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FILE: EAC 07 247 51247 Office: VERMONT SERVICE CENTER Date: **JUL 29 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Georgia corporation, operates an Indian specialty restaurant. The petitioner states that it is a subsidiary of Hotel Saravana Bhavan, located in Chennai, India. The petitioner seeks to employ the beneficiary in the position of management consultant/operations manager for a three-year period.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity; (2) that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity; or (3) that the U.S. company and the beneficiary's foreign employer have a qualifying relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner previously provided sufficient evidence to establish that the beneficiary has been and would be employed in a primarily managerial capacity. Counsel further asserts that the director overlooked previously submitted evidence demonstrating that the foreign entity purchased the U.S. company in December 2006, and therefore established the claimed parent-subsidiary relationship. Counsel submits a brief and documentary 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 first issue in the present matter is whether the petitioner established that beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

The nonimmigrant visa petition was filed on August 28, 2007. In a letter dated July 6, 2007, the petitioner described the beneficiary's position with the foreign entity as follows:

[The beneficiary] is serving as our Manager, Marketing Development where he has been managing all the crucial functions to our operations. The quality of our products which to a greater degree (more than 90%) determines how much sustained clientele we can generate depends on these functions. He has authority to make strategies decisions [sic] so that he can create that significant impact we know is possible on operations. His day-to-day decisions are key to our success. He has been Management Consultant/Operations Manager who will be responsible for the production of food which meets the quality standards for food service and procurement of food products including purchasing, ordering, receiving, storing and unit inventory quantities of food and supplies necessary for menus. He is also [sic]

Responsible for designing and implementing marketing and sales strategies targeted at our customers and the hospitality industry as a whole. He has definitely been conducting analysis of our customers' demands and specifications to suggest the most appropriate hospitality service, as well as recommend modification to our recipes/food to increase marketability and to broaden the niche in the hospitality industry. He has been developing plans to expand into various national and international markets. He continues to develop services designed to more effectively manage cost, quality and services resulting in improved customer service and/or continuous improvement.

He has conducted research, gathering data on customer preference, guiding setting of competitive pricing and implementing market strategies. He has studied market research results in order to identify and capitalize on market trends in specialty food industry. He will also design and implement strategies to increase and broaden the customer base.

He has also been responsible for co-ordination of food services at the restaurant, estimation of food and beverage costs; hire and assign personnel; investigate and resolve food quality and service complaints, review financial transactions and monitor budget to ensure efficient operation and to ensure that expenditures stay within the budget limitations; coordinate activities of and direct indoctrination and training personnel in the restaurant to ensure an efficient and profitable food service; direct marketing plans and promote popularity of various dishes; review menu, analyze recipes, determine food, labor and overhead costs, ensure that food preparation and cooking, sizes of portions, and garnishing of foods meets prescribed manner; establish and enforce nutrition and sanitation standards for restaurant, etc.

* * *

In summary, the beneficiary's duties can be grouped thus:

Strategic planning, marketing research including market expansion; develop position control system to contain labor cost; coordinate the resources and activities required to meet demands of customers; supervise/perform business functions; (60%)

Market strategies, promotional efforts, market comparison, etc. (40%)

The director issued a request for additional evidence on September 11, 2007. The director requested, *inter alia*, additional evidence to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. Specifically, the director requested that the petitioner provide information regarding: the job titles and duties of the beneficiary's subordinates; the amount of time he devoted to managerial or executive duties while employed by the foreign entity; and the degree of discretionary authority he had over day-to-day operations. The director also requested an organizational chart depicting the management structure of the foreign company.

The petitioner responded to the director's request on October 26, 2007. The petitioner submitted an organizational chart for the foreign entity which depicts employees by surname only. It appears that the beneficiary is identified as "Management/Operations/Marketing" in the "Production & Sales" department which is notated "currently 52 branches." The employees who are listed under the position include a kitchen manager, a deputy manager, an assistant manager, a kitchen supervisor, and an "FSD/Floor Manager." The floor manager is depicted as supervising four chefs, an assistant cook, a head baker, a pantry man, and a helper.

The director denied the petition on November 6, 2007, concluding that the petitioner had not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. In denying the petition, the director noted that "no position description, delineation of duties or other supporting documentation was submitted to demonstrate the position and capacity that the beneficiary may have worked in the foreign company."

On appeal, counsel for the petitioner asserts that the company's initial submission contained information regarding the beneficiary's position with the foreign entity, and such information demonstrates that the position is "managerial in scope and character." Counsel asserts that the petitioner also submitted the foreign entity's organizational chart, which corroborates its claim that the position is managerial in nature. Counsel contends that the petitioner's claims are substantiated with evidence that the beneficiary's duties are "sufficiently managerial to be qualifying duties as required by the regulations."

Upon review of the petition and the evidence, the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

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.*

While the petitioner submitted a lengthy description of the beneficiary's alleged position of "Manager, Market Development," the duties listed appear to be an amalgamation of two to three different positions, and the letter in fact contains references to a "Manager, Food Production" position and indicates that the beneficiary "has been Management Consultant/Operations Manager." Based on these discrepancies, it is difficult to determine which duties the beneficiary actually performs with the foreign entity or where his position lies within the company's organizational hierarchy. Some of the listed duties relate to marketing and promotion, some duties relate to supervision of food production activities, and some duties relate to purchasing and inventory functions. It has not been established that all of these duties would in fact be combined into one

position, particularly since the petitioner goes on to state that the beneficiary devotes 60 percent of his time to strategic planning, marketing research, coordinating resources and supervising/performing business functions, and 40 percent of his time to “market strategies, promotional efforts, market comparison, etc.” The general breakdown of the beneficiary’s duties therefore does not appear to include the food production management and procurement functions which figured prominently in the more detailed description provided by the petitioner within the very same letter. 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). 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. *Id.* at 591.

Furthermore, even assuming that the position description included in the petitioner’s letter dated July 6, 2007 presented a complete and accurate account of the beneficiary’s duties, the listed responsibilities have not been shown to be managerial or executive in nature. The claimed managerial responsibilities are described in vague and non-specific terms that fail to identify what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary “has been managing all the crucial functions of our operations,” “has authority to make “strategi[c] decisions,” and “has been developing plans” for expansion. The petitioner failed to explain what specific “crucial functions” the beneficiary manages or how he manages them, or what “strategic decisions” are within his power to make. 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).

Many of the more specific duties listed in the beneficiary’s position description do not rise to the level of managerial or executive in nature. For example, duties such as holding responsibility for “purchasing, ordering receiving, storing and unit inventory quantities of food and supplies,” “conducting analysis of our customers’ demands,” conducting research, gathering data, studying market research results, coordinating food services, estimating food and beverage costs, resolving customer complaints, training personnel, reviewing menus, analyzing recipes, and overseeing cooking, portion sizes and garnishes are not duties that have been shown to be managerial or executive in nature.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are “primarily” managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to sufficiently document what proportion of the beneficiary’s duties would be managerial functions and what proportion would be non-managerial. As noted above, the general breakdown provided by the petitioner is of little probative value as it does not encompass all of the areas of responsibility claimed to be under the beneficiary’s supervision. The petitioner lists the beneficiary’s duties as including both managerial and administrative tasks, but fails to adequately quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary’s daily tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Upon review of the initial evidence, the director specifically requested additional evidence regarding the management and personnel structure of the foreign entity, including the number of subordinate supervisors, their job titles and duties, the amount of time the beneficiary allots to managerial/executive duties, and his degree of discretionary authority. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The only evidence submitted in response to the director's specific request is an organizational chart which depicts a [REDACTED] as "Mgmt/Operations/Mktg," and shows that he supervises various kitchen staff. The petitioner failed to provide the requested position descriptions for the staff reporting to the beneficiary, nor did it provide the requested information regarding how the beneficiary divides his time between qualifying and non-qualifying duties. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner also failed to explain the introduction of what appears to be yet another job title for the beneficiary. Again, 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. at 591-92. Further, given the petitioner's claim in its initial letter that the beneficiary's job title is Manager, Marketing Development, it is not entirely credible that he supervises kitchen staff in the performance of his duties.

The beneficiary will not be considered to be employed in a managerial capacity simply because he has been given various managerial job titles and placed at a senior level in the foreign entity's organizational chart. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Based on the petitioner's failure to provide a clear and credible account of the beneficiary's current job title, duties and the amount of time he devotes to his duties, and its failure to provide the requested information regarding the beneficiary's subordinate staff, the AAO cannot discern with any degree of certainty what position the beneficiary holds or what constitutes his day-to-day duties. Therefore, the petitioner has failed to establish that the beneficiary performed primarily managerial or executive duties in his current role with the foreign entity. The petitioner has not submitted additional evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

In its letter dated July 6, 2007, the petitioner stated that it seeks to employ the beneficiary as the management consultant/operations manager for its Atlanta branch. Although the beneficiary has not previously been granted L-1 status to work for the petitioning organization in the United States, the petitioner stated that it is "constrained to request the extension of the services of the beneficiary who has clear knowledge, expertise and experience with our unique recipes which he has protected over the years." In the same letter, the petitioner also referenced the beneficiary's transfer from California to New York. Again, 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). Since the beneficiary in this matter is clearly being transferred from India and does not currently hold L-1 status, it

appears that the petitioner is simply re-using a letter submitted in support of another employee's petition and substituting the beneficiary's name, thus raising questions regarding the accuracy of the submitted information in describing the beneficiary's actual role within the petitioner's organization.

The petitioner described the offered position as follows:

At this time, we have the need for a Management Consultant/Operations Manager who will be responsible for the production of food which meets the quality standards for food service and procurement of food products including purchasing, ordering, receiving, storing and unit inventory quantities of food and supplies necessary for menus. He will also [sic]

Examine and study the potential for expansion into newer markets in Atlanta metropolis and vicinity. Plan services designed to provide clearer, more effective and focused strategic and tactical business operations.

Conduct cost comparisons with competitors in the food industry and develop an optimal project margin.

Design training and development programs that result in improved management, communication and productivity skills.

Continuously develop services designed to more effectively manage cost, quality and services resulting in improved customer service and/or continuous improvement.

Work with management to introduce new/improved products/services to cater not just the Asian population already familiar with the quality of our products and services but to the broader American publics. This is crucial to the business growth.

Advise company on promotional strategies to target both American and other ethnic markets.

Project long & short term business goals and create unique marketing strategies and tactics to support the achievement of these business goals.

Analyze competitors' positioning in the market relative to ours, including detailing their services, products, price strategies, affiliations, and promotional efforts and a comparison of their marketing efforts, assessment of the strengths, weaknesses, opportunities and threats.

Identify potentially profitable market segments and perform feasibility analysis and demographic analysis of the geographic sites to be able to develop a demand and service needs analysis, establishing the needs for additional services in any locale and the most appropriate means of providing the services for that community including mobile units or store front offices.

Provide continuing services to the company in implementing and improving upon business strategies in the different markets.

The individual will develop plans to operate new locations, supervise and direct personnel program and training. The individual will negotiate contracts; coordinate production, and product quality in accordance with policies, principles, and procedures established by the business owner;

Drawing on his theoretical and practical knowledge and experience of the industry, [the beneficiary] will make recommendations to enhance and streamline operations of the company. He will initiate audits of operations, structure, and process to make policy recommendations and implement solutions and/or improvements. He will continue to rely on his sophisticated managerial background to make operational decisions in issues outlined by laws, guidelines, board directives or other written documents to increase the company's business process, inventory and ultimately, profitability. He will draw on his prior management experience to resolve personnel problems, handle complaints, infractions, and ensure professional execution of responsibilities. Furthermore [the beneficiary] will represent the company to third parties, including government agencies.

In the request for evidence issued on September 11, 2007, the director requested additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity with the U.S. entity. Specifically, the director requested: (1) a comprehensive description of the beneficiary's proposed duties, including the approximate percentage of time he would spend on each duty to be performed; (2) documentation of how many other individuals in the company are or would be employed in the same position or similar positions; (3) brief job descriptions for other employees in the organization, including job titles, duties and education requirements; (4) information regarding the number of supervisors under the beneficiary's management and their job titles and duties; (5) the amount of time the beneficiary will devote to managerial/executive duties; (6) the degree of discretionary authority the beneficiary will have in the company's day-to-day operations; and (7) an organizational chart for the petitioner which depicts the management structure of the organization.

In response, the petitioner submitted a letter dated October 22, 2007, in which it further described the beneficiary's proposed duties as follows:

The job duties are peculiar and complex with respect to the restaurant business. The Product/Service Management Consultant will examine and study the potential for expansion into newer markets in South Eastern United States and vicinity.

Proactively identify growth opportunities by category, customer and brand and communicate action plan to address each.

Customize strategic business initiatives such as new item launches or strategies to ensure executional [sic] excellence at the customer/market level.

Plan services designed to provide clearer, more effective and focused strategic and tactical business operations.

Examining and studying potential for expansion into new business areas. Identifying company's requirements to expand into new markets. Studying all functional areas including service planning, finance, accounting and marketing of the company.

Conducting cost comparisons with competitions in the food industry and developing and optional project margin. Advising on promotional strategies to targeted both American and ethnic markets. Providing continuing consultation of the company in implementing and improving upon business strategies in the different markets. Providing continuing study and information on the feasibility of reaching, implementing and improving business in diverse populations in Southeast United States.

Prepare presentations to corporate consumer business prospects, markets and competitor activities for key client services and business development to support efforts to win new business.

Conduct cost comparisons with competitors in the food industry and develop an optimal profit margin.

Working with the marketing and communications personnel, design training and development programs that will result in reaching a wider market than the Indian population in the U.S., improved management, communication and productivity skills.

Continuously develop services designed to more effectively manage cost, quality and services resulting in improved customer service and/or continuous improvement.

Work with management to introduce new/improved products/services to cater not just the Asian population already familiar with the quality of our products and services but to the broader American public. This is crucial to the business growth.

Advise company on promotional strategies to target both American and other ethnic markets.

Project long & short term business goals and create unique marketing strategies and tactics to support the achievement of these business goals.

Analyze competitors' positioning in the market relative to ours, including detailing their services, products, price strategies, affiliations, and promotional efforts and a comparison of the marketing efforts, assessment of the strengths, weaknesses, opportunities and threats.

Identify potentially profitable market segments and perform feasibility analysis and demographic analysis for the geographic sites to be able to develop a demand and service needs analysis, establishing the needs for additional services in any locale and the most appropriate means of providing the services for that community including mobile units or store front offices.

Provide continuing services to the company in implementing and improving upon business strategies in the different markets.

The individual will develop plans to operate new locations, and manage personnel programs and training.

In summary, the beneficiary's duties can be grouped thus:

Planning, study the potential for expansion of the business and devise ways to expand the business, provide clearer, more effective and focused strategic and tactical business operations, study competition and make recommendations; etc. - 70%

Profitability and feasibility analysis, pricing, promotional efforts, cost management - 30%

The petitioner enclosed an organizational chart for the U.S. company, and noted that it recently acquired the business and is in the process of "completely overhauling" its operations. The petitioner stated that it could not provide copies of Forms W-2, as the employees of the previous owner do not work for the petitioning company. The petitioner also noted that they have requested that certain key employees be transferred to the U.S. from the parent company but that only two or three of them have been able to enter the United States.

The organizational chart submitted identifies neither the beneficiary nor his proposed position as management consultant/operations manager. The chart does depict an open "management analyst" position, which reports to the petitioner's branch manager and has no subordinates. The petitioner provided the requested position descriptions for the other employees and open positions within the organization.

The director denied the petition, concluding that the petitioner had failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. The director noted that, in light of the depicted staffing and scope of business, it seems probable that the beneficiary will be primarily engaged in the performance of non-qualifying duties.

On appeal, counsel for the petitioner asserts that the director "ignored the important job duties of examining and studying potential for expansion into new business areas and identifying company's requirements to expand into new markets." Counsel emphasizes that the position "is to study all functional areas including service planning, finance, accounting and marketing of the company as well as providing continuing study and information on the feasibility of reaching, implementing and improving business in diverse populations in Southeast United States."

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(1)(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.*

Although the petitioner provided a lengthy position description, it fails to demonstrate how the beneficiary's duties would be primarily managerial or executive in nature. For example, the petitioner indicated that the beneficiary will "proactively identify growth opportunities," "customize strategic business initiatives," "plan

services,” study potential for expansion, study “functional areas,” including service planning, finance, accounting and marketing,” conduct cost comparisons, advise on promotional strategies, prepare presentations, develop services, introduce new products and services, analyze competitors’ positioning, and perform feasibility analysis. The majority of the beneficiary’s duties involve research, study, analysis and reporting with respect to the petitioner’s alleged expansion activities, and the petitioner has not established that these duties fall under the statutory definition of either managerial or executive capacity. Rather, the beneficiary’s duties appear to be more akin to those of a marketing or management analyst who researches a problem and provides recommendations to management, rather than those of a manager who supervises and controls a staff of subordinate managers, supervisors or professionals, or manages an essential function of the business. The actual duties themselves 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). Furthermore, although the petitioner indicates that the beneficiary will be employed as management consultant/operations manager, it appears that his position is designated on the organizational chart as “management analyst.”

In addition, the petitioner’s initial letter indicated that the position of management consultant/operations manager “will be responsible for the production of food which meets the quality standards for food service and procurement of food products including purchasing, ordering, receiving, storing and unit inventory quantities of food and supplies necessary for menus.” Further, the petitioner initially indicated that the beneficiary would “negotiate contracts” and “coordinate production.” These duties, which have not been shown to be managerial in nature, were not included in the position description submitted in response to the director’s request for evidence, and no explanation was provided for their absence. An employee who “primarily” performs the tasks necessary to produce a product or to provide services or other non-qualifying duties 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 Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Overall, the position descriptions submitted fall significantly short of demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity.

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). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner indicates that the beneficiary will be “working with the marketing and communications personnel,” designing training and development programs,” and “managing personnel programs and training.” However, the petitioner does not indicate that it actually employs or intends to employ any marketing or communications personnel, nor does the petitioner’s organizational chart indicate that any current or proposed employees would report to the beneficiary’s proposed position. Therefore, the petitioner has not established that the beneficiary qualifies for the benefit sought as a “personnel manager.”

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the beneficiary's duties that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Here, the petitioner has not specifically stated that the beneficiary will be managing a function, nor has it provided a detailed position description that is comprised of primarily managerial or executive duties. The petitioner refers to the company's "expansion into new business areas," and the beneficiary's responsibility to "study all functional areas," but the petitioner's statements fall significantly short of specifically identifying a function to be managed by the beneficiary. The petitioner's alleged expansion plans for the southeast United States have also not been documented. The petitioner stated in its letter dated October 22, 2007 that "more branches are planned for immediate activation in Alpharetta Georgia; Morrow, Georgia; Orlando, Florida; Miami, Florida, etc., in the immediate future." The petitioner also stated that its "Vice President, Worldwide Operations & Branch Development" is in the United States "furthering this purpose," but this employee does not appear on the petitioner's organizational chart. The petitioner provided no supporting evidence to corroborate the claimed expansion efforts. Furthermore, the petitioner does not indicate that it intends to employ any administrative, market research or other support staff who would assist the beneficiary, either directly or indirectly, with the company's promotion and expansion efforts and all of the inherent study, data collection and analysis inherent to the beneficiary's responsibilities. In view of the size and nature of the petitioner's purported business, it appears that the beneficiary will more likely than not perform the tasks related to his "function" rather than truly "manage" the function. See generally *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006). The fact that the beneficiary is the only employee charged with duties related to the marketing, promotion and expansion of the business is

insufficient to elevate his status to that of a managerial or executive employee. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The third and final issue addressed by the director is whether the petitioner established that there is a qualifying relationship between the U.S. and foreign entities. 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 pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner, [REDACTED], indicated on Form I-129 that it is a subsidiary of Hotel Saravana Bhavan, located in Chennai, India. The petitioner stated in its letter dated July 6, 2007 that the U.S. company is a wholly-owned subsidiary of the foreign entity. The petitioner submitted the following evidence in an effort to establish the requisite relationship between the two companies:

- A Certificate of Merger dated October 18, 2003, issued by the Georgia Secretary of State, which identifies “Madras Saravana Bhavan, Inc.” as surviving entity and “Pritam Restaurants and Catering, Inc.” as non-surviving entity;
- A Certificate of Amendment issued by the Georgia Secretary of State on February 28, 2007, which changes the name of “Madras Saravana Bhavan, Inc.” to “Madras Saravana Bhavan, Inc.”
- Articles of Amendment to the Articles of Incorporation of Madras Saravana Bhavan, Inc. which removes the original Article 1, which states “The name of the Corporation is Madras Saravana Bhavan, Inc.” and replaces it with a new Article I which states “The name of the Corporation is Asht Vinayak, Inc.” The articles are dated February 14, 2008 and were stamped as received by the Secretary of State on February 28, 2007.
- A membership certificate for Saravana Bhavan, LLC, a New York limited liability company, issued to Hotel Saravana Bhavan on July 1, 2005.

In the request for evidence issued on September 11, 2007, the director requested that the petitioner submit a chart outlining the name changes for the petitioning company, and submit a listing of all locations operated by the U.S. company. The director also stated that nothing in the record clearly documented the legal ownership of the petitioner by Hotel Saravana Bhavan as claimed on the petition. The director instructed the petitioner to submit “legal documentation” to demonstrate that the foreign entity owns 100 percent of the U.S. company as claimed.

In a letter dated October 22, 2007, the petitioner explained that it recently bought the business from Narendra Patel, who had been using the petitioner’s name to do business. The petitioner submitted the following additional evidence:

- An assignment of lease dated December 15, 2006 between Madras Saravana Bhavan, Inc. as assignor and Fortune Food, Inc. as assignee. The original lease was signed by Madras Saravana Bhavan, Inc. in 2001.
- Copy of stock certificate number one for Fortune Food, Inc., issuing 500 shares of its authorized stock to Hotel Saravana Bhavan Pvt. Ltd. The certificate is dated January 8, 2007 and indicates on its face that the company has 500 shares of authorized capital stock.

The petitioner also indicated that it was submitting a purchase agreement, but this evidence was not included in the petitioner’s response.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner and the foreign entity have a qualifying relationship. In denying the petition, the director stated:

The petitioner, Madras Saravana Bhavan, Inc. claims to be owned by a Hotel Saravana Bhavan. Documentation in the record shows that the United States entity was originally formed under another name and through merger in April 2003, was taken over by the United States petitioner. No legal documentation was submitted that shows how the foreign company owns the United States entity.

On appeal, the petitioner asserts that it has submitted evidence of ownership of the petitioner, in the form of a stock certificate which shows that Hotel Saravana Bhavan owns and controls the U.S. entity. The petitioner resubmits the assignment of lease and the stock certificate number one issued by Fortune Food, Inc. to Hotel Saravana Bhavan.

The petitioner also provides a "Settlement and Release Agreement" dated December 15, 2006 between Saravana Bhavan Holdings, LLC of the United Arab Emirates, Hotel Saravana Bhavan of India, Saravana Bhavan USA, Inc., a California corporation, Saravana Bhavan, LLC, a New York Corporation, and Fortune Food, LLC, a Georgia limited liability company (collectively referred to as "HSB") and Madras Saravana Bhavan, Inc., referred to as "MSB." The agreement indicates that MSB had asserted claims for relief against HSB in a civil action alleging trademark infringement. The agreement further indicates that HSB seeks to purchase and acquire from MSB its restaurant located at 179 Lawrenceville Highway in Decatur, Georgia and the agreement was entered into by the parties "in full settlement and satisfaction of any and all claims." The agreement indicates that the purchase price was \$1.2 million.

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.

Upon review, the petitioner has not established the requisite relationship between the U.S. and foreign entities. All evidence submitted with the initial petition would have reasonably led to a conclusion that the petitioner in this matter is the Georgia corporation named "Madras Saravana Bhavan, Inc.," and, as noted by the director, there is no evidence that the foreign entity, Hotel Saravana Bhavan, owns this Georgia company. The introduction of a stock certificate for "Fortune Food, Inc.," without any additional explanation or documentation, was not sufficient to establish the qualifying relationship, considering that the name of the petitioning company has been consistently identified simply as "Madras Saravana Bhavan." Therefore, the record before the director did not establish the requisite parent-subsidiary relationship since there was nothing in the record to indicate that the petitioner in this matter and Fortune Food, Inc. were one and the same entity. The director's assumption that the petitioner in this matter is "Madras Saravana Bhavan, Inc." was reasonable

given that all documentation in the record, with the exception of the stock certificates issued by Fortune Food, Inc., referred to this company and this company alone.

The Settlement and Release Agreement that has now been entered into the record on appeal does associate Fortune Food with the foreign entity as a member of the same group of companies, but does not clearly indicate which company purchased the restaurant formerly owned and operated by Madras Saravana Bhavan, Inc. Regardless, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Furthermore, absent some evidence that Fortune Food, Inc. is doing business under the fictitious name "Madras Saravana Bhavan," the record is still insufficient to establish that the beneficiary will be employed by a company that has a qualifying relationship with Hotel Saravana Bhavan. It is noted that the petitioner, rather than submitting voluminous and irrelevant evidence related to the former owner of the restaurant the petitioner now claims to operate, could have greatly simplified matters by using its registered name on the petition, and providing its articles of incorporation, the purchase settlement agreement, the assignment of lease, its stock certificate, evidence that the purchase was consummated, and evidence that it has registered a fictitious name allowing it to operate as "Madras Saravana Bhavan." In light of all of the deficiencies in the evidence in the record, the petitioner has not established that it maintains the claimed qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

The petition will be denied 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.