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U.S. Citizenship and Immigration Services

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[redacted]

File: EAC 07 156 53301 Office: VERMONT SERVICE CENTER Date: FEB 17 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation, states that it intends to operate a photography studio and sell photography equipment. The petitioner claims to be a subsidiary of [redacted], located in Malaysia. The petitioner seeks to employ the beneficiary as the manager of its new office in the United States.

The director denied the petition concluding that the petitioner did not establish: (1) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for at least one year within the last three years; (2) that the U.S. entity, within one year of approval of the petitioner, would support a managerial or executive position; or (3) that the U.S. entity and the beneficiary's foreign employer have a qualifying relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the petitioner submitted sufficient evidence to establish that the beneficiary has been and will be employed in a primarily managerial 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.

(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 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 involves executive or managerial authority over the new operation; and

(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 this matter is whether the petitioner established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for one continuous year in the three-year period preceding the filing of the petition.

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

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as

promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant petition on May 7, 2007. The petitioner indicated on the L Classification Supplement to Form I-129 that the beneficiary has been employed as manager of the foreign parent company since October 2004, and noted that his duties "included purchasing, negotiating and review of photography products and to supervise a staff of 3." The petitioner indicated that the beneficiary is also the "supervising photographer" in the foreign entity's studio.

In a letter dated April 1, 2007, the foreign entity stated that it employees 12 people and is engaged in the operation of a photography studio, as well as import and export of computers and consumer photography equipment. The petitioner further described the beneficiary's duties as follows:

> [The beneficiary] has been working with our company in Malaysia since 2004 as a general manager/photographer. Among his duties is to review, supervise, purchase and negotiate photography products for the company and is the supervising Photographer of our photo studio. His technique in photography is one of the major contributions of the success of the studio. He has the authority to hire or fire and recommend personnel actions and the authority to exercise the day to day discretion over the operations of the photo studio. He reports to the president of the company.

The petitioner submitted a copy of the foreign entity's payroll as of March 30, 2007, indicating a total staff of five employees, including the beneficiary. The petitioner also submitted the beneficiary's "payment vouchers" from the foreign entity for the months of December 2006 and January 2007.

Finally, the petitioner submitted a letter dated April 20, 2007, bearing a stamp from the foreign entity, which states that the beneficiary is the director of the company, holding the position of "Head [of] the Digital Photo Division as the chief photography advisor." The foreign entity indicated that the beneficiary has been a director since the company was formed in 2004 and has helped it to progress "in term of technical know-how and photography skill."

On May 21, 2007, the director issued a request for evidence (RFE). The director requested, *inter alia*, additional evidence to establish that the beneficiary was employed by the foreign entity for one continuous year within the three years preceding the date of filing. Specifically, the director requested: the beneficiary's last annual tax return and tax withholding statement reflecting the foreign employer; copies of payroll documents reflecting the beneficiary's period of employment and salary; or "other unequivocal evidence" establishing the beneficiary's employment by the foreign entity for the requisite time period. The director also requested additional evidence regarding the beneficiary's employment capacity and the management structure of the foreign entity, including: (1) the number of subordinate supervisors managed by the beneficiary; (2) the job titles and duties of all employees he managed; (3) the executive and technical skills required to perform the overseas duties; (4) the amount of time the beneficiary allocated to executive or managerial functions; and (5) the beneficiary's degree of discretionary authority over the foreign entity's operations. Finally, the director requested an organizational chart for the foreign entity and position descriptions for all of the foreign entity's employees.

In a letter dated August 3, 2007, the petitioner further described the beneficiary's duties as follows:

> He supervised our sales persons on representation, promotion of products/packages and floor clerk on review of inventory, appointments and follow-up engagements. He confers with account representative on inventory, sales and equipment. He also negotiates and review[s] photography products and managed the day to day discretion over the operation of the photography studio for the company.
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> * * *
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> The employees of the foreign entity's [sic] are [redacted]
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> Managing Director – manage the staff and daily operations of the Malaysia and US office
> Account Representative – account payable and receivable; inventory.
> Sales person – sales; meet, greet and confer with clients
> Floor Clerk – handle phone calls, stock inventory, make appointments etc.

The petitioner re-submitted the foreign entity's payroll roster as of March 30, 2007, which includes the beneficiary, the secretary, a sales person, and two individuals who were not included in the employee list and whose job titles and duties have not been identified. The managing director, the floor clerk, the account representative, and one of the sales persons do not appear on the payroll roster.

The petitioner also submitted a copy of the foreign entity's "Form 49, Return Giving Particulars in Register of Directors, Managers and Secretaries and Changes of Particulars." The document, which is dated October 28, 2004, identifies the beneficiary as one of two directors of the foreign entity.

The director denied the petition on August 24, 2007, concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for one continuous year within the three years preceding the filing of the petition. The director noted that the petitioner has failed to submit a copy of the beneficiary's latest annual tax return and withholding statement or other evidence that would establish that the beneficiary was employed by the foreign entity for the requisite period of time. The director also found that the petitioner did not adequately respond to the director's request for additional information regarding the management structure of the foreign entity.

On appeal, counsel for the petitioner asserts the following:

> [T]he beneficiary was the Manager for [the foreign entity] since 2004 as indicated on their August 3, 2007 letter. It also stated that the beneficiary ... is under the Managing Director and that he supervised the sales person, account representative and the secretary. There were no subordinate supervisors; managerial skills and authority in day to day operations include management of staff, reviews and negotiate inventory and contracts, sales and accounts. Make decisions to hire, fire staff, office policy. [The foreign entity] consider [sic] that all matter [sic] perform [sic] and decided by [the beneficiary] are managerial duties since it [sic] involve [sic] and affect [sic] the company.
>
> [The beneficiary] is a Manager and shareholder of the foreign company. His shareholding certificate and payroll voucher were previously submitted. A copy of [the beneficiary's] social security statement issued from the Malaysian government indicating [the foreign entity] is the employer is attached to further support employment.

The attached document is written in the Malaysian language and is not accompanied by a certified English translation. Because the petitioner failed to submit a certified translation of the document, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The petitioner also submits a letter from the foreign entity dated October 20, 2007, which is identical in content when compared to the above-referenced letter dated April 21, 2007.

Upon review, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for one continuous year within the requisite three-year period. In this case, the beneficiary was last admitted to the United States in B-2 status in August 2006, and therefore the petitioner must establish that the beneficiary was employed by the foreign entity in a qualifying capacity for one continuous year in the three years prior to that date. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A), periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the

one year of continuous employment abroad, but such periods shall not be counted toward fulfillment of that requirement.

The petitioner was specifically requested to submit documentary evidence to establish the beneficiary's one year of continuous employment. The documentation submitted in response consisted of a payroll register from the month of March 2007, payment vouchers for December 2006 and January 2007, and the above-referenced "Form 45" identifying the beneficiary as a director of the foreign entity since 2004. The AAO concurs with the director that this documentation was inadequate, did not address the director's specific request, and did not represent "unequivocal evidence" needed to establish that the beneficiary was employed by the foreign entity for the requisite amount of time. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The fact that the beneficiary was named a director of the foreign entity when it was formed in October 2004 does not automatically lead to a conclusion that he was employed by the foreign entity on a continuous, full-time basis since that time, as it is not clear from the evidence of record when the foreign entity commenced business operations. The petitioner has not submitted any documentation of business activities for the foreign entity dated prior to July 2006.

The AAO also concurs with the director's determination that the petitioner failed to establish that the foreign entity employed the beneficiary 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 has failed to provide a description of the beneficiary's duties sufficient to establish that he was employed by the foreign entity in a primarily managerial or executive capacity. Preliminarily, the AAO notes that the petitioner and foreign entity have assigned the beneficiary a total of seven different job titles, including "director," "manager," "general manager/photographer," "head of the digital photo division," "supervising photographer," and "chief photography advisor." While it is the beneficiary's actual duties and not his job title that determine whether his employment was in a qualifying capacity, the petitioner's failure to specifically and consistently identify the beneficiary's job title makes it difficult to determine exactly where his position fits within the foreign entity's overall organizational structure. 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).

Furthermore, the petitioner's descriptions of the beneficiary's responsibilities with the foreign entity include a number of duties that do not fall under the statutory definition of managerial or executive capacity. For example, the petitioner indicated that the beneficiary's duties included "purchasing, negotiating and review of photography products." As none of the foreign entity's lower-level employees are described as being engaged in any product research or purchasing duties, it is reasonable to conclude that the beneficiary himself performs these non-managerial duties. The petitioner also indicates that the beneficiary "exercised day to day discretion

over the operations of the photo studio." The foreign entity emphasized the beneficiary's "technical know-how" and "photography skill," and evidence submitted on appeal indicates that the beneficiary "specialized in wedding photography" while employed by the foreign entity.[1] Although the petitioner has assigned the beneficiary job titles such as "manager/photographer," "chief photography advisor," and "head of digital photo division," the foreign entity has not claimed to employ a photographer. The foreign entity's promotion materials indicate that the company offers wedding photography services, as well as a digital photography department.

If the beneficiary is in fact the foreign entity's only photographer, then it is evident that he primarily performs the operational tasks necessary to provide the foreign entity's products and services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The fact that the foreign entity assigned the beneficiary several managerial job titles is irrelevant absent evidence that his duties were primarily managerial in nature as defined at section 101(a)(44)(A) of the Act. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

At the time of filing, the petitioner stated that it has 12 employees, and that the beneficiary supervised a staff of three, with the authority to hire and fire staff under his supervision. In response to the RFE, the petitioner indicated that the foreign entity has six employees in addition to the beneficiary, and that the beneficiary supervised two sales representatives and one floor clerk. On appeal, the petitioner asserts that the beneficiary supervised a sales person, an account representative and a secretary, and that "there were no subordinate supervisors." The petitioner's payroll records for the month ended March 30, 2007 showed a total of only five employees, including the beneficiary, and the job titles and duties of two of the employees were not identified. The petitioner has not attempted to explain any of these discrepancies with respect to the staffing of the foreign organization or the beneficiary's supervisory role within it. 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).

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[1] See letter from the beneficiary dated January 27, 2007, which the petitioner claims was submitted in support of the beneficiary's request for an extension of his B-2 nonimmigrant status.

However, regardless of which employees the beneficiary may have supervised, the petitioner has confirmed that he did not manage any subordinate supervisors. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not indicated that any of the beneficiary's subordinates possessed or required a baccalaureate degree in order to perform their job duties. Accordingly, any supervisory tasks performed by the beneficiary did not fall within the regulatory criteria for managerial capacity. [2]

On appeal, rather than clarifying the beneficiary's duties, counsel reiterates the previous job descriptions which were already found to be insufficient and states that the foreign entity considers "all matter[s] perform[ed] and decided by [the beneficiary] are managerial duties." Counsel's assertion that the foreign entity considers the beneficiary to be employed in a managerial capacity is not an acceptable substitute for a detailed description of the beneficiary's actual duties and adequate documentary evidence of the foreign entity's organizational structure, which, in addition to being requested by the director, is specifically required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(C)(3). 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 Obaigbena*, 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).

Overall, based on the limited evidence in the record, it cannot be concluded that the beneficiary has been performing primarily managerial or executive duties for the foreign entity. The fact that the foreign entity operates a photography studio and does not claim to employ any photographers other than the beneficiary is particularly harmful to its claim that the beneficiary is "managing" the studio. The totality of the evidence suggests that the beneficiary has been responsible for providing the services of the foreign entity, rather than primarily performing managerial duties, managing a subordinate staff of professionals, managers or supervisors, or managing an essential function of the foreign entity.

Based on the foregoing discussion, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity on a full-time basis for one continuous year within the requisite three-year time period. Accordingly, the appeal will be dismissed.

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

The second issue in this matter is whether the petitioner established that the petitioner established that the new U.S. company will support a managerial or executive position within one year.

In its letter dated April 1, 2007, the foreign entity indicated that the beneficiary will perform the following duties as manager of the new office in the United States:

> Among his continued duties will be to developed [sic], managed [sic] our marketing, purchasing and sales of the photography equipment and the establishment of our photography studio in the United States.
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> [The beneficiary] is especially qualified for this position, he will be responsible for the day to day management, authority to hire and fire personnel as well as to choose agents for consultations, permits/licenses, accounting, advertising etc. He will exercise discretion of the daily operations, established [sic] goals and policies for our organizations [sic] and exercise with wide latitude of discretionary decision making. He will receive only general supervision form [sic] the board of directors.

As evidence that the new U.S. company has been funded, the petitioner submitted a letter from JP Chase Morgan Bank indicating that the U.S. company had an account balance of $16,088 as of April 16, 2007, and copies of two checks totaling RM18,000 issued to the U.S. entity by the foreign entity in April 2007. The petitioner also submitted a bank letter pertaining to the beneficiary's personal checking account, and a wire transfer receipt for funds in the amount of RM20,000, transferred to the account by [redacted] [surname illegible] on January 23, 2007. According to the wire transfer receipt, this amount is equivalent to approximately $5,650. The petitioner also provided copies of bank statements for the foreign entity for the months of July through September 2006.

The director found this initial evidence insufficient to establish that the petitioner would support a managerial or executive position within one year. Accordingly, in the RFE issued on May 21, 2007, the director requested the following additional evidence: (1) a copy of the petitioner's business plan giving specific dates for each proposed action for the next two years; (2) copies of bank wire transfers or other evidence to document the transfer of funds from the foreign entity; (3) documentary evidence to show that the foreign entity has been in contact with the U.S. entity's incorporate and has funded the incorporation of the U.S. entity; (4) evidence to show how the new company will grow to be of sufficient size to support a managerial or executive position; and (5) a description of the proposed staff of the new office, including the number of employees, their job titles, duties and their proposed wages/salaries.

In a reply dated August 3, 2007, the petitioner submitted a letter from the foreign entity, which indicated that it has purchased over $100,000 worth of inventory for the U.S. entity. The foreign entity also indicated that the U.S. company has hired three employees, including the beneficiary, and further described its structure as follows:

> is the photographer and assistant Manger [sic]. is the floor clerk responsible for appointments, mail, care for inventory and other miscellaneous. [redacted]s salary is $400.00 and [redacted] is $250.00 per week.

> [The beneficiary] is the Manager of [the petitioning company] in the US. He is responsible in establishing the business contacts & accounts, purchasing equipment, advertising, permits/licenses, establish goals and policies for our organizations and training and supervising of [redacted] and [redacted]
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> * * *
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> The executive and technical skills require [sic] are the decisions to hire staff, establish accounts, purchase equipment, inventory, and negotiate sales etc. All of the time spent by [the beneficiary] is allotted to executive duties since it is his sole decision in the US on hiring, establishing, negotiating contacts and contracts for the new company. He does confer with [the managing director] on major purchasing.

The petitioner provided copies of Forms W-4 and Forms I-9 for the two employees named above.

In lieu of the requested business plan, the petitioner submitted a projected profit and loss statement for a six-year period. The statement identifies total start-up costs of $67,650, including "set-up cost," pre-opening expenses, initial inventory and rental deposits. The only proposed employees mentioned in the plan are a manager, an assistant manager, and a supervisor.

With respect to the foreign entity's investment in the new office, the petitioner submitted wire transfer receipts for transfers in the amount of $1,710 and $2,857. The petitioner provided various invoices and Customs Form 7501 relating to purchases of equipment and supplies, and copies of e-mail correspondence between the beneficiary and a "[redacted]" regarding start-up activities for the U.S. company. There are also invoices indicating that the foreign entity purchased approximately $5,500 in equipments or supplies from a Chinese company and had the items shipped to the U.S. entity in April and May 2007. None of the other documents submitted clearly link the foreign and U.S. companies.

The director denied the petition concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity within one year, or that the U.S. company would support a managerial or executive position. The director found insufficient evidence to establish the size of the U.S. investment or the financial ability of the foreign organization to commence doing business in the U.S.

On appeal, counsel for the petitioner states that the foreign entity has paid for equipment totaling over $100,000 from China and wire transfers indicated that the foreign entity has invested in the U.S. entity. The petitioner resubmits the two wire transfers dated June 2007, showing the transfer of funds from the foreign entity to the United States entity.

Upon review, the petitioner's assertions and additional evidence are not persuasive in establishing that the United States operation will support a managerial position within one year.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not

normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

For several reasons, the petitioner in this matter has failed to establish that the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner has failed to sufficiently describe both the beneficiary's and his subordinates' proposed duties after the petitioner's first year in operation; has failed to establish that a sufficient investment has been made in the United States operation; and has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

First, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after one year in operation. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which largely paraphrases the statutory definitions of managerial and executive capacity is not sufficient. For example, the petitioner indicated that the beneficiary will exercise discretion over the daily operations, establish goals and policies, hire and fire personnel, exercise wide latitude in discretionary decision-making, and receive only general supervision from the board of directors. 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.).

The petitioner also indicated that the beneficiary would establish business contacts and accounts, purchase equipment and inventory, manage marketing and advertising, manage purchase and sale of equipment, and establish a photography studio, but did not indicate whether he would directly perform these operational tasks, or whether he would delegate non-managerial tasks such as purchasing, sales and marketing to subordinate personnel. 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)). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must 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). While it appears that the beneficiary would exercise the requisite authority over the U.S. company as the senior member of its three-person staff, the brief position descriptions provided fall significantly short of establishing that the beneficiary's primary duties would be managerial or executive in nature.

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The petitioner failed to describe its staffing plan, although the director specifically requested a detailed description of the proposed staff. The petitioner indicated that it has hired a photographer and assistant manager, whose duties have not been described, and a floor clerk, who is stated to be responsible for appointments, mail and miscellaneous tasks. There is no indication in the record that the petitioner intends to hire any additional staff during the first year of operations. As the petitioner fails to explain what tasks the beneficiary and his subordinate staff will perform after the petitioner's first year in operation or to explain how much time the beneficiary will devote to performing non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager or executive. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a

managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has not established that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. The petitioner failed to specifically describe the duties of the proposed subordinate employees. 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). Absent job descriptions for the subordinates, it cannot be concluded that the beneficiary will supervise and control other supervisory, managerial, or professional employees. The fact that the petitioner has designated one of its employees as "assistant manager" is not sufficient to establish that he would in fact be employed in a supervisory or managerial position. Since the same employee is also claimed to be the only photographer in the petitioner's photography studio, it is reasonable to assume that his primary duties would be providing the petitioner's services, rather than managing or supervising subordinate personnel. In order to be a supervisor, the 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)).

Finally, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services,* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F 2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. Systronics Corp. v. INS, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner intends to operate a photography studio, provide digital printing services, and sell photography equipment. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of a manager who performs the claimed "exclusively executive" duties, a photographer and a floor clerk. Rather, given that the petitioning entity intends to employ a staff of only three people, it is reasonable to conclude that all employees will be primarily engaged in the day-to-day operational and administrative tasks inherent to operating this type of business. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial or executive capacity after the petitioner's first year in operation.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to establish that a sufficient investment was made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*). In this matter, the record indicates that the petitioner had a bank account balance of $16,088 at the time the instant petition was filed. The petitioner has repeatedly claimed that it has received approximately $100,000 in equipment as an investment from the foreign entity, but this investment has not been adequately documented in the record, and the total amount invested in cash and equipment appears to be significantly less than the purported amount. Furthermore, some of the documentation submitted to establish the investment is dated subsequent to the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the AAO concurs with the director that the record is lacking in evidence of the size of the U.S. investment. Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year for this additional reason.

Third, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(*1*). The petitioner's "business plan" provides a "projected profit and loss" for a six-year period, but does not specifically describe the petitioner's proposed products, services, customers, or competitors. The director specifically requested a two-year plan providing specific dates for each proposed action. The record does not contain any independent analysis, contracts, or purchase orders. Absent a detailed, credible description of the petitioner's proposed United States business operation addressing the petitioner's proposed product/services, marketing plan, customers, staffing, and income/expense projections, it is impossible to determine whether the proposed enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year for this additional reason.

Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above reasons.

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

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

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

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

* * *

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

The evidence of record shows that the foreign entity owns 197 out of 200 shares issued by the U.S. company, and therefore the petitioner has demonstrated a parent-subsidiary relationship. The director's denial of the petition was based on the petitioner's failure to show that the foreign entity is doing business. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H), "Doing Business" means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

At the time of filing, the petitioner submitted a copy of the foreign entity's lease agreement, some promotional materials, bank statements for the months of July through September 2006, several invoices from the same time period, and a March 2007 payroll summary.

In the request for evidence issued on May 21, 2007, the director requested additional evidence to establish that the foreign entity is doing business. Specifically, the director requested documentary evidence of the foreign entity's business activities, including copies of client contracts, purchase contracts, purchase orders, invoices, Bills of Lading, and copies of U.S. customs documentation.

In response, the petitioner submitted a number of invoices for products sold by the foreign entity between May 2007 and July 2007.

The director denied the petition, concluding that the petitioner failed to establish that the foreign entity is a qualifying organization doing business abroad. The director acknowledged the invoices submitted, but found the evidence insufficient to meet the petitioner's burden of proof.

On appeal, the petitioner asserts that the foreign entity "is a photostudio plus sales in electronic equipment not limited to camera, video, photo albums, phone, computer accessories and other electronic accessories." On appeal, the petitioner submits: (1) an original, color photograph depicting the foreign entities' storefront; (2) the foreign entity's bank statements for the months of August and September 2007; and (3) color photocopies of checks paid to the foreign entity during the months of July through October 2007.

Upon review, the director's decision with respect to this issue only will be withdrawn. The petitioner has submitted sufficient evidence to establish that the foreign entity was doing business at the time the petition was filed, and that it continues to do business. Therefore, the foreign entity is a qualifying organization, and the petitioner has established the requisite qualifying relationship between the U.S. and foreign entities.

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 at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.