



U.S. Citizenship  
and Immigration  
Services

Identifying data deleted to  
prevent clear and  
unwarranted  
invasion of personal privacy

**PUBLIC COPY**

07



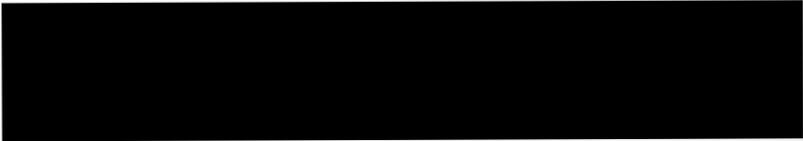
File: EAC 07 113 52790 Office: VERMONT SERVICE CENTER Date: **MAR 10 2008**

IN RE: Petitioner:  
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability company organized under the laws of the State of Washington and is allegedly in the hospitality, real estate, and auto sales business. The beneficiary was granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily executive capacity; or (2) that the petitioner has a qualifying relationship with the foreign employer.

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 to the petitioner asserts that the director erred, that the beneficiary's duties are primarily those of an executive or manager, and that the petitioner has established that it is an affiliate of the foreign employer.

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 first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

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

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

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

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act, and counsel on appeal appears to claim that the beneficiary could be classified as either an executive or a manager. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed as either a manager *or* an executive and will consider both classifications.

The petitioner describes the beneficiary's proposed duties in a letter dated March 13, 2007 as follows:

[The beneficiary] is responsible for the over-all [sic] management of [the petitioner], including decision making as to the existing business, business development, business expansion, hiring and firing, overseeing bank related transactions, directing and supervising material procurement, and marketing and networking.

The petitioner describes its business as operating a restaurant, acquiring real estate, and engaging in automotive sales.

The petitioner also submitted an organizational chart for the United States operation. The chart shows the beneficiary at the top of the organization supervising a "vice president" who, in turn, is portrayed as supervising a helper/waitress and an assistant cook. The beneficiary is also portrayed as being solely responsible for the automotive and realty portions of the petitioner's business. Finally, the petitioner describes the duties of the "vice president" as follows:

Cooking the specialty Turkish & Indian food, changing menu's daily special items, adding new dishes, adding & introducing Indian dishes, taking daily management decisions and in the absence of [the beneficiary], doing cashier work and attending customers/visitors.

On March 29, 2007, the director requested additional evidence. The director requested, *inter alia*, quarterly wage reports for the petitioner's employees, job descriptions for the petitioner's employees, and a description of the petitioner's management and personnel structure.

In response, the petitioner submitted its quarterly wage report for the first quarter of 2007, the quarter in which the instant petition was filed. The wage report indicates that the petitioner employed two people during that quarter and paid a total of \$1,920.00 in wages. The petitioner did not specifically identify the two employees.

The petitioner also submitted an organizational chart for the United States operation that differs materially from the chart submitted with the initial petition. The revised chart shows the "vice president" supervising, directly or indirectly, five workers. It appears that this chart includes both the two workers employed at the café identified in the initial petition as well as three additional restaurant workers employed at "Nelly's Café," a business allegedly acquired by the petitioner after the filing of the instant petition.

On June 28, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in an executive capacity.

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

Upon review, counsel's assertions are not persuasive.

Title 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 Citizenship and Immigration Services (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. Future hiring and business expansion plans may not be considered. A visa petition may not be approved based on speculation of future eligibility. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Furthermore, businesses acquired or employees hired after the filing of the instant petition will not be considered. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. In the instant matter, it has not been established that the United States operation will employ the beneficiary in a predominantly managerial or executive position.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will be responsible for its management, "including decision making as to the existing business, business development, business

expansion, hiring and firing, overseeing bank related transactions, directing and supervising material procurement, and marketing and networking." However, the petitioner does not specifically explain what, exactly, the beneficiary will do in "managing" or "overseeing" the actual performance of the non-qualifying day-to-day tasks inherent to these duties given that the petitioner's additional claimed employees are described as solely performing restaurant operation tasks. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the record is not persuasive in establishing that the beneficiary will primarily perform qualifying duties. As noted above, the petitioner asserts that the beneficiary will "manage" the petitioner's business operations, which allegedly include an automobile sales business, a real estate business, and a restaurant, the Istanbul Café.<sup>1</sup> However, the petitioner only claims to employ subordinate workers in the restaurant component of the business. Therefore, it appears that the beneficiary will perform all the tasks related to both the automobile and the real estate components of the United States operation as the petitioner does not claim to employ any subordinate workers capable of relieving the beneficiary of the need to perform these tasks. Moreover, the record is not persuasive in establishing that the beneficiary will be relieved of the need to perform the non-qualifying administrative or operational tasks related to his operation of the restaurant component of the business. Instead, according to the job description for the "vice president," the beneficiary will be "doing cashier work and attending customers/visitors" and the "vice president" will only assume these tasks in the beneficiary's absence when he is, presumably, performing other non-qualifying tasks inherent to the operation of the other components of the petitioner's business. Finally, and crucially, it is unclear how many workers are actually employed by the petitioner, if any. While the initial organizational chart identifies four employees including the beneficiary, the wage report for the month in which the petition was filed claims only two employees. It is also unclear which two of the four "employees" listed in the organizational chart were the two employees claimed on the quarterly wage report. 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). In view of the above, it has not been established that the beneficiary will be "primarily" employed as a manager or an executive. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and

---

<sup>1</sup>As the record indicates that the petitioner's claimed second restaurant was not acquired until after the filing of the instant petition, the operation of this business and the petitioner's claimed employment of staff at this location may not be considered in the adjudication of the instant petition. As noted above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

(B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the organizational chart, the beneficiary will directly supervise a "vice president" who, in turn, will supervise a helper/waitress and an assistant cook. However, none of these employees, including the "vice president," is described as having supervisory or managerial responsibilities over other employees. To the contrary, these employees are all described as cooking, waiting on tables, and performing other tasks necessary to the operation of a restaurant. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed in a position superior to other employees on an organizational chart, or because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)). The record is not persuasive in establishing that the petitioner has an organizational complexity requiring the employment of an employee who primarily performs "managerial" duties through the supervision of a subordinate tier of managers or supervisors. Accordingly, it appears that the beneficiary is more likely than not primarily performing non-qualifying administrative or operational tasks in his operation of the restaurant along side his subordinate staff. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9<sup>th</sup> Cir. 2006).

In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner failed to establish the skills and education required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage professional employees.<sup>2</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>3</sup>

---

<sup>2</sup>In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

<sup>3</sup>While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears instead that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d at 1316 (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v.*

---

primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

*INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the petition contains serious inconsistencies regarding its staffing and business operations. For example, and as noted above, the petitioner claims in its organizational chart to employ four workers, including the beneficiary. However, the wage report for the same time period indicates that the petitioner only employed two workers. Also, while the petitioner claims to be engaged in various business enterprises including a restaurant, a real estate operation, and automobile sales, the record contains business documents which inconsistently identify the owner or owners of these enterprises. For example, it appears that the true owner of the automobile business may be a different limited liability company or may be operated by the beneficiary as a sole proprietorship. Also, it appears that the beneficiary and his spouse individually own all or some of the business assets also attributed to the petitioner. The petitioner offers no explanation reconciling these various inconsistencies. 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. 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.

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

The second issue in the present matter is whether the petitioner has established that it has a qualifying relationship with the foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." *See also* 8 C.F.R. § 214.2(l)(14)(ii)(A). Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." "Affiliate" is defined in pertinent part as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

In this matter, the petitioner asserts that it is an "affiliate" of the foreign employer. According to the petitioner's 2006 tax return, the owners of the petitioner are the beneficiary (50%), [REDACTED] the beneficiary's spouse (25%), and [REDACTED] (25%). However, according to the document titled "details of shareholding" for the foreign employer, the equity owners are [REDACTED] (2760 shares), [REDACTED] (2760 shares), [REDACTED] (920 shares), the beneficiary (920 shares), [REDACTED] (1380 shares), and [REDACTED] (460 shares). The "preferred" shareholders are [REDACTED] (200 shares), Mr. [REDACTED] (200 shares), and the beneficiary (200 shares).

On June 28, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

On appeal, counsel asserts that the record establishes that the two entities are "affiliates" as defined in the regulations. Counsel also asserts that it was inappropriate for the director to have denied the petition on this basis without first requesting additional evidence pursuant to 8 C.F.R. § 103.2(b)(8).

Upon review, counsel's assertions are not persuasive.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner and the foreign employer do not share common ownership and control and, therefore, are not "qualifying organizations." First, while the beneficiary owns 50% of the petitioner, the beneficiary only owns 10% of the equity shares, and 33.3% of the preferred shares, of the foreign employer. Accordingly, the beneficiary appears to control the petitioner but does not have similar control over the foreign employer. Therefore, the petition may not be approved for this reason.

Second, it appears that counsel is asserting that the organizations are qualifying because the beneficiary and his family collectively own and control the foreign employer. However, this familial relationship does not constitute a qualifying relationship under the regulations. If counsel is claiming that the beneficiary essentially controls the foreign employer through his family, it must be established that he has gained *de facto* control. In order to establish *de facto* control, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm. 1982). A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999). As the record in this matter is devoid of evidence establishing that the beneficiary, a minority shareholder, "controls" the foreign employer, the petitioner, which is 50% owned by the beneficiary, has not established that it has a qualifying relationship with the foreign employer.

Third, the petitioner and the foreign employer do not share ownership and control because each individual does not own and control "approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). For example, the beneficiary owns 50% of the petitioner, 10% of the foreign employer's equity shares, and 33.3% of the foreign employer's preferred shares. [REDACTED] owns 25% of the petitioner, 30% of the foreign employer's equity shares, and 33.3% of the foreign employer's preferred shares. Accordingly, as each individual does not own and control approximately the same share or proportion of each entity, the entities are not qualifying organizations. The beneficiary owns and controls the petitioner as the 50% owner but does not exert similar control over the foreign employer.

Finally, it must be noted that counsel's assertion on appeal that the director was obligated to request additional evidence pertaining to the petitioner's ownership and control prior to denying the petition on these grounds is without merit. Title 8 C.F.R. § 103.2(b)(8) states in pertinent part:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence.

\* \* \*

[I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence[.]

In this matter, the record establishes that the petitioner is not eligible for the benefit sought. As explained above, the record indicates that the beneficiary is the 50% owner of the petitioner while being only a 10% equity owner, and 33.3% preferred shareholder, of the foreign employer. The two entities are not qualifying organizations, and the director was correct in denying the petition on this basis without requesting additional evidence. Regardless, even if it was established that the director was obligated to request additional evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties will be primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad, if any. In fact, the organizational chart for the foreign employer portrays the beneficiary as supervising no employees. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the

petition, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be 50% owned by the beneficiary. As the beneficiary is claimed to be an owner of the company, the petitioner must establish that the beneficiary's services will be used for a temporary period and that he will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. Given that the record indicates that the beneficiary may be establishing an individual business presence in the United States separate and distinct from his employment by the petitioner, it is not credible that the beneficiary will depart the United States at the conclusion of his assignment. 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).

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

The previous approval of an L-1A petition does not preclude CIS from denying an extension based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.