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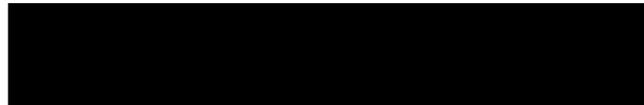


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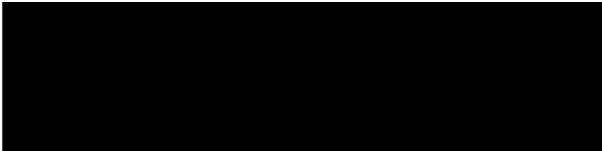
**FEB 06 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. On November 19, 2008, the AAO issued a request for additional evidence (RFE), advising the petitioner of evidentiary deficiencies in the record that, if unresolved, would preclude the AAO from sustaining the appeal. The petitioner responded to the AAO's request on January 23, 2009. Upon review, the appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it operates an auto and light truck repair service center. It claims to be an affiliate of [REDACTED] located in Bulacan, Philippines. The petitioner seeks to employ the beneficiary as its vice president, operations for a period of three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary's services are to be used for a temporary period or that the beneficiary will be transferred to an assignment abroad upon the completion of her temporary services, as required by 8 C.F.R. § 214.2(l)(3)(vii). The director also noted that the petitioner failed to submit certain evidence requested in an RFE issued on March 7, 2008, but did not explicitly deny the petition on this basis.

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 asserts that the petitioner submitted sufficient evidence to establish that the beneficiary's employment in the United States will be temporary.

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 sole issue addressed in the director's decision is whether the petitioner established the temporary nature of the beneficiary's services pursuant to 8 C.F.R. § 214.2(l)(3)(vii), which states:

If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

At the time of filing, the petitioner indicated that the beneficiary is a shareholder in both the foreign entity and the U.S. entity. In a letter dated January 31, 2008, counsel for the petitioner stated that the petitioner wishes to employ the beneficiary on a temporary basis for a period of three years, and indicated that she will be transferred back to the foreign entity after completion of her temporary stay in the United States.

The director issued a request for additional evidence on March 7, 2008. The director requested the beneficiary's payroll records, evidence to establish that the petitioner and the foreign entity have a qualifying relationship, evidence that the U.S. company is doing business, and additional evidence regarding the beneficiary's current and proposed job duties and the organizational structures of both the U.S. and foreign entities. The director did not specifically request additional evidence to establish that the beneficiary's employment would be on a temporary basis or evidence to establish that the beneficiary would be transferred abroad upon the completion of her assignment in the United States.

Nevertheless, the director denied the petition on June 7, 2008 on the sole ground that the petitioner failed to establish that the beneficiary's proposed employment in the United States would be for a temporary period. The director observed that the beneficiary is an owner of the petitioning company and is therefore required to comply with the regulation at 8 C.F.R. § 214.2(l)(3)(vii).

On appeal, counsel for the petitioner asserts that the petitioner met its burden of proof by stating that the beneficiary will be employed on a temporary basis and transferred back to the foreign entity upon completion of her assignment.

Upon review, the AAO disagrees with the director's reasoning for denying the petition, but agrees with the director's ultimate conclusion that the petitioner did not establish that the beneficiary's employment in the United States will be temporary. Generally, the petitioner for an L-1 nonimmigrant classification needs to submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Iovic*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). In *Matter of Iovic*, the beneficiary owned 51 percent

of the petitioning company, and the Commissioner determined that "the operation, and indeed, the very existence of the business depends upon the presence of the owner/operator/stockholder." 18 I&N Dec. at 364.

Here, the beneficiary is claimed to be one of six shareholders of the U.S. company. There is no evidence that she has a controlling interest in the petitioning company, and the AAO can find no basis for concluding that she is a "major stockholder" of the company as contemplated by the regulation at 8 C.F.R. § 214.2(l)(3)(vii). Therefore, the AAO finds the facts of this case distinguishable from *Matter of Iovic*.

However, as discussed further below, the petitioner has failed to submit requested evidence to show that the foreign entity continues to operate in the Philippines. Regardless of whether the beneficiary is the owner or major shareholder of the U.S. company, her employment cannot be considered "temporary" if there is reason to doubt that the foreign entity will continue to be actively doing business upon completion of her United States assignment. The petitioner has not provided evidence of the foreign entity's ongoing business operations. Furthermore, there is some confusion in the record as to the current location and employer of the group of individuals who are claimed to comprise the managerial/executive staff of both companies, as they appear on both companies' organizational charts. If all of the senior staff have re-located to the United States, there is further reason to doubt that the foreign entity remains or will remain operational.

Accordingly, the AAO finds that the petitioner has not submitted sufficient evidence to establish the temporary nature of the beneficiary's employment in the United States. For this reason, the decision of the director will be affirmed and the appeal will be dismissed.

As noted above, upon review of the petition, the AAO observed that the director had overlooked a number of evidentiary deficiencies in the record that, if unresolved, would preclude the AAO from sustaining the appeal. Accordingly, on November 19, 2008, the AAO addressed these deficiencies in a request for evidence. The petitioner's response submitted a response dated January 16, 2009. Upon review of the petitioner's response, the AAO will deny the petition based on the petitioner's failure to establish: (1) that the U.S. company and the foreign entity have a qualifying relationship; and (2) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The next issue to be addressed is whether the petitioner established that the U.S. entity and the foreign entity have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

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

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

\* \* \*

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One 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.

The petitioner filed the nonimmigrant petition on February 1, 2008. The petitioner indicated on Form I-129 Supplement L at part 9 that the petitioner and the beneficiary's foreign employer are affiliates, but the petitioner did not complete part 10, which instructs the petitioner to describe the stock ownership and control of each company. In a letter dated January 31, 2008, counsel for the petitioner stated that the two companies are affiliates "as both corporations have interlocking directors, who exercise effective ownership and control over both corporations."

In support of the petition, the petitioner submitted a "Secretary's Certificate" dated November 22, 2006, which listed the stockholders of the foreign entity as follows: [REDACTED]

[REDACTED] and [REDACTED]. The petitioner also provided a "Registration Data Sheet" which depicted the stock ownership of the foreign entity as follows:

[REDACTED]	5,000 shares
[REDACTED]	2,000 shares
[REDACTED]	1,000 shares
[REDACTED]	1,000 shares
[REDACTED]	1,000 shares

On March 7, 2008, the director requested additional evidence, including a list of owners for the foreign entity and the percentages they own, and a copy of the foreign entity's articles of incorporation.

In response, the petitioner submitted a "Secretary's Certificate" dated June 6, 2007, which referred to the election of new board members and listed the members as: [REDACTED] and [REDACTED]. The document was accompanied by another "Registration Data Sheet" which is identical to the one provided previously, with one exception. The beneficiary, rather than [REDACTED] was listed second on the sheet as the owner of 2,000 shares of the company. However, the Taxpayer Certification Number listed for the beneficiary is the same number previously listed for [REDACTED] and no explanation was provided for this discrepancy

With respect to the U.S. entity, the petitioner initially submitted a document titled "Owners & Board of Directors" and listed the following names: [REDACTED] and [REDACTED]

The director subsequently requested a copy of the petitioner's articles of incorporation, but did not request any other evidence to establish the ownership and control of the corporation. The petitioner submitted a copy of its articles of incorporation filed with the California Secretary of State on April 9, 2007. According to the articles of incorporation, the U.S. company is authorized to issue 10,000 shares of stock. The petitioner re-submitted its list of owners and board members.

In the RFE issued on November 19, 2008, the AAO instructed the petitioner to explain why it submitted two different lists of stockholders for the foreign entity. The AAO further instructed the petitioner to submit the following documentation to establish the ownership and control of the foreign entity: (1) Articles of Incorporation, corporate by-laws and any other corporate documentation outlining the number of stocks authorized and the identity of the foreign entity's stockholders; (2) copies of all stock certificates issued by the foreign entity to date; and (3) evidence establishing the Philippines Taxpayer Identification Numbers for both [REDACTED] and the beneficiary, such as copies of identification documentation issued by the government of the Philippines.

In addition, the AAO advised the petitioner that its self-prepared list of owners is not sufficient to establish the ownership and control of the company. Accordingly, the AAO instructed the petitioner to submit: (1) clear photocopies of all stock certificates issued by the U.S. entity; and (2) a copy of the petitioner's stock ledger identifying the names of all stockholders, the number of shares held, the date of issuance of all shares, and the amount paid by each shareholder in exchange for their shares.

The AAO emphasized that the documentation submitted should clearly show the total number of shares issued by both entities, the exact number of shares issued to each shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, the petitioner was instructed to submit any agreements relating to the voting of shares, the distribution of profit, and the management and direction of each company.

In a response dated January 16, 2009, counsel for the petitioner emphasizes that the U.S. and foreign entities have "interlocking directors, who exercise effective ownership and control over both corporations." Counsel states that the two lists of shareholders provided for the foreign entity are different because the latter listing and registration "is pursuant to the election of new board members." Counsel asserts that the use of the same Taxpayer Certification Number for two different individuals "seems to be a mistake that needs correction." Counsel asserts, however, that the two companies "have interlocking directors and the two companies are owned and controlled by the same group of individuals, as here the companies are closed corporations owned by family members." With that, counsel asserts that the qualifying relationship requirement is met. Counsel does not acknowledge the AAO's request for evidence of the ownership and control of the foreign and U.S. entities and submits no additional evidence in support of the claimed affiliate relationship.

Upon review, the petitioner has not established that the U.S. and foreign entities have a qualifying relationship.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The record contains no explanation and no documentary evidence of the ownership and control of the U.S. company. As noted by the director, a self-prepared list of owners is insufficient to establish the petitioner's burden of proof. The petitioner has had ample opportunity to provide official corporate documentation for the U.S. company and has failed to do so. 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). No affiliate relationship can be found where the ownership and control of one of the claimed affiliates has not been documented.

Furthermore, the petitioner has not submitted evidence in response to the AAO's RFE to reconcile the inconsistencies in the evidence submitted with respect to the foreign entity's ownership and control. If the petitioner's ownership did change in 2007, it is unclear why the petitioner would have initially submitted documents reflecting the ownership of the foreign entity in 2006 with a petition filed in 2008. 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 discrepancy could easily be resolved through the submission of all stock certificates issued by the foreign entity; however, the petitioner has opted to not submit such evidence.

There is no evidence of an affiliate relationship beyond counsel's claim that both companies are "closed corporations owned by family members" and "owned and controlled by the same group of family members." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the assertions made in the record, the foreign entity is owned by five individuals and the U.S. entity is owned by six individuals. Assuming that this information is even accurate, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity . . . ." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2)(emphasis added). In addition, the record does not show that there is a parent entity with ownership and control of both companies, or a single individual who has a controlling interest in both companies, that would qualify the two entities as affiliates. Although counsel claims that the petitioning company and the overseas company are by members of the same family, this familial relationship does not constitute a qualifying relationship under the regulations.

Finally, the AAO notes that the petitioner failed to submit evidence that the foreign entity continues to do business in the Philippines. The AAO specifically requested that the petitioner submit copies of invoices, receipts, purchase orders, and any other documentation that will show the foreign entity's continued business operations since 2007. The AAO also requested copies of payroll records for 2007, photographs of the foreign entity's business premises, and a copy of the foreign entity's latest corporate tax return filed with the appropriate Philippines tax authority.

The only documents submitted in response are what appear to be draft copies of tax returns for the years 2005, 2006 and 2007, which were previously submitted. The AAO advised the petitioner that these documents were insufficient to establish that the foreign entity continues to do business, as there is no evidence that these returns were filed with the appropriate tax authority in the Philippines. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The only other documents submitted with respect to the foreign entity's operations are a lease agreement that expired in 2005 and a contract signed in 2004, which are insufficient to demonstrate the company's ongoing business operations in the Philippines as of 2008.

Based on the foregoing discussion, the petitioner has not established that the foreign and U.S. entities have a qualifying relationship. For this reason, the petition will be denied.

The next issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States 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 indicates that the beneficiary will be employed as its vice president, operations. In his letter dated January 31, 2008, counsel for the petitioner described the beneficiary's proposed duties as follows:

As Vice President – Operations at [the petitioner], [the beneficiary] will act as executive officer to perform management functions and as proxy for the Board of Directors in their absence. In addition, she will evaluate employee productivity assigned in the operations and marketing of profitable services; review comprehensive monthly administrative reports, annual and monthly budgets, cost controls and monthly billings; evaluate marketing, business development, account management, planning and business operations; review and evaluate current lease/rental contracts with landlord/lessor; project future locations for possible

expansion due to customer demand; coordinate palm [sic] organizations for repair yard operations and expansion plans; develop and implement business opportunities and marketing strategies to sustain business stability, maximize growth and profitability, expand market penetration, and accomplish company objectives. [The beneficiary] will provide a high level of leadership to the management team in order to achieve business profitability.

The petitioner indicated on Form I-129 that it employs 15 workers. The petitioner submitted an organizational chart which indicates that the beneficiary, as vice president – operations, will report to the company's president, and directly oversee three positions designated as [REDACTED]. Two of the supervisor positions are held by the same person, [REDACTED] although the chart indicates that she supervises employees at two different locations: [REDACTED] and [REDACTED]. The chart shows that 13 individuals, identified simply as "employees," report to [REDACTED]. The other [REDACTED] has no subordinates reporting to him, according to the organizational chart.

The remaining employees on the chart are the other claimed owners/shareholders of the company, and are identified as holding the positions of president, vice president-administration, vice-president-controller, vice-president – finance, and vice president – marketing. The chart depicts an executive secretary who reports to the four vice presidents. It is noted that three of the vice presidents, the company president, and the executive secretary also appear on the foreign entity's organizational chart. It is not clear whether these individuals are or will be in the United States during the beneficiary's assignment.

In the RFE issued on March 7, 2008, the director instructed the petitioner to submit: (1) the total number of employees at the U.S. location where the beneficiary will be employed; (2) an organizational chart for the U.S. company including names, job titles, job duties and source of remuneration for all of the beneficiary's subordinates; (3) a more detailed description of the beneficiary's duties and the percentage of time the beneficiary will spend in each of the listed duties; (4) copies of the U.S. company's payroll summary, Form W-2 and Form W-3s; and (5) a list of all U.S. employees since the date of establishment, including names, job titles, social security numbers and beginning and ending dates of employment.

In response to the director's request, the petitioner re-submitted the same organizational chart provided with the initial petition. The petitioner further described the beneficiary's proposed duties as follows:

- Evaluates employees productivity assigned in the operations and marketing of profitable services;
- Reviews comprehensive monthly administrative reports, annual and monthly budgets, cost controls and monthly billings both [the foreign entity] and [the petitioner];
- Evaluates marketing, business development, account management, planning, and business operations;
- Reviews/evaluates current rental/lease contracts with the landlord/lessee;
- Projects future locations for possible expansion due to customer service demands;
- Coordinates plan organizations for the Subic Base Yacht repair yard operations and expansion plans on auto repairs in Plaridel Bulacan operation;

- Completes USA manufacturer deals on the installation of over 1,000,000 lbs. of boat lift for the Subic Base Yacht repair yard operations.

The petitioner did not submit the requested job descriptions for the beneficiary's proposed subordinates in the United States, or the requested evidence of wages paid to employees in the United States. The petitioner provided a copy of its 2007 IRS Form 1120, U.S. Corporation Income Tax Return, which shows that the company paid \$27,183 in compensation to officers and \$7,629 in wages for the year ended December 31, 2007.

The director noted in her decision dated June 7, 2008 that the petitioner failed to produce the requested payroll summaries and Forms W-2, but did not deny the petition on this basis. On November 19, 2008, the AAO requested that the petitioner submit much of the same evidence requested in the director's RFE dated March 7, 2008, including a comprehensive description of the beneficiary's duties and the percentage of time she will allocate to each duty; copies of IRS Forms W-2 and Forms 1099 for 2007 as evidence of payments to employees and contracts; a copy of the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2008; a copy of the petitioner's California Form DE-6, Employer's Quarterly Report, for the first quarter of 2008; and a list of all company employees since the beginning of 2008, including names, job titles, hire and termination dates, and job descriptions for each employee.

In response to the AAO's RFE, counsel re-states the position description that was included in his letter dated January 31, 2008. The petitioner has not submitted any of the other evidence requested.

Upon review, the petitioner has not established that the beneficiary will be employed in the United States 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.*

The petitioner's description of the beneficiary's duties is vague and non-specific, offering little clarification as to what the beneficiary would do on a day-to-day basis as the petitioner's vice president of operations. For example, the petitioner indicates that the beneficiary will "perform management functions," "evaluate employee productivity," "evaluate marketing, business development account management, planning and business operations," "maximize growth and profitability," and "accomplish company objectives." While these statements generally describe the beneficiary's objectives, they provide no insight as to what specific duties the beneficiary would be expected to perform as the vice president of an auto repair business. 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 her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner has been advised that the beneficiary's position description is deficient and has been given two opportunities to submit a comprehensive description of the beneficiary's proposed duties. On both occasions, the petitioner has declined to elaborate with respect to the beneficiary's intended duties and the amount of time she will devote to her duties. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. This failure of documentation is important because the beneficiary's responsibilities include some administrative, business development, marketing and finance-related functions, and it remains unclear as to whether the beneficiary would supervise lower-level employees to perform these tasks, or whether she would be personally performing non-managerial tasks. 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). The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. *See* 8 C.F.R. § 103.2(b)(8). 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).

In addition, the petitioner's vague description of the beneficiary's duties cannot be read or considered in the abstract. 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. Here, the petitioner's failure to document its claimed staffing levels and failure to provide information regarding the beneficiary's alleged subordinates undermines its claim that the beneficiary will be employed in a primarily managerial or executive capacity.

The petitioner claims to employ a total of fifteen employees. It submitted an organizational chart for the U.S. company which depicts a total of 22 employees, including the beneficiary. As noted above, there are six employees who appear on the organizational charts for both the U.S. and foreign entities, and the actual location and employer for these individuals has not been established. It appears that one or more of the claimed executive staff was employed in the United States in 2007 as the petitioner's Form 1120 indicates that the company paid compensation to one or more officers during that tax year.

Although the petitioner claimed to employ 15 employees as of February 1, 2008, the limited evidence in the record shows that the company paid only \$7,629 in salaries and wages for the year ended on December 31, 2007. The petitioner has twice been instructed to submit evidence of wages paid to employees, including Forms W-2, Forms 941 and California Form DE-6. Such evidence would clearly show the actual number of employees working for the petitioner at the time of filing. The petitioner has declined to provide such evidence. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The staffing structure indicated on the petitioner's organizational chart has not been supplemented with any corroborating evidence.

Moreover, even assuming *arguendo* that the organizational chart for the U.S. company reflects an accurate portrayal of the petitioner's staff at the time of filing, the petitioner has failed to provide the requested job descriptions and other pertinent information regarding the beneficiary's proposed subordinates. The petitioner claims that the beneficiary will supervise two supervisors, one of which will supervise 13 "employees."

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

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of its supervisors or "employees." 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). Thus, the petitioner has not established that these employees possess or require a bachelor's degree, such that they could be classified as professionals. Furthermore, without the requested position descriptions, the petitioner's identification of two employees as "supervisors" is insufficient to establish that the beneficiary would be engaged in managing supervisory employees. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. In order to be a supervisor, an employee must be shown to possess some significant degree of control or authority over the employment of a subordinate. 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)). Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Finally, it does not appear, based on the minimal evidence submitted, that the petitioner employs any staff who would be engaged in administrative, financial, or marketing tasks associated with operating the petitioner's business. The petitioner states that it operates an auto body repair service. It is reasonable to assume that its 13 "employees" are involved in repairing and painting automobiles under the supervision of the two supervisors. It is unclear who would perform all other non-managerial duties associated with operating the business, if not the beneficiary.

In summary, the petitioner's claim that the beneficiary is employed in a primarily managerial or executive capacity is undermined by its failure to provide a clear and credible description of the beneficiary's actual duties, the amount of time she will devote to specific duties, and its failure to document its claimed staffing levels or to provide any description of the duties performed by the beneficiary's subordinates. Notwithstanding the beneficiary's job title and placement on the petitioner's organizational chart, the lack of persuasive evidence in the record makes it impossible to conclude that the beneficiary will perform primarily managerial or executive duties for the U.S. entity. The beneficiary's "control," management, or direction over a company or a function cannot be assumed or considered "inherent" to her position merely on the basis of broadly-cast job responsibilities.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity or that the petitioner could support the beneficiary in such a capacity within one year. For this additional reason, the petition will be denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with

respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.