulating the beneficiary's day-to-day responsibilities, such that they could be classified as primarily managerial or executive in nature. The petitioner cannot rely on vague characterizations and conclusory assertions to establish the beneficiary's employment in a managerial or executive capacity.

Furthermore, the petitioner’s description of the beneficiary’s duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary’s duties represents a credible perspective of the beneficiary’s role within the organizational hierarchy. As observed by the director, the record does not demonstrate that the petitioner has a sufficient

number of direct or contracted employees or other outside workers who could perform the non-managerial duties associated with operating the petitioner's business on a day-to-day basis.

The petitioner indicated on Form I-129 that it has one employee. The petitioner was subsequently explicitly instructed to submit a list of all its employees and detailed position descriptions for them. Although the petitioner provided an organizational chart depicting an "executive director" working under the beneficiary, the petitioner failed to submit a position description for this employee and there is no evidence that the petitioner has actually compensated her for any services. The petitioner stated that it utilizes the services of Hispano Americano de Servicios, Inc., but, again, declined to describe these services or offer any evidence of payments to the claimed independent contractor company. Finally, the petitioner stated that it contracts "vendors" on weekends. The petitioner did not identify these vendors, the exact services they provide, nor did it provide evidence of payments to them. 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)).

On appeal, the petitioner provides letters from three independent contractors who claim to provide "accounting and immigration services," import/export logistics and customs services, and "design, advertising, typing, e-mail management, printing" and related services. The petitioner still has not provided evidence of payments to any of the claimed contractors. Moreover, none of the claimed contractors is claimed to relieve the beneficiary from conducting the day-to-day sales and marketing activities of the U.S. company. Therefore, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not demonstrated that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel's argument that the petitioner "is still considered a 'new office' according to immigration and business standards" is not persuasive. The beneficiary had been working for the petitioner in the United States for over one year in L-1A status at the time the petition was filed and therefore is expected to have reached a point where he is performing primarily managerial or executive duties on a day-to-day basis. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in

the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, CIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has been "doing business" in a regular, systematic, and continuous manner for the previous year. 8 C.F.R. § 214.2(l)(14)(ii).

Here, the petitioner has conceded that it achieved slower growth than anticipated and had to modify its business plan and delay the hiring of employees. There is no indication in this matter that the director did not consider the reasonable needs of the organization in making his determination that the beneficiary would not be employed in a primarily managerial or executive capacity. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act. Contrary to the petitioner's assertions, the record does not establish that the beneficiary was relieved from primarily performing non-managerial duties associated with the company's sales, customer service, marketing, financial, and administrative functions. Moreover, even if the petitioner had established that the U.S. company employs the claimed independent contractors, it has not supported its assertion that such contractors relieve the beneficiary from performing the non-managerial day-to-day operations involved in producing a product or providing a service.

Collectively, the lack of a subordinate staff brings into question how much of the beneficiary's time can actually be devoted to the claimed managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The AAO has consistently interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties. As discussed above, the petitioner has not established this essential element of eligibility.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue in this matter is whether the petitioner has established that a qualifying relationship exists between the U.S. company and the beneficiary's previous foreign employer. 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 indicated on the L Classification Supplement to Form I-129 that the U.S. company is a subsidiary of the **foreign entity, yet, where asked to described the stock ownership of each company, the petitioner stated that [REDACTED] owns a 98 percent interest in the foreign entity and a 51 percent interest in the U.S. company, thus suggesting an affiliate relationship.**

The petitioner's stock certificate number one shows that 255 of the petitioner's 500 issued common shares have been issued to the Peruvian company, Services Connection, S.A. This information conflicts with what the petitioner indicated on the L Classification Supplement to Form I-129, where it identified [REDACTED] as its majority shareholder. Finally, according to the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, Schedule K, no foreign person or company owns at least 25 percent of the petitioning company. 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). Based on these unresolved discrepancies, the AAO cannot determine whether the petitioner continues to have a qualifying relationship with the foreign entity. 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.