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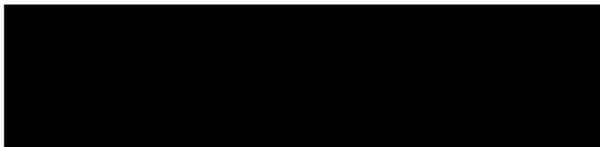
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FILE: EAC 07 096 52522 Office: VERMONT SERVICE CENTER Date: **MAR 21 2008**

IN RE: Petitioner:  
Beneficiary:



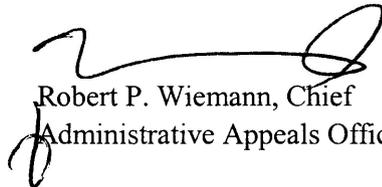
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability company organized in the State of South Carolina that states that intends to provide food catering services. The petitioner claims that it is an affiliate of Nepton Food Services, Ltd., located in Haifa, Israel. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a three-year period.<sup>1</sup>

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 qualifying managerial or executive capacity; or (2) that the beneficiary would be employed in the United States in a managerial or executive capacity within one year.

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 disputes the director's findings and asserts that the petitioner submitted sufficient evidence to establish that the beneficiary had been and would be employed in a qualifying managerial or executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

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

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

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

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<sup>1</sup> Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

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

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The 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 February 11, 2007. On the L Classification Supplement to Form I-129, the petitioner indicated that the beneficiary was employed by the foreign entity from October 2004 until January 2006<sup>2</sup>, and performed the following duties:

Main chef, products preparation, restaurant staff supervision and management; has been in charge of 7 employees on average; has been in charge of both food quality and restaurant service; responsible for menu composition, products preparation, supervising other cooks and restaurant personnel.

In a letter dated February 8, 2007, the petitioner indicated that the beneficiary has held the position of president of the foreign entity since 2005, and further described his duties as the following:

He has been in charge of 2 managers, five employees on average and many subcontractors who are hired based on need and demand basis. [The beneficiary] has been in charge of the company's management, supervising and responsible also for catering events, food quality and consultation services for restaurants as well. He has been the general manager, being responsible for the menu composition, products preparation, supervising other chefs, cooks and restaurant personnel.

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<sup>2</sup> The petitioner indicated in its supporting letter that the beneficiary continues to be employed by the foreign entity as its president. It is noted that at the time of filing, the beneficiary had been in the United States in B-2 status for a period of approximately 12 months.

The petitioner stated that the foreign entity provides catering services and also manages a restaurant, for which the beneficiary serves as general manager. The petitioner provided an organizational chart for the foreign entity which identifies the beneficiary as president, and a managing director as his direct subordinate. The chart indicates that the managing director supervises a chief cook, who supervises one worker, and a customer service manager, who supervises five waiters. Only four of the subordinate workers were identified by name.

The petitioner also submitted a letter dated December 7, 2006 from [REDACTED] who appears to be the foreign entity's tax advisor. [REDACTED] states that the foreign entity runs a restaurant in Haifa, Israel and employed on average approximately seven employees. He states that the beneficiary, in addition to being the owner and president of the foreign entity, was the restaurant's chef, while the remaining employees included two cooks and four other employees who worked as dishwashers, kitchen help and waiters. The petitioner submitted a similar letter from the foreign entity's accountant, who confirmed that the beneficiary was employed as the foreign company's president from October 2004 until January 2006, and that the company employed seven employees in 2005.

On March 1, 2007, the director issued a request for evidence, in part instructing the petitioner to provide additional evidence that the beneficiary was employed by the foreign entity in an executive or managerial capacity for one continuous year within the three years preceding the filing of the petition. Specifically, the director requested: (1) a description of the typical managerial responsibilities performed by the beneficiary abroad, along with explanations and documentary evidence of managerial decisions made by the beneficiary; (2) information regarding the number of subordinate supervisors working under the beneficiary's supervision; (3) job titles and job duties for all employees managed by the beneficiary; (4) the amount of time allocated by the beneficiary to executive/managerial duties, and the amount of time allocated to non-executive functions; (6) an organizational chart for the foreign entity; and (7) complete position descriptions for the beneficiary and each of the employees he managed, to include a breakdown of the number of hours devoted to each employees' job duties on a weekly basis. The director also requested the beneficiary's latest annual tax return and tax withholding statement, copies of payroll documents reflecting the beneficiary's period of employment and salary, and "other unequivocal evidence" establishing the beneficiary's employment with the foreign entity.

In a response dated May 9, 2007, the petitioner submitted a statement from the foreign entity addressing the requested evidence. The foreign entity indicated that the beneficiary "is supervising 9 individuals," who were identified as a managing director, chief cook, general assistant, customer relations manager, and five subordinate waiters and servers. The foreign entity described the beneficiary's duties as the following:

[The beneficiary's] managerial duties include directing and coordinating activities involving with purchase, inventory supervision and management, marketing policy, sale and distribution of catering and the restaurants products.

He is responsible to develop budget for restaurant operation, negotiating with suppliers, utilizing experience and knowledge of current market conditions, he is responsible for the daily menu, pricing policy, determining variety and quantity of restaurant products to be produced, and served according to orders and sales projections.

He is implementing through subordinate managerial personnel policies to utilize human resources, machine and materials productively.

He is responsible of hiring and discharging employees.

He is Training the subordinates in all phases of restaurant activities.

He is consulting with clients to define needs for their event as regard of the catering services the restaurant offers.

He is budgeting and scheduling the event with the restaurant activities.

He is assigning staff for the event.

He is charged of all financial activities of the restaurant, such as:

Depositing the restaurant income of the day before.

Determining the base pay for each employee.

[The beneficiary] [is] also responsible for the food quality, he is guiding the cooks what to make and they follow [the beneficiary's] recipes.

In conclusion, [the beneficiary] is allotted 80% of his time to executive/managerial duties and 20% of his time to non executive function (this 20% includes professional function as [the beneficiary] is a chef).

It is noted that the petitioner submitted evidence that the managing director claimed to work under the beneficiary's supervision was appointed to her position on February 1, 2006, and thus it has not been established that this individual worked under the beneficiary's supervision during his period of employment with the foreign entity.

The petitioner also provided the requested foreign payroll stubs for the beneficiary for the January 2005 to January 2006 period. However, the evidence shows that he was paid by "M.A. Nepton Ltd.," not "M.H. Nepton Food Services Ltd.," which is the company identified as the beneficiary's qualifying employer abroad.

The petitioner did not provide an organizational chart for the foreign entity, or the requested detailed position descriptions for the foreign entity's employees.

The director denied the petition on June 8, 2007, concluding that the petitioner had not established that the beneficiary was employed by the foreign entity in a managerial or executive capacity. The director referenced the initial position description provided for the beneficiary's position and determined that the petitioner had failed to establish that the beneficiary functioned at a senior level, or that he supervised and controlled the work of supervisory, managerial or professional employees who relieved him from performing the services of the corporation.

On appeal, counsel reiterates that the beneficiary devotes approximately 80% of his time to executive/managerial duties. Counsel further describes the beneficiary's duties as president of the foreign entity as follows:

He has sole responsibility for identifying and developing new strategic business relationships, business partnering and collaboration opportunities. [The beneficiary] also has single point responsibility for providing guidance and leadership in coordinating catering and restaurant activities; developing business/marketing strategies for target potential customers; overseeing evaluation of supplier proposals, negotiation of contracts, management of contracts and ongoing performance review of suppliers and vendors. As President of [the foreign entity], he also provides the leadership necessary to achieve business improvements and ensure food sales and performance objectives are met. [The beneficiary] also assesses the individual performance of his employees and is responsible for the organizational structure and selection of personnel.

The remaining 20% of [the beneficiary's] job duties is spent developing and planning the menu with his executive chef and overseeing activities among the kitchen, dining room, catering operations, and restaurant management to ensure that customers are satisfied with their dining experience. Because of his extensive experience in the food services industry, [the beneficiary] also allots his time to recruiting new employees and monitoring employee performance and training.

In support of the appeal, the petitioner submits a new organizational chart for the foreign entity, which appears to include both current and former employees. The permanent employees identified include the beneficiary's position of president and general manager, a managing director, a catering and special event management employee, a chief cook, a sous chef, a general kitchen worker, a restaurant management and customer service employee, and two waiters. The chart also identifies four seasonal workers, including a general worker and three additional waiters. The petitioner provides brief position descriptions for each worker.

The AAO notes that with respect to the foreign entity's organizational chart and position descriptions for its employees, 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 need 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). The appeal will be adjudicated based on the record of proceeding before the director.

Upon review of the petition and the evidence, the petitioner has not established 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.*

Here, the petitioner's initial description of the beneficiary's duties suggested that his position involved operational tasks required to produce a product or service, as well as first-line supervision of restaurant personnel. For example, the petitioner stated that the beneficiary is the "main chef" and is responsible for products preparation and menu composition. The petitioner further added that the beneficiary was "responsible also for catering events, food quality and consultation services for restaurants." Based on these representations, at least some portion of the beneficiary's time was allocated to actually providing the products and services of the restaurant and catering business operated by the foreign entity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner also referenced the beneficiary's responsibility for being "in charge of the company's management," and "supervising other chefs, cooks and restaurant personnel." However, these general statements are insufficient to establish that the beneficiary allocates the majority of his time to qualifying managerial tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). Although the petitioner indicated that the beneficiary "has been in charge of 2 managers, 5 employees on average," as discussed further below, the record does not contain clear evidence of the foreign entity's staffing levels during the beneficiary's period of employment abroad from October 2004 through February 2006, and thus does not establish he actually supervised managerial employees during this period.

Accordingly, the director requested a comprehensive description of the beneficiary's duties while employed by the foreign entity, and a clear explanation as to how his time was allocated among his duties. While the petitioner submitted a lengthier position description in response, the description did not include the specific breakdown of the percentage of time the beneficiary devotes to managerial duties. This information was critical, as the position description alone is insufficient to establish that the beneficiary performed primarily managerial or executive 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). Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

For example, in response to the director's request for evidence, the petitioner stated that the beneficiary's "managerial duties" include "directing and coordinating activities involving with purchase, inventory supervision and management, marketing policy, sale and distribution of catering and the restaurants products," and he is also described as "directing sales activities," "assigning stuff for the event" and "in charge of all financial activities." However, because the petitioner did not provide position descriptions for the beneficiary's subordinates or clearly document the number of employees working for the foreign entity during the beneficiary's period of employment abroad, it has not been established that the beneficiary was actually relieved from performing non-qualifying duties associated with the various functions he is claimed to "direct and coordinate." In addition, the petitioner indicated that the beneficiary himself was responsible for training

restaurant employees, consulting with clients to define their needs for catering services, negotiating with suppliers, scheduling events for catering clients, making bank deposits, and providing direct guidance to cooks, in addition to devoting 20% of his time to the non-executive function of acting as a chef. These duties suggest that the beneficiary has been directly involved in selling the foreign entity's services, purchasing inventory, engaging in first-line supervisory tasks, coordinating catering events, and providing first-level supervision to non-professional employees.

The definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Thus, the fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity as defined by sections 101(a)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization. Here, due to the petitioner's failure to provide a meaningful breakdown of how the beneficiary's time has been allocated among managerial and non-managerial tasks, and its failure to describe how the foreign entity's non-managerial functions are allocated among the subordinate employees, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity.

Moreover, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

As alluded to above, the record does not clearly establish the number or type of employees who were working under the beneficiary's supervision during his claimed period of employment abroad from October 2004 through February 2006. Notably, the evidence submitted shows that both the beneficiary and his claimed subordinate employees have been working for "M.A. Nepton Ltd.," not "M.H. Neptune Food Services, Ltd." This discrepancy has not been resolved and will be discussed further below. At the time of filing, the petitioner stated that the beneficiary has been supervising an average of seven employees, and indicated that two of these were managers. An organizational chart submitted at the time of filing depicted a total of nine employees working under the beneficiary's supervision, including a subordinate managing director. The supplemental letter from the foreign entity's tax advisor stated that the foreign entity employed seven employees in total. He identified the beneficiary as the chef and indicated that his subordinates included two cooks and four workers engaged in dishwashing, cleaning, kitchen help and waiting tables. The foreign entity's accountant also confirmed a total staff of seven workers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where

the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based on the discrepancies in the evidence submitted, it cannot be concluded that the beneficiary was supervising subordinate managers. Regardless, as discussed above, the petitioner failed to provide the requested names, job titles and job descriptions for the beneficiary's subordinates in response to the director's request for evidence.

The AAO acknowledges that, on appeal, the petitioner has provided extensive payroll records for the foreign entity, as well as a new organizational chart depicting a total of 13 employees. In comparing the payroll records and organizational chart, it appears that the chart depicts all employees who worked for the foreign entity for any length of time in 2005. Three of the employees, a catering and special event manager, a sous chef, and a general worker, did not appear on the organizational chart submitted at the time the petition was filed, and no explanation has been provided for their addition. The record contains evidence that the foreign entity's managing director was actually appointed to her post in February 2006, at the same time the beneficiary left the foreign entity to come to the United States, while the "catering & special event management" employee appears to have been hired in August 2006.

The petitioner also submits translated copies of documents identified as "W-2 Forms" issued by M.A. Nepton Ltd. for the 2005 tax year, which are assumed to be the Israeli equivalent of a U.S. wage and tax statement.<sup>3</sup> The employees who received payments, based on this documentation, include: the beneficiary; five waiters who worked anywhere from three to eight months during the year; a general worker who worked during the months of January and February 2005; a general worker who worked all year; a sous chef who worked all year; a chief cook who worked during the months of January through April and August through November 2005; and the customer service manager, who worked all year.

However, there are additional inconsistencies in the documentation. For example, the petitioner has provided 2005 payroll records for the chief cook and customer service manager, but the 2007 payroll documentation for the same individuals indicates that they started working for the company in October 2006 and May 2006, respectively. The above-referenced "general worker" who appears to have worked all year in 2005 also appears to have been hired in February 2006, based on the information contained in her 2007 pay statements. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. Given the inconsistencies and discrepancies, it is difficult to determine with any degree of confidence how many employees the beneficiary supervised while employed by the foreign entity or whether any of his subordinates were in fact managers, supervisors or professionals.

Overall, it appears that the foreign entity was operating a restaurant and catering business with an average of no more than seven employees during the beneficiary's year of employment abroad. According to an advertisement submitted by the petitioner, the foreign entity's restaurant is open for business for twelve hours daily, or 84 hours per week. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Given the type of business operated by the foreign entity, it would reasonably require

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<sup>3</sup> It is noted that, according to a "Confidentiality Agreement" between the foreign entity and M.A. Nepton, Inc., the latter was actually established in February 2006, which raises questions regarding the credibility of wage and tax information submitted by this company for the 2005 tax year.

employees to market and advertise the restaurant and catering services, purchase and monitor inventory, food and supplies, receive deliveries, greet and seat customers, serve customers, clear tables, prepare food according to customer orders, operate a cash register, properly store food and ingredients, manage the business's day-to-day finances, perform opening and closing duties daily, schedule and coordinate catering events, and perform administrative and clerical tasks associated with operating any business. The petitioner has not established that the beneficiary's subordinate staff consisting of one or two cooks, two or three waiters, a general worker and a customer service employee would have reasonably relieved the beneficiary from participating in these non-managerial functions on a day-to-day basis. Rather, a review of the foreign entity's staffing levels, in light of the overall purpose and stage of development of the foreign entity, supports a conclusion that the beneficiary likely performed a combination of managerial, first-line supervisory, and operational tasks, rather than performing in a primarily managerial or executive capacity.

Based on the foregoing discussion, the petitioner has not submitted sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the beneficiary would be employed by the United States entity in a qualifying managerial or executive capacity within one year.

In its letter dated February 14, 2007, the petitioner indicated that the U.S. company was founded to provide catering services and produce events, and to provide consultation services to other restaurants and caterers who wish to improve their menus. Specifically, the petitioner stated that the U.S. company "will provide the services needed to manage the restaurants owned by 'AM-PM Mini Marts, Inc.' and other clients, and will supervise both the food and service provided."

The petitioner described the beneficiary's proposed role of president as follows:

[The beneficiary] will personally supervise and coordinate all operations of the company and will be responsible for the improvement of the composition of Mediterranean style recipes based on healthy nutrition. He will supervise a local staff of food specialists, chefs, nutritionists and waiters as needed. He will train and hire local subcontractors as well.

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Among his duties, [the beneficiary] will direct and coordinate all activities and operations of the company to obtain maximum efficiency and economy of operation and maximize profits. He will plan and develop corporate policies and goals, and implement goals through subordinate administrative personnel; he will coordinate all company's activities such as consultation regarding health food and recipes improvement, catering services; he will direct and coordination promotion of services and products performed to develop new clientele, increase share of market and obtain competitive position in industry. [The beneficiary] will also analyze company budgets, request to identify areas in which reduction can be made, confer with administrative personnel and review daily activities.

[The beneficiary] will also maintain and coordinate all communications and updates regarding company's activities between the U.S. and Israel to ensure efficiency. Establishing the contacts between the U.S. company and the parent company in Israel – particularly the exchange of knowledge and expertise – is expected to enhance our profitability and market edge by utilizing the parent company's special expertise in its area of business.

The director issued a request for evidence on March 1, 2007, instructing the petitioner to submit additional evidence to establish that the intended United States operation will support a primarily managerial or executive position within one year. Specifically, the director requested: (1) a more detailed description of the beneficiary's proposed duties, including specific tasks to be performed; and (2) the petitioner's business plan providing specific dates for each proposed action for the first two years of operation.

In response, the petitioner submitted a copy of its business plan, which indicates that the company will operate with a management team that includes the beneficiary as "owner/head chef and manager," a finance director, and a catering manager, who will receive combined salaries amounting to \$80,000 annually. The business plan includes a projected profit and loss statement which indicates that the company anticipates paying \$100,000 in salaries and wages during the 2007 and 2008 years. The business plan included no further information regarding the petitioner's anticipated staffing levels. The petitioner did not provide the requested detailed position description for the beneficiary's proposed position.

The evidence submitted in response to the director's request for evidence showed that the petitioner signed a sublease agreement with "AM-PM Mini-Marts, Inc." for "the kitchen area" of the Beach House Bar and Restaurant located at 1205 North Ocean Boulevard in Myrtle Beach, South Carolina, with a term commencing on May 1, 2007. The petitioner provided photographs and financial information for the restaurant, but did not explain the petitioner's role in operating the restaurant, which is not specifically mentioned in the business plan.

The petitioner also submitted evidence that "Beach Bums of SC, LLC," a company which appears to be indirectly owned by the petitioner's minority shareholder, purchased property located in Myrtle Beach, South Carolina in January 2007. The petitioner did not explain the significance of this purchase with respect to the new U.S. company and the requirements set forth at 8 C.F.R. § 214.2(l)(3)(v).

The director denied the petition on June 8, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity within one year. The director concluded that based on the evidence submitted, and the size and nature of the U.S. office, it appears that the beneficiary would be engaged primarily in non-managerial operational tasks, with occasional first-line supervisory duties over nonprofessional employees.

On appeal, counsel for the petitioner asserts that the director failed to take into consideration that an L-1 executive may "direct the management of the organization or a major component or function of the organization." Counsel further explains as follows:

Due to the personnel structure and the nature of the petitioner's business, it should be expected that [the beneficiary] will be engaged to a limited extent in day-to-day activities during the early stages of the business, but that he will also exercise discretionary decision

making ranging from the hiring and training of new personnel to the formation of the Petitioner's goals and policies.

\* \* \*

While [the beneficiary] will remain minimally engaged in directing day-to-day operations, he will be principally responsible for the success or failure of the company such that operations, marketing, strategy, financing, creation of company culture, human resources, hiring, firing, compliance with safety regulations, sales, etc. will all fall on his shoulders. As President, his main duty will be to set the strategy and direction of the company.

The original record reflects that [the beneficiary] will be directing the development of [the petitioner] and that in light of [the petitioner's] reasonable needs and stage of development at the time the petition was filed, [the beneficiary] will operate at a senior level with respect to the function managed. The body of experience and knowledge that [the beneficiary] developed through his employment as President of [the foreign entity] makes his transfer to the United States highly desirable. . . . [The beneficiary] will devote approximately 70% of his time on executive/managerial duties. The remaining 30% will be divided into planning and developing future business projects, menu creation, overseeing customer relations, establishing and maintaining contact with suppliers and vendors.

Counsel asserts that the director should have focused on the functions directed by the beneficiary, rather than on the work performed by the U.S. company's staff. Counsel contends that the beneficiary "will principally allocate his time to developing new business opportunities, establishing new strategic business relationships and developing additional markets," and will rely on subordinate employees to oversee the day-to-day operations of the company.

The petitioner submits extensive documentary evidence in support of the appeal. This evidence includes: (1) the petitioner's year-to-date payroll information through September 2007; (2) a second sublease agreement between the petitioner and AM-PM Mini-Marts, Inc. for "the bar area" of a restaurant located at 1206 North Ocean Blvd., Myrtle Beach, South Carolina, dated March 30, 2007 with a term commencing May 1, 2007; (3) copies of bank statements and checks issued from the petitioner's payroll and operating accounts; (4) the petitioner's financial statement as of August 31, 2007, showing "wholesale" revenues of approximately \$265,000; (5) a letter dated April 1, 2007, from [REDACTED] of Surf Bums, Inc., offering the petitioning company the position of providing consulting services for a new restaurant to be opened in 2008; (6) a consulting service agreement between the petitioner and Guatemala C.A. to provide "restaurant and catering consultation" for a fee of \$15,700; (7) a letter from a local Jewish community center requesting the petitioner's assistance with the organization's food service needs and catering; and (8) a current organizational chart for the U.S. company.

The petitioner indicates that its employees currently hold the management positions at two restaurants, the Beach House and Gilligans, where they are responsible for training, management and daily operations. The organizational chart identifies the beneficiary as president and general manager, supervising a financial consultation employee, who supervises an "accounting and deposits" employee, and a "catering & consultation service & management" employee. This employee is depicted as supervising two head cooks, a

bar manager and a head waiter, who are shown to be supervising cooking staff, bartenders, and wait staff at the above-referenced restaurants. The petitioner provides brief position descriptions for each employee.

The petitioner further explains the beneficiary's role within this staffing structure as follows:

[T]he general manager will need extensive experience in all aspects of managing a restaurant. These details shall include everything from creating a menu that will support all visual aspects and vision of the Mediterranean Cuisine, to training the kitchen staff on the uniqueness of that field. The manager will need to know how to hire, train and direct all employees in this field. The manager will be expected to perform all duties at each location and all future locations.

Due to the nature of our location the GM duties will change with development of the season. From the month of January-April, 70% of the GM time will be involved in hiring and training the staff for the upcoming season, 20% for general operation and the remaining 10% will go to research development/planning of future projects, from May-September (labor day) 70% of the managers time will be consumed by daily operations of the system and the remaining 30% will go to the planning of future projects, the remaining 20% will go to regular operations.

Upon review, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity within one year.

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.*

In the instant matter, the petitioner has provided only a vague description of the beneficiary's job duties that fails to identify what his tasks will be on a day-to-day basis. For example, the petitioner indicated that the beneficiary would "personally supervise and coordinate all operations," "direct and coordinate all activities and operations," "plan and develop corporate policies and goals," "coordinate all company activities," and "direct and coordinate promotion of services and products." Many of these duties merely paraphrase portions of the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A)(iii) and 101(a)(44)(B)(ii) of the Act. 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. at 1108.

The petitioner also failed to outline the petitioner's anticipated organizational structure for its first year of operations, and only noted that the beneficiary would supervise food specialists, chefs, nutritionists, waiters, and subcontractors, "as needed." Based on the minimal evidence submitted in support of the petition, the director requested that the petitioner provide a detailed, specific description of the beneficiary's proposed duties, and a business plan for the company.

Although the petitioner submitted a voluminous response to the director's request for evidence, it did not further address the beneficiary's proposed duties in the United States. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on such factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

However, in this case, while the petitioner submitted a lengthy business plan, it was significantly lacking in details regarding the proposed staffing of the organization for the first year of operation, and failed to identify any anticipated staff beyond the beneficiary, a finance director, and a catering manager. There was also ambiguity in the record as to how the petitioner would "cooperate with AM-PM Mini Marts, Inc. in managing two restaurants and pubs," as the petitioner did not submit any agreements between these two companies that would clearly outline the petitioner's role in the management of the restaurants. The petitioner also submitted evidence related to other companies apparently owned by its minority shareholder, Erez Sukarchi, but provided no explanation as to how the evidence relates to the petitioning company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Although the petitioner has submitted voluminous evidence on appeal, 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 need 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).

Moreover, the petitioner has still failed to adequately describe the beneficiary's proposed duties in the United States. On appeal, counsel states that the beneficiary will be "directing the development" of the petitioner, that he is "the key performer" within the organization, and that he will devote approximately 70% of his time on "executive/managerial duties." At the same time the petitioner states that the beneficiary, during part of the year, will spend 70% of his time "hiring and training staff;" 20% of his time on "general operation;" and 10% on research and planning. The petitioner did not explain what tasks are involved in "general operation," nor did it indicate how training restaurant staff would fall under the statutory definition of managerial or executive capacity. The petitioner further indicates that the beneficiary, during the remainder of the year would devote 70% of his time to "daily operations of the system," 20% of his time to "regular operations," and 30% of his time to planning of future projects.

The petitioner's claim that the beneficiary will devote a total of 90% of his time to "daily operations" and "regular operations," without further explanation is so vague that it is essentially meaningless. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language

of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Based on the foregoing discussion, the AAO finds that the director properly determined that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year.

Beyond the decision of the director, as noted above, there is an inconsistency in the record regarding the beneficiary's foreign employer which raises questions as to whether there is a qualifying relationship between the foreign employer and the U.S. entity, as required by 8 C.F.R. § 214.2(l)(3)(i). The petitioner stated on the L Classification Supplement to Form I-129 that the beneficiary was employed by "M.H. Nepton Food Services, Ltd." in Haifa, Israel, from October 2004 until January 2006. The petitioner indicated that the U.S. entity and the foreign entity are affiliates, based on common majority ownership by the beneficiary, who was stated to own 51 percent of the U.S. entity and 60 percent of the foreign entity.

However, as noted above, all of the pay stubs submitted as evidence of the beneficiary's employment abroad show the name of his employer to be "M.A. Neptun Ltd.," not "M.H. Nepton Food Services Ltd." The record contains a Shares Allotment and Shareholders Relationship Agreement between these two companies, which was executed on February 15, 2006 indicating that on that date, 40 of M.H. Nepton Food Services Ltd.'s shares would be allocated to M.A. Nepton Ltd. The petitioner indicated on Form I-129 that 40 percent of M.H. Nepton Food Services Ltd. is owned by an individual, [REDACTED], rather than by the company, M.A. Nepton Ltd. The petitioner has not submitted copies of the foreign entity's articles of incorporation or organization or copies of its share certificates. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record also contains a confidentiality agreement dated February 15, 2006 between "[REDACTED]" and [REDACTED] of "[REDACTED]," which includes the following paragraph:

[REDACTED] is the manager of Neptune, LLC and since February 15, 2006 [Ms. [REDACTED]] has managed the Neptune Restaurant. Subsequent to February 15, 2006, [REDACTED] opened a new company, M.A. Neptune, Inc. [REDACTED] was registered as the owner of M.A. Neptune, Inc. even though [REDACTED] owns 60% of the stocks in M.A. Neptune, Inc.

No other evidence of the ownership and control of either foreign entity was submitted. The petitioner has not clearly documented which company served as the beneficiary's foreign employer, nor has it adequately documented the ownership and control of either foreign entity. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.