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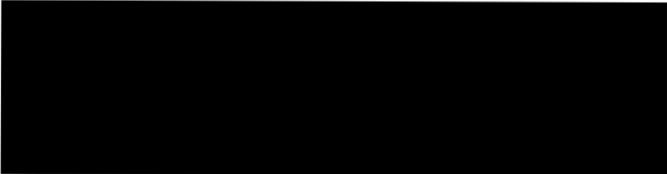
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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File: EAC 08 189 51875 Office: VERMONT SERVICE CENTER Date: JUN 04 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[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, 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 limited liability company, states that it intends to engage in development of marketing strategies for food and beverage companies. The petitioner claims to be a subsidiary of Marketing Food & Drink 2006, C.A., located in Venezuela. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a period of one year.

The director denied the petition on two independent grounds, concluding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; and (2) that it would employ the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish the claimed parent-subsidiary relationship between the foreign and United States companies. Counsel asserts that the beneficiary has been offered employment in a managerial capacity and contends that all regulatory requirements for a new office petition set forth at 8 C.F.R. § 214.2(l)(3)(v)(C) have been met. 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 to be addressed is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. 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.

- (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 indicates that it is a wholly-owned subsidiary of Marketing Food & Drink 2006, C.A., located in Caracas, Venezuela. At the time of filing, the petitioner submitted a copy of its articles of organization filed with the New York Department of State on April 2, 2008, and a copy of its operating agreement, which was dated June 30, 2008. The AAO notes that the petition was filed on June 26, 2008. According to the operating agreement at page 3, article 6, the capital contribution of Marketing Food & Drink 2006, C.A. is to be in the amount of "\$00.00.00," and "the Members shall not be required to make any additional capital contributions." The operating agreement identifies Marketing Food & Drink 2006, C.A. as the owner of 100% interest in the company. The agreement at page 9, article 11, identifies the beneficiary as the managing member of the company. The petitioner also submitted a second version of its articles of organization which appears to have been created subsequent to the articles filed on April 2, 2008. The petitioner did not submit evidence that the latter document was filed with the New York Department of State.

The petitioner's initial supporting evidence also included a copy of its Form SS-4, Application for Employer Identification Number. According to the Form SS-4, the petitioning company has three (3) members. Where asked to indicate the "Name of principal officer, general partner, grantor, owner or trustor," the petitioner

indicated "Janine Goldentaier." The beneficiary is identified as "Executor, administrator, trustee, "care of" name."

The director issued a request for additional evidence (RFE) on July 7, 2008, in which he requested, *inter alia*, additional evidence to establish the existence of a qualifying relationship between the petitioner and the foreign entity. Specifically, the director requested: (1) copies of all issued and outstanding stock or share certificates for both companies; (2) copies of stock ledgers for the United States and foreign entities; and (3) copies of the canceled checks, letters of credit, monetary transfers, etc. that were used by the foreign entity to fund the incorporation of the U.S. entity.

In response, the petitioner submitted: a copy of its membership certificate number one issuing 100 membership units to Marketing Food & Drink 2006, C.A. on April 30, 2008; a copy of its certificate registry indicating that only one membership certificate has been issued; and the Minutes of the First Meeting of the Sole Member of [the petitioner], dated May 5, 2008. In a letter dated July 21, 2008, counsel for the petitioner stated that the membership certificate demonstrates that the foreign entity is the sole member and controlling parent company of the U.S. petitioner.

The Minutes of the First Meeting of the Sole Member indicate that Marketing Food & Drink 2006, C.A. was present at the meeting as managing member and that, during the meeting, "Marketing Food & Drink, L.L.C." (the petitioning company) was elected Managing Member.

In response to the director's request that the petitioner submit evidence to establish that the foreign entity funded the incorporation of the U.S. entity, counsel stated that the petitioner was submitting "copies of the checks and statements from U.S. Companies to provide services for [the petitioner] used to fund the incorporation of the U.S. entity." The petitioner submitted invoices issued by a sign company, a plumber, an electrician, a restaurant equipment supplier, and a fire prevention/safety equipment company dated in May, June, and July 2008. The petitioner did not provide copies of canceled checks used to pay for these services.

Finally, the record shows that a contract for the purchase and installation of a fire protection system made between the petitioner and Interstate Fire and Safety Equipment Co. was signed by [REDACTED], who indicated her title as "partner."

The director denied the petition on August 8, 2008, concluding that the petitioner did not establish the existence of a qualifying relationship. In denying the petition, the director observed that the petitioner did not provide U.S. dollar equivalents for any financial figures listed in Brazilian currency and concluded that the petitioner "submitted no documentation to show the ownership and control of the foreign entity that was translated into English." The director further stated that "it is not clear who owns and controls the affiliates."

On appeal, counsel for the petitioner asserts that the petitioner is a wholly-owned subsidiary of the foreign entity, and states: "Evidence of this qualifying relationship submitted to the USCIS includes [the petitioner's] Membership Certificates Number 1 dated April 31, 2008 and its Operating Agreement dated April 30, 2008." Counsel further states that the petitioner was established by the foreign entity "with an initial investment of \$50,000."

Upon review, and for the reasons stated herein, the petitioner has not established that it has the claimed qualifying relationship with the foreign entity. However, the AAO notes that the director improperly characterized the nature of the petitioner's relationship with the foreign entity as that of "affiliates." The evidence submitted is sufficient to establish that the beneficiary is the majority shareholder of the foreign entity and the AAO finds that the petitioner provided proper translations and currency conversions for the majority of the Venezuelan documents submitted that are relevant to this issue. The director's conclusions with respect to the petitioner's failure to establish an affiliate relationship will be withdrawn. 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 critical issue to be addressed is whether the petitioner submitted sufficient evidence to establish that the foreign entity owns and controls the U.S. company.

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 or membership certificates alone are not sufficient evidence to determine whether a stockholder or member maintains ownership and control of a corporate entity. The corporate stock or membership certificate ledger, stock certificate registry, corporate bylaws, operating agreement and the minutes of relevant annual shareholder or member meetings must also be examined to determine the total number of shares or membership units issued, the exact number issued to the shareholders or members, 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 regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock or membership certificates into the means by which stock ownership or membership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership or membership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Here, there are inconsistencies in the record regarding the ownership of the petitioning company and insufficient evidence to corroborate the petitioner's claim that Food & Marketing 2006, C.A. is the company's sole owner. The most notable inconsistency is the petitioner's Form SS-4, which indicates that the petitioner is owned by three members, and which lists [REDACTED] as holding the title of principal officer, general partner or owner. 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). Although the petitioner claims that [REDACTED] is only a contract employee of the company, the record shows that she has been issued a company credit card and is authorized to conduct banking transactions for the petitioner. In addition, the record shows that [REDACTED] wrote a check in the amount of \$14,705 to the petitioner from her personal bank account. She also signed a contract for the installation of a fire prevention system at the petitioner's premises and indicated her title as "partner."

The petitioner relies on a copy of its membership certificate #1 issuing 100 membership units to the Venezuelan entity, and a membership certificate ledger. However, there are no documents which identify the total number of membership units the petitioner is authorized to issue or limiting this amount to 100 units. The petitioner's operating agreement, submitted at the time of filing, presents confusing information as it identifies both the foreign entity and the beneficiary as holding the office of "managing member." The operating agreement is also dated June 30, 2008, although it was submitted to USCIS prior to that date. On appeal, counsel refers to the operating agreement dated April 30, 2008, but this document has not been submitted. As noted above, the Minutes of the First Meeting of the Sole Member indicate that the petitioning company itself was elected as "managing member" of the company.

There are also discrepancies in the record with respect to the amount of money contributed by the foreign entity in exchange for its claimed ownership interest in the U.S. company. The Operating Agreement submitted indicates that there would be a capital contribution of "\$00.00.00" made by the foreign entity. On appeal, counsel states that the foreign entity made an initial investment of \$50,000 in creating the U.S. company, but there is no evidence of any transfer of funds from the foreign entity to the U.S. company. The only funds documented were those provided by Ms. Goldentaier, and the petitioner's bank balance at the time of filing amounted to less than \$16,000. 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)).

Given all of these unresolved inconsistencies, the AAO finds the evidence submitted to be insufficient to corroborate the petitioner's claim that it is wholly owned by the foreign entity. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Based on the foregoing discussion, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. For this reason, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval 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 indicated on Form I-129 that the beneficiary will serve as general manager of the U.S. company, and stated that the company currently has three employees. On the L Classification Supplement to Form I-129, the petitioner stated that the beneficiary's duties as general manager will be:

Developing, controlling and monitoring budget, overseeing hiring activities, managing commercial matters, managing customer intake, performing quality control, directing marketing operations, managing client accounts, developing client relations

In a letter dated June 4, 2008, the petitioner stated that the U.S. company will "specialize in the organization of gastronomic events and services, catering and preparation of foods by professionals," and "offer high quality gastronomic services to the New York City metropolitan area." The petitioner further described the beneficiary's proposed position as follows:

The position requires that [the beneficiary] determine staffing requirements for our New York office, interview, hire and train new employees in the United States in accordance with the strategy set by our Venezuelan offices.

In addition, [the beneficiary] will manage [the petitioner's] current and future employees, including our chefs, advertising professionals and journalists, economists, public relations staff as well as our accountants and attorney.

She will prepare work schedules and assign employees their specific duties on a daily basis. [The beneficiary] will direct the hiring, training and performance evaluations of all employees and oversee their daily activities with the sole discretion to terminate their employment with [the petitioner]. She will monitor employee performance and activities related to our subsidiary's offered services.

. . . . [The beneficiary will ensure that our methods of management and services are implemented by our New York subsidiary and that our employees are adequately trained to follow its innovative system of management and of client development. [The beneficiary] will also ensure that the chefs that our New York company retains in the United States are adequately trained to meet our culinary standards.

[The beneficiary] will also be responsible for directing and coordinating our company's financial and budget activities to fund operations, and ultimately increase our company's efficiency. She will determine goods and services to be sold, set prices and credit terms based on forecasts of customer demand.

[The beneficiary] will review the company's financial statements, sales and activity reports and other performance data prepared by our accountants to measure productivity and to determine areas needing cost reduction and program improvement, if any.

In the United States [the petitioner] is conducting initial operations with 3 employees. Over the next three years we expect the staff to increase, and the business to grow considerably.

The petitioner submitted a copy of a sublease agreement between the petitioner and Chef Delivery, LLC, and a copy of the master lease agreement between [REDACTED] and [REDACTED] Chef Delivery LLC and Mt. Pleasant Properties, LLC. According to the master lease, the property is to be used for "Catering and Culinary training for outgoing corporate use."

The petitioner also submitted evidence that the U.S. company had a bank account balance of \$15,705 as of June 18, 2008. The petitioner did not specifically identify the size of the investment in the U.S. company, nor did it identify the scope of the U.S. business, its proposed organizational structure, or its financial goals.

The AAO notes that counsel's letter accompanying the petition filing referred to a business plan; however, after careful review, the AAO cannot locate a business plan in the record of proceeding. The petitioner did submit an electronic file which contains a marketing presentation outlining the company's business activities and clients in Venezuela. The petitioner indicated on its Form SS-4 that the U.S. company will engage in catering services.

In the RFE issued on July 7, 2008, the director advised the petitioner that it did not submit sufficient evidence to establish that the beneficiary, within one year, will be relieved from performing the non-managerial, day-to-day operations involved in producing the petitioner's products or providing a service. Accordingly, the director instructed the petitioner to submit: (1) an organizational chart for the U.S. entity, clearly identifying the beneficiary's position and those of her proposed subordinates; and (2) complete position descriptions for the beneficiary's proposed subordinates, including a breakdown of the number of hours devoted to each of the subordinates' job duties on a weekly basis.

In response, the petitioner submitted a proposed organizational chart which identifies the beneficiary as holding the positions of general manager and marketing manager of the U.S. company. The chart shows that the beneficiary supervises an administration manager, [REDACTED] a marketing and sales supervisor and a production manager ([REDACTED]). The chart indicates vacancies for legal professionals, a human resources manager, a cleaning assistant, a maintenance assistant, a marketing assistant, a production supervisor, and three production assistants.

In a separate statement from the beneficiary, she indicated that she will not be performing any "day to day non managerial operations," and explained the company's intended staffing as follows:

[The petitioner] has already contracted one employee, [REDACTED], and plans to employ several more professionals and chefs in the near future, and certainly within one year of operation.

As soon as my visa is issued, I will personally determine the company's staffing needs and recruit marketing professionals, legal advisors and communications executives. I will also contract with several chefs and culinary arts professionals who will be in charge of performing the day to day food testing and preparation of receipts on behalf of our clients.

Marketing professionals will prepare marketing strategies and reports and provide their professional opinions to our clients based on the testing of the product conducted by our chefs and culinary arts employees.

Legal professionals will ensure that the company remains in compliance with United States regulations, and our advertising professionals will ensure that our share of the U.S. market continues to grow.

The director denied the petition on August 8, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director found that the petitioner submitted insufficient evidence regarding the beneficiary's day-to-day duties, and failed to establish that she will have a subordinate staff sufficient to relieve her from performing routine administrative duties.

On appeal, counsel asserts that the petitioner submitted sufficient evidence to establish that the U.S. company will be able to sustain the beneficiary's proposed managerial position within one year. Counsel reiterates the job duties from the petitioner's letter dated June 4, 2008 and asserts that such duties are clearly managerial in nature. Counsel asserts that the petitioner indicated that it will have three employees for the first year of business and did in fact identify the proposed beneficiary's proposed subordinates, along with evidence that one of them has already been issued a company credit card. Counsel emphasizes that the petitioner is not able to submit evidence of employment such as payroll records at this time because it is a new office.

Finally counsel asserts that the beneficiary's subordinates will include professionals, including advertising professionals and journalists, economists, public relations staff as well as staff accountants and attorneys.

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

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.

Id.

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 her proposed 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. *See* 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 general description of the beneficiary's proposed duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after one year in operation. The petitioner stated on Form I-129 that the beneficiary will be "managing commercial matters, managing customer intake, performing quality control, directing marketing operations, managing client accounts, and developing client relations." Many of these responsibilities, without further explanation regarding the specific tasks to be performed, suggest that the beneficiary may be directly involved in marketing and client services operations. The AAO will not speculate as to what qualifying duties may be involved in "managing commercial matters," "performing quality control," or "developing client relations." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). If the beneficiary will be personally involved in selling or providing the petitioner's marketing services to clients, such duties will not be in a managerial or executive capacity. 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).

While the petitioner provided a lengthier description of the beneficiary's duties in its letter dated June 4, 2008, the duties discussed therein primarily involved the hiring, scheduling, assignment, training, evaluation and

oversight of employees, and duties related to finance and budget activities. The authority to hire and oversee employees and manage the company's overall budget activities would be considered qualifying managerial duties. However, the AAO notes that the petitioner did not further elaborate upon the duties briefly discussed elsewhere in the record, such as those related to commercial operations, client relations, client accounts, marketing, customer intake and quality control, nor is there sufficient evidence in the record to establish that the beneficiary would be relieved of performing these operational tasks within one year. As discussed further below, the petitioner has not submitted a business plan or hiring plan in support of its general statements regarding the number and types of employees to be hiring during the first year of operations.

The definitions of executive and managerial capacity each 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 show 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, based on the current record, the AAO is unable to determine whether the claimed managerial duties would constitute the majority of the beneficiary's duties within one year, or whether the beneficiary would primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties would be 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).

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 her duties and to the operation of the business in general. First, there is some confusion in the record as to the type of business the petitioner will operate. The petitioner indicates that it will develop marketing strategies for food and beverage companies, and that like its parent company, it will "specialize in organization of gastronomic events and services." The petitioner indicated on its Form SS-4 that it will operate a catering business. The master lease agreement for the petitioner's premises states that it will be used for "catering and culinary training," and the petitioner submitted evidence that it is in the process of converting the space into a commercial kitchen. It does not appear that the premises include any office or office space. The staffing requirements of a catering/culinary training business and a marketing consulting business would reasonably be quite different.

At the time of filing, the petitioner stated that it will conduct "initial operations" with three employees and would increase the staff "over the next three years." The petitioner further stated that its employees will include chefs, advertising professionals, journalists, economists, public relations staff, accountants and attorneys, but did not identify which positions would be hired within the first year of operations. In response to the RFE, the petitioner predicted that it would hire marketing professionals, advertising professionals, legal advisors, communications executives, chefs and culinary arts professionals. The petitioner stated that it had contracted one employee and plans to employ "several more professionals and chefs" within one year of operation.

At the same time, the petitioner submitted an organizational chart which listed open positions for a human resources manager, cleaning assistant, maintenance assistant, several production assistants and a marketing assistant, with no chefs or culinary positions, or positions for communications professionals, advertising

professionals, economists, journalists or accountants. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Although the petitioner indicated that only one employee had been contracted, it identified three employees on the chart, including an administration manager, a production manager and a marketing and sales supervisor. The petitioner provided no explanation as to the status of these employees, but confirms that they are not on the petitioner's payroll. The AAO notes that two of the employees appear to be the owners or managers of the company from which the petitioner is subleasing its premises, Chef Delivery LLC, while the other employee is listed as the administration manager on the foreign entity's organizational chart.

Furthermore, although requested by the director, the petitioner did not provide detailed position descriptions for the proposed subordinate positions identified on the organizational chart. 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). Absent job descriptions for the subordinates, it cannot be concluded that the beneficiary will supervise and control other supervisory, managerial, or professional employees. See section 101(a)(44)(A)(ii) of the Act. The fact that the petitioner has designated six proposed positions as managers or supervisors is not sufficient to establish that she would in fact be employed in a supervisory or managerial position. 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)).

The petitioner's inconsistent statements regarding the type of business to be operated and number of employees to be hired during the first year of operations cannot be resolved, as the petitioner has not submitted a business or hiring plan outlining the company's intended staffing for its first year which would document the positions to be filled and the petitioner's financial ability to hire subordinates during the first year of operations. 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. at 165.

Overall, as the petitioner fails to clearly explain what tasks the beneficiary and her subordinate staff would 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 she will be "primarily" employed as a manager or executive within one year.

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 less than \$16,000 at the time the instant petition was filed. Counsel claims on appeal that the foreign entity has made a \$50,000 investment in the U.S. company, but there is no evidence that such funds have been transferred to the U.S. entity. 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). The petitioner's remodeling costs alone, as evidenced by contracts and proposals in the record, will easily exceed \$16,000 and may even exceed the \$50,000 figure quoted by counsel. Moreover, the petitioner has not submitted a business plan outlining its intended start-up costs or the capital expenditure required during the first year of operations. Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year, and the petition must be denied 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)(I). The petitioner has not submitted a business plan, and it is not clear from the record whether the petitioner intends to operate a traditional catering business, as indicated on its Form SS-4, or whether it will follow the foreign entity's more complex business model. 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. Again, 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. at 165. 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 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.