

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COP



U.S. Citizenship
and Immigration
Services

D7

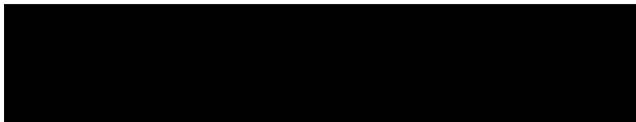


File: EAC 08 004 53432 Office: VERMONT SERVICE CENTER Date: JUN 12 2009

IN RE: Petitioner:
 Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

A handwritten signature in black ink.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the nonimmigrant petition and 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 Jersey corporation established in June 2007, states that it intends to operate multiple gas stations. It claims to be a subsidiary of F.N. Exports (Pvt) Ltd., located in Pakistan. The petitioner seeks to employ the beneficiary as general manager of its new office in the United States for a period of three years.¹

The director denied the petition on three separate and independent grounds. Specifically, the director determined that the petitioner had failed to establish: (1) that the U.S. company and the foreign employer have a qualifying relationship; (2) that the beneficiary has been employed by a qualifying entity abroad in a managerial or executive capacity for at least one continuous year in the three-year period preceding the filing of the petition; or (3) that the U.S. company would employ the beneficiary in a primarily managerial or executive capacity within one year of the 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 submits a brief statement on Form I-290B, Notice of Appeal or Motion. Counsel asserts that the evidence submitted establishes that the beneficiary has been and will be employed in a primarily managerial or executive capacity by the preponderance of the evidence standard, and suggests that the director unfairly based his decision on the nature of the petitioner's business.

Counsel stated on Form I-290B that he would submit a brief and/or additional evidence to the AAO within 30 days of filing the appeal. Counsel filed the appeal on September 15, 2008 and, as of this date, no additional brief or evidence has been received. Accordingly, the record will be considered complete.²

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.

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

² The AAO contacted counsel by facsimile on May 26, 2009 to advise him that the record does not contain the brief or evidence that counsel intended to submit, and to afford him an opportunity to resubmit any timely filed evidence. As of this date, counsel has not responded to the correspondence.

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 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 regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as:

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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 3, 2007. The petitioner stated on Form I-129 that it is a subsidiary of Z.N. Exports (Pvt) Ltd., located in Pakistan. The petitioner indicated that the beneficiary has been employed by this company since 2002.

In support of the claimed parent-subsidiary relationship, the petitioner submitted a copy of its stock certificate #1 issuing all 1,000 shares of the petitioner's authorized common shares to Z.N. Exports (Pvt) Ltd. on June 12, 2007, the date of incorporation. The petitioner also submitted a copy of its stock transfer ledger, which indicated that the company has only issued one stock certificate.

As evidence that the foreign company is doing business, and as evidence of its financial status, the petitioner submitted: (1) a bank statement for "Z.N. Textile Pvt. Ltd." issued by Union Bank Limited in April 2001 for the year ended December 31, 2000; (2) the income tax return filed by Z.N. Textiles (Pvt.) Ltd. for the 1999-2000 assessment year; and (3) copies of Bills of Lading and other business documents for Z.N. Exports (Pvt) Ltd. which were all from the year 2000.

The director issued a request for additional evidence (RFE) on December 28, 2007, in which he advised the petitioner that the evidence submitted does not establish that the foreign entity, Z.N. Exports (Pvt.) Ltd., is doing business as defined in the regulations. Accordingly, the director requested that the petitioner submit additional evidence to establish that the foreign entity has been and will be doing business, including: (1) documentary evidence of the foreign entity's business activities for the past year to include contracts, purchase orders, invoices, Bills of Lading, etc.; (2) a detailed description of the type of business operated by the foreign entity, with corroborating documentation; and (3) photographs of the interior and exterior of the foreign entity's business premises.

In addition, as evidence of the size of the investment in the U.S. entity and the financial status of the foreign entity, the director requested copies of the foreign entity's audited financial statements and tax returns for the last three years, and documentation of the transfer of any funds between the foreign and U.S. companies.

In response to the RFE, the petitioner submitted copies of bank statements from 2006 and 2007 for "Emjay Exports Pvt. Ltd.," as well as evidence of this company's business activities for the period 2003 through May 2005, including copies of invoices and shipping documents. The petitioner also submitted photographs of the interior of a textile factory, an exterior photograph of a gate which bears the name "Z.N. Fibers (Pvt.) Ltd.," and an interior door which reads "Z.N. Textiles (Pvt) Ltd." Finally, the petitioner submitted copies of the beneficiary's pay statements since June 2005, all of which identify "Emjay Exports Pvt. Ltd." as the employer. According to the information on the statements, the beneficiary joined this company in June 2005.

In a letter dated March 22, 2008, the petitioner stated: "We are 100% owned by Z.N. Exports (pvt) Ltd. of Pakistan. It has a division by the name of "Emjay Exports." The petitioner did not submit the requested tax returns for the foreign entity, or evidence of any funding provided by the foreign entity for the U.S. company.

The director denied the petition on August 13, 2008, concluding that the petitioner did not establish that the U.S. entity has a qualifying relationship with the beneficiary's foreign employer. In denying the petition, the director noted that the petitioner failed to submit evidence that the beneficiary's claimed foreign employer and the petitioner's claimed parent company, Z.N. Exports (Pvt) Ltd., is doing business. The director further noted that, while there is some evidence that the beneficiary's employer may be Emjay Exports (Pvt) Ltd., the petitioner did not submit documentation establishing that this company has a qualifying relationship with either Z.N. Exports or

the U.S. company. The director emphasized that the petitioner's unsupported assertion that Emjay Exports is a "division" of Z.N. Exports, was not sufficient.

On appeal, counsel for the petitioner neglects to address this issue. Accordingly, the director's decision will be affirmed and the appeal will be dismissed.

As noted by the director, there is no evidence that the petitioner's claimed parent company, Z.N. Exports (Pvt) Ltd is doing business as defined in the regulations, and therefore, it is not a qualifying organization. The petitioner's suggestion that the company does business through a "division" is not sufficient. As noted by the director, the petitioner provided no documentation to establish that Emjay Exports has a valid subsidiary or affiliate relationship with Z.N. Exports, or evidence that it is a division of that company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Since the petitioner's only stock certificate is issued to Z.N. Exports, the petitioner must establish that that Z.N. Exports is doing business in order to establish the claimed parent-subsidiary relationship.

Furthermore, the petitioner did not submit the requested evidence of ongoing business activities, including invoices for the previous year and copies of recent tax returns, for either company. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Finally, the AAO further notes that documentation submitted with respect to the claimed parent company refers to Z.N. Textiles (Pvt) Ltd. and Z.N. Fabric (Pvt.) Ltd. The petitioner has not provided evidence that these two entities and Z.N. Exports (Pvt) Ltd. are one and the same company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The second issue addressed by the director is whether the petitioner established that the beneficiary has been employed by a qualifying entity abroad in a primarily managerial executive capacity for at least one continuous year during the three years preceding the filing of the petition. See 8 C.F.R. § 214.2(l)(3)(iii) and 8 C.F.R. § 214.2(l)(3)(v)(B).

The petitioner indicated at the time of filing that the beneficiary has served as general manager of Z.N. Exports (Pvt) Ltd. since March 2002. The petitioner submitted an employee list for Z.N. Exports indicating that it employs two executives (a chief officer and director) and six office staff, including the beneficiary, an export manager, a chief accountant, a finance manager, a purchase manager and an employee in charge of stitching. As noted above, the petitioner did not submit evidence that the foreign entity has been doing business. The most recent evidence of business activities was from January 2001.

In the RFE issued on December 28, 2007, the director requested, *inter alia*, additional evidence to establish that the beneficiary has been employed by a qualifying organization in a managerial or executive capacity for at least one year within three years preceding the filing of the petition. The director requested evidence of employment to include the beneficiary's last annual tax return and tax withholding statement, if applicable; copies of payroll documentation reflecting the beneficiary's period of employment and salary; and other unequivocal evidence establishing the beneficiary's period of employment with the foreign entity.

The director further requested a letter from the foreign employer describing the nature of the beneficiary's employment including his current position title, a complete position description, his date of hire and salary, and an outline of all positions he has held. Finally, the director requested an organizational chart for the foreign entity, complete job descriptions for the beneficiary and all employees he supervised, and additional information regarding the beneficiary's level of authority within the company.

In response, the petitioner submitted copies of "salary slips" issued by Em-Jay Exports (Pvt.) Ltd. for the months of June 2005 through February 2007. The salary slips indicate that the beneficiary joined the company in June 2005 and has held the title "general manager" since that time. The petitioner did not submit a copy of the beneficiary's individual tax return or the requested letter from the foreign entity.

The petitioner stated in its letter dated March 22, 2008 that the beneficiary has been employed by the foreign entity as "Operations Manager," and, as noted above, indicated that Emjay Exports is a "division" of K.N. Exports. The petitioner stated that the beneficiary manages the employees identified on the original employee list for K.N. Exports submitted at the time of filing, and provided brief descriptions for the positions of Export Manager, Chief Accountant, Finance Manager, Purchase Manager and Stitching in Charge. The petitioner did not describe the beneficiary's duties with the foreign entity other than noting that he spent all of his time managing these employees and reporting to the president and vice president.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been employed by a qualifying entity in a managerial or executive capacity for one continuous year within three years preceding the filing of the petition. The director again noted that the record does not establish that either K.N. Exports or Em-Jay Exports is a qualifying entity. The director also emphasized that the petitioner failed to provide the requested letter from the foreign employer describing the length and nature of the beneficiary's employment with the foreign entity.

On appeal, counsel for the petitioner states: "We believe that the petitioner has demonstrated by a preponderance of the evidence that [the beneficiary] performed in a managerial or executive capacity with the foreign entity for a continuous period of at least one year."

Upon review, counsel's assertion is not persuasive. First, as discussed above, the petitioner has not established that either K.N. Exports (Pvt) Ltd. or Em-Jay Exports (Pvt.) Ltd. is a qualifying organization and for that reason, the petitioner has failed to satisfy the evidentiary requirement at 8 C.F.R. § 214.2(l)(3)(iii).

Second, the petitioner has submitted no explanation to clarify its inconsistent claims regarding the identity of the beneficiary's foreign employer. The petitioner initially stated that the beneficiary has been employed by

Z.N. Exports (Pvt) Ltd. since March 2002, and submitted an employee list identifying him and his claimed subordinates as employees of that company. In response to the RFE, the petitioner submitted evidence that the beneficiary is on the payroll of Em-Jay Exports (Pvt) Ltd., but provided no explanation other than noting that this entity is a "division" of K.N. Export. The petitioner nevertheless indicated that the beneficiary manages the same five managers included on the K.N. Exports employee list, but fails to explain why he would do so if he is the general manager of Em-Jay Exports. The record is devoid of evidence that the beneficiary's claimed subordinates are actually employed by an active business entity, or by the same entity that is now claimed to employ the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Finally, even if the petitioner had established through supporting evidence the true identity of the beneficiary's foreign employer and its status as a qualifying organization, the record remains devoid of any meaningful explanation of the nature of the beneficiary's employment with the foreign entity, and therefore there would be no basis to conclude that he was employed in a primarily managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act. The petitioner's claim that the beneficiary held the title of "general manager" or "operations manager" is insufficient to establish the beneficiary's eligibility. 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 petitioner's failure to submit a letter from the foreign entity or the detailed position description requested in the RFE will not be excused. 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).

For all of these reasons, the petitioner has failed to establish that the beneficiary has been employed by a qualifying organization in a primarily managerial or executive capacity for one continuous year within three years preceding the filing of the petition. For this additional reason, the appeal will be dismissed.

The third issue addressed by the director is whether the petitioner established that the United States operation, within one year of the approval of the petition, will support an executive or managerial position.

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.

At the time of filing, the petitioner stated that it employs four workers and seeks to employ the beneficiary in the position of general manager. The petitioner indicated that it intends to operate a retail business and submitted evidence that it has entered a lease agreement with Getty Petroleum Marketing, Inc. to operate a gas station located at 3205 Hudson Avenue in Union City, New Jersey. The petitioner submitted photographs of a full-service Lukoil gas and service station. The petitioner also submitted copies of its cigarette retail dealers license, certificate of authority, and business registration certificate issued by the State of New Jersey.

The petitioner did not submit a letter describing the beneficiary's proposed duties, a business plan, or other information regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals. The petitioner also failed to submit evidence of the size of the investment in the United States entity. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

In the RFE issued on December 28, 2007, the director instructed the petitioner to submit: (1) a copy of its business plan for commencing operations, giving specific dates for each proposed action for the next two years; (2) a comprehensive description of the beneficiary's proposed duties; (3) evidence to show how the U.S. company will grow to be of sufficient size to support a managerial or executive position within one year; (4) a description of the personnel of the new office including the number of employees, job titles, job duties and salaries and wages to be paid; and (5) evidence of the size of the United States investment. The director

also requested evidence to establish that the Lukoil gas station pictured in the photographs is the premises located at 3205 Hudson Avenue in Union City, New Jersey.

In its letter dated March 22, 2008, the petitioner stated that the beneficiary will perform the following duties:

- 1) Supervision of existing employees – 55%
- 2) Recruiting and interviewing new employees – 10%
- 3) Investigation of potential new locations – 10%
- 4) Checking financial and tax records for the stores – 20%
- 5) Miscellaneous duties and travel time – 15%

The petitioner further stated:

[The beneficiary] will be the Operations Manager of our enterprise. [He] will be primarily involved in supervising the overall operation of the organization.

He will direct and coordinate activities of subordinate managerial personnel involved in operating retail chain stores: He will interview and select individuals to fill managerial vacancies. He will maintain employment records for each manager and terminate employment of store managers whose performance does not meet company standards.

Further, he will direct, through subordinate managerial personnel, compliance of workers with established company policies, procedures, and standards, such as safekeeping of company funds and property, personnel and grievance practices, and adherence to policies governing acceptance and processing of customer credit card charges. He will inspect the premises of assigned area stores to ensure that adequate security exists and that physical facilities comply with safety and environmental codes and ordinances.

He will regularly review operational records and reports of store managers to project sales and to determine store profitability. [The beneficiary] will coordinate the sales and promotional activities of store managers and analyze the marketing potential of new and existing store locations and recommend additional sites or deletion of existing area stores. He will negotiate with vendors to enter into contracts for merchandise and determines allocations to each store manager.

The petitioner indicated that the U.S. company employs a director/president and a vice president, who will serve as the beneficiary's direct supervisor. Briefly the petitioner stated that the president "directs and oversees the overall operation," hires top level managers, "plans and implements the overall direction of the company," and is responsible for financial relations and interfacing with accountants and attorneys. The petitioner stated that the vice president "oversees the overall status of the company on a daily basis," and spends the majority of his time supervising the beneficiary's position and performing the duties of the president in his absence.

The petitioner indicated that the beneficiary would directly supervise the company's two location managers who "perform the duties normally associated with the management of a retail outlet," including recruiting, interviewing, training and supervising subordinate staff, resolving customer problems, handling inventory control, and making bank deposits. The petitioner stated that it employs two assistant managers who assist the location manager with their duties, prepare bank deposits and tax reports, and recruit and supervise clerks and cashiers. Finally, the petitioner stated that it employs four clerks/cashiers who interact directly with customers.

The petitioner submitted an organizational chart depicting the beneficiary's responsibility over the staff of two existing locations and two future locations that would be similarly staffed.

The petitioner did not address the director's request for a business plan or evidence of the size of the United States investment. Instead, the petitioner stated: "Our company is already active and is generating sufficient income to support itself and to provide for expansion and to pay the proffered wage to [the beneficiary]."

The director denied the petition, concluding that the petitioner did not establish that the United States operation, within one year, will support an executive or managerial position. The director emphasized that the petitioner submitted no evidence in support of its claim that it has already grown, or would grow, to a size sufficient to support the beneficiary's proposed position. The director noted that the petitioner failed to submit a copy of its business plan or any evidence to establish whether the business is expected to achieve any additional growth within one year.

On appeal, counsel submits the following statement on Form I-290B:

The petitioning company has a gross annual income of approximately \$2,000,000.00 and has 8 employees. Certainly an enterprise of this size needs someone to run it. [The beneficiary] as Operations Manager of the company would be that person. The job description provided with the petition shows that he would be primarily engaged in managerial or executive duties. This is what is required for an L-1A and he meets that requirement. It is unfair and not consistent with the statute to say that the nature of this business is such that it would not need a manager. The statute does not discriminate against types of businesses.

Counsel asserts that the denial is "against the weight of the evidence," and contends that the petitioner has met its burden of proof by the preponderance of the evidence standard.

Upon review, counsel assertion's are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity 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)(B).

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 therefore. Most importantly, the business plan must be credible.

Id.

Here, the petitioner has not adequately described or documented the intended scope of the U.S. office, its financial goals and its anticipated organizational structure after one year, or the size of the investment in the United States entity.

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.*

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).

Here, the petitioner indicates that the beneficiary will devote a total of 65 percent of his time to recruiting, supervising and coordinating the activities of managerial personnel, specifically, retail store/gas station managers. The AAO acknowledges that if the petitioner established through the submission of corroborating evidence that it will be, within one year, operating multiple gas stations, each headed by a bona fide manager or supervisor and with sufficient staff to perform the day-to-day operations of each location, then the beneficiary might qualify for L-1A classification as a personnel manager.

However, there is no evidence in the record to support the petitioner's claim that the U.S. company already employs eight employees and has gross sales of \$2 million, or that it is in the process of opening two additional locations. The only documentary evidence submitted establishes that the petitioner has leased and obtained a franchise agreement for a single gas/service station located in Union City, New Jersey. There is no evidence that the petitioner has leased or purchased a second location and no evidence that it has hired the eight employees depicted on its organizational chart. Nor does the record contain any bank statements, financial records or evidence of business activities already being conducted in the United States, other than photographs of one gas station.

The AAO acknowledges that the petitioner appears to have purchased an existing business that was already operational, and its circumstances may therefore be different from those of a new office that is truly a "start-up" enterprise. If the petitioner chooses to rely on its current operational status to establish the beneficiary's eligibility for L-1A classification, then it is reasonable to expect the petitioner to submit evidence to corroborate its claimed organizational structure, business activities and financial status. 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). Counsel's claims on appeal regarding the petitioner's staffing structure and financial status are also insufficient. 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 Laureamo*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Nevertheless, the petitioner is still a "new office" as that term is defined in the regulations, and its failure to provide documentary evidence in response to the director's request for a business plan and evidence of the investment in the U.S. company further undermines the AAO's ability to evaluate the petitioner's claims regarding the beneficiary's proposed employment. 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).

Since there is no evidence in the record to corroborate the petitioner's claimed staffing levels, the existence and operation of its second location, or evidence to support its claims that it can and will open additional locations, the AAO cannot find that the beneficiary will be primarily performing managerial duties as claimed

by the petitioner. Again, the petitioner has documented that it leases one gas station, and the AAO will base its analysis on the staffing of this business.

Although the gas station includes a service center and provides and performs state inspections, the petitioner does not claim that it employs or will employ mechanics. The photographs submitted also show that it is a full-service station where customers do not pump their own gas. Given the nature of the business, the AAO is not persuaded that two cashiers/clerks, an assistant manager and a manager are actually sufficient to staff the outlet during all of its operating hours. The petitioner already claims to employ a president and vice president who are senior to the beneficiary's proposed position, and has not documented its need for a third tier of management to oversee the one gas station.

When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's proposed subordinates are supervisors or managers, notwithstanding the job title of "store manager" or "location manager." Instead, the record indicates that the beneficiary's subordinates, would likely perform the actual day-to-day tasks of operating the gas station. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Further, the AAO notes that, even if the petitioner did establish through submission of evidence that it would operate multiple gas stations, the claimed staffing of one manager, one assistant manager and two cashiers per station would not reasonably fulfill the staffing needs of each location, depending on the size of the location, the services it provides (mechanical services, convenience store, full service pumps, prepared foods, etc.), and its actual operating hours. Again, the petitioner's claims are undermined by its failure to provide either evidence relating to its current operations or a viable business plan outlining the exact number of locations it will open, the types of employees it will hire and the nature of the services it will provide.

Contrary to counsel's assertion on appeal, the director did not unfairly discriminate against the petitioner because it operates a gas station. Rather, the director's decision was primarily based on the petitioner's failure to provide evidence required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) and failure to submit a complete response to the RFE issued on December 27, 2008.

For all of the above reasons, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year, or that the U.S. company could support such a position. For this additional reason, the appeal will be dismissed.

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. 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.