

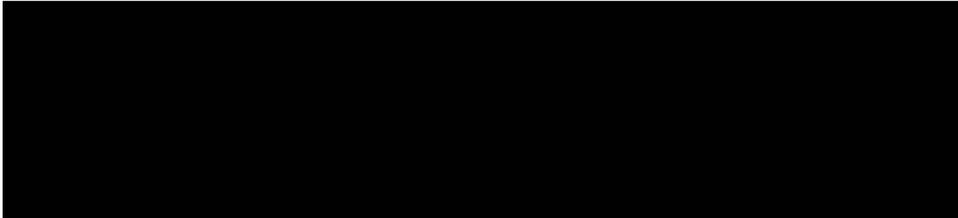
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U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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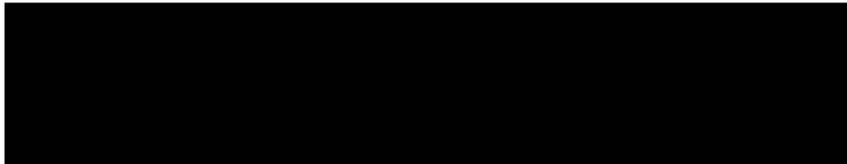
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File: EAC 07 116 52478 Office: VERMONT SERVICE CENTER Date: **JUN 16 2009**

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).

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 California corporation established in March 2007, intends to provide non-emergency medical transportation services. It claims to be a subsidiary of S Teodoro Trucking, located in the Philippines. The petitioner seeks to employ the beneficiary as president of its new office in the United States for a period of two years.¹

The director denied the petition on two independent grounds. Specifically, the director determined that the petitioner had failed to establish: (1) that the U.S. company has secured sufficient physical premises to house the new office; and (2) that the beneficiary would be acting in a primarily managerial or executive capacity and that the U.S. company would support the beneficiary in such capacity within one year. The director further observed that the petitioner did not submit evidence to establish the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary.

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 fully complied with the director's request for additional evidence regarding the new business and submitted sufficient evidence to establish the petitioner's and beneficiary's eligibility. 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.

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.

- (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 had secured sufficient physical premises to house the new office as of the date the petition was filed.

The petitioner filed the nonimmigrant petition on March 14, 2007. The petitioner indicated on Form I-129 that the beneficiary's worksite will be located at [REDACTED] in Huntington Beach, California. This address was also identified on Form I-129 as the beneficiary's current residential address in the United States.

The director issued a request for additional evidence (RFE) on May 21, 2007, in which he requested, *inter alia*, evidence to establish that the petitioner has secured sufficient physical premises to house the new office. The director also requested photographs of the interior and exterior of all physical premises secured.

In response to the director's request, the petitioner submitted a copy of a month-to-month lease for the premises located at [REDACTED] Huntington Beach, California. The lease agreement is between [REDACTED] as landlord and the beneficiary as tenant. The lease contains the following "Use of Premises" provision:

The Premises shall be used and occupied by Tenant and Tenant's immediate family . . . exclusively, as a private, single family dwelling, and no part of the Premises shall be used at any time during the term of the Agreement by Tenant for the purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private single family dwelling.

The petitioner provided photographs of the exterior of a single family home, and a photograph of a passenger van with a makeshift sign bearing the U.S. company's name, address and telephone number. The petitioner also submitted one interior photograph depicting a desk, computer and fax machine in a small office. The petitioner indicated that the photographs show its "home base business" being run at the residence described above. According to the petitioner's business plan, also submitted in response to the RFE, the company foresees renting a larger office "in the next two years."

The AAO notes that the record also contains a service agreement between the petitioner and a business known as Alternative Senior Care, which has contracted the petitioner to provide transportation services to its senior clientele residing at its eleven residential assisted living facilities located in and around Huntington Beach, California. According to the contract, one of the facilities is located at [REDACTED] in Huntington Beach.

The director denied the petition on April 12, 2008, concluding that the petitioner failed to establish that it had secured physical premises to house the new office. The director acknowledged the evidence submitted, but emphasized that the dwelling was leased to the beneficiary and his family, rather than to the U.S. company, and commercial use of the premises is expressly prohibited in the lease.

On appeal, counsel asserts that "although the business is located at a home, this fact does not retract from the fact that it is in fact an operating business." Counsel contends that the regulations do not require that the business premises be of a certain size or in an office building, and notes that many businesses start as home businesses and grow over time.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that it has secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The AAO acknowledges that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office, and observes that there may be cases in which a home office would satisfy the regulatory requirements. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations. To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a home office, if required, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling will meet the company's needs. Finally, photographs and floor

plans of the leased premises may assist in determining that the premises secured are sufficient to accommodate the petitioner's business operations.

Here, the petitioner has not offered any additional evidence on appeal to show that the specific premises secured is sufficient to accommodate the petitioner's business, nor has counsel addressed the specific deficiencies outlined in the director's decision. As noted by the director, the lease agreement was entered by the beneficiary in his personal capacity, for a dwelling to be used by his family, and the lease expressly prohibits the operation of a business from the location. The petitioner has not provided evidence that the landlord has granted the petitioner authorization to operate the business from the premises or that the petitioner has obtained any applicable licenses required to operate a commercial transport business from a private home. 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)).

Furthermore, the evidence in the record suggests that the premises identified in the lease are already being used as a residential assisted living facility. It is reasonable to question whether the petitioner's landlord, who is also identified as an administrator for Alternative Senior Care, would lease an entire facility to a family to be used as a residence when there are presumably clients/patients residing there. These facts raise questions regarding the validity of the lease agreement. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Finally, while the petitioner has submitted photographs that are claimed to depict the petitioner's business, the photographs do not clearly identify the address of the house, and the interior photographs could just as easily depict an office used by the other business that appears to be occupying the premises. Furthermore, while the petitioner submitted a photograph of a van with a sign depicting its company name in response to the RFE on August 1, 2007, the evidence submitted on appeal includes a Certificate of Title for the company's vehicle which was issued on October 18, 2007. Again, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

The second 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, and whether the beneficiary will be employed in a primarily managerial or executive capacity.

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

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

- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated March 11, 2007, counsel for the petitioner described the beneficiary's proposed position as follows:

[The beneficiary] will fill the position of President/CEO for the U.S. entity. In this executive capacity he will be in control of the overall operations of the business and arrange for the strategy and conduct of the business.

[The beneficiary] will be responsible to hire and train managers and workers in the business. He will coordinate and direct the activities of the workers/supervisors. He will be in control of the strategy of the business and in the operational efficiency and effectiveness of the initial office and with the other planned.

[The beneficiary] will accordingly be the executive setting up the operations of the business and be in overall charge of the staff to ensure that his directions and instructions are properly carried out.

As noted above, the regulations governing new office petitions at 8 C.F.R. 214.2(1)(3)(v)(C) require the petitioner to submit information regarding: (1) the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals; and (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.

In support of the petition, the petitioner submitted automated teller machine (ATM) receipts showing the balance in the beneficiary's U.S. savings account, and banks statements showing funds (in pesos) in the beneficiary's Philippines bank account as of November 2006. The petitioner also submitted a copy of the foreign entity's income tax return and audited financial statements for the year ended December 31, 2005. The petitioner did not address the nature of the proposed U.S. office or describe the anticipated scope of the entity, its organizational structure or its financial goals.

In the RFE issued on May 21, 2007, the director requested additional information regarding the beneficiary's proposed duties and the proposed staffing of the U.S. office, and instructed the petitioner to identify the number of employees to be hired, their job titles, the duties to be performed by each employee, and their anticipated salaries/wages. The director also requested a business plan providing specific dates for each proposed action, for the first year of operation, as well as evidence to show how the new company will grow to be of sufficient size to support a managerial or executive position.

The director further instructed the petitioner to submit evidence to establish the size of the United States investment and the financial ability of the foreign entity to commence doing business in the United States, including: evidence of funds transferred from the foreign entity to fund the U.S. company; evidence of the financial status of the U.S. company; and an original bank letter confirming the petitioner's account balance as of March 14, 2007.

In response, the petitioner submitted an 11-page "Company Introduction," which includes the following description of the beneficiary's duties:

- Overseeing the entire operation, which includes responsibility for making policy, financial decisions, advertising, marketing and sales for the business.
- Hiring, screening, and training all prospective employees, dealing with the company accountant on a monthly basis for taxes and overall financial reporting. The projection of cash flows and implementation of business plans in a growing business.

The company introduction indicates that the company will operate a "non-emergency transport business such as transporting clients to hospital follow-ups, to and from doctor's clinics, rehab, dental, lab and radiology appointments and recreational facilities." According to the business plan, the petitioner plans to procure "modern and more capacity transportation vehicles," and projects that it will own five vehicles and employ ten workers within five years.

The business plan includes an organizational chart depicting the anticipated office structure for the first year in operation. The chart identifies the beneficiary as the president/CEO and shows that he will supervise drivers and caregivers. The record also includes a projected organizational chart which depicts maintenance personnel, a

manager, a vice president, a secretary and a treasurer, in addition to the positions of president, driver and caregiver.

Finally, the business plan includes projected profit and loss statements for the years 2008 through 2012. The petitioner anticipates that it will achieve gross sales of \$98,000 in 2008 and pay salaries and wages of \$50,400. The beneficiary's proffered annual salary is \$45,000.

As evidence to establish the size of the United States investment, the petitioner submitted evidence that it opened a business checking account with a balance of \$20,000 on August 1, 2007. The petitioner also provided letters from two Philippine banks providing the balance of the beneficiary's savings account and the balance of a joint cooperative account held by the beneficiary and his wife. In response to the director's request for copies of wire transfers executed to transfer funds from the foreign entity to the U.S. entity, the petitioner submitted additional ATM receipts showing the balance available in his United States savings accounts.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity or that the U.S. company, within one year of the approval of the petition, will support an executive or managerial position. In denying the petition, the director determined that the petitioner's response to the RFE did not clearly define the beneficiary's responsibilities or indicate exactly what duties he would be performing as president of the U.S. company. The director also found insufficient evidence to establish the size of the investment in the United States company, noting that the petitioner did not open a bank account until several months after the petition was filed, and that the petitioner had failed to submit any evidence of funds transferred from the foreign entity. Overall, the director determined that the evidence did not establish how the company would grow to be of sufficient size to support a managerial or executive capacity position within one year.

On appeal, counsel for the petitioner reiterates the position description that was included in the petitioner's business plan and objects to the director's finding that such description is "self-serving," noting that the beneficiary, as the owner of the new company, is the only person available to provide the information. Counsel asserts that the petitioner now employs a driver and plans to acquire additional vehicles and employ additional workers over the next five years. The petitioner submits copies of invoices for services rendered by the petitioner in March and April 2008 and evidence of wages paid to the driver during the month of December 2007.

Counsel further emphasizes that the petitioner has opened a business checking account with a balance of \$20,000, and asserts that the money held by the beneficiary and his wife in the Philippines is available for funding the new business, as the beneficiary is the owner of both the foreign and U.S. entities.

Upon review, counsel assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity or that the petitioning company will support a managerial or executive position within one year.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of

managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(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 established that the beneficiary will be performing primarily managerial or executive job duties within one year, nor has it adequately documented the size of the United States investment or the financial ability to commence doing business in the United States.

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.*

Counsel's initial description of the beneficiary's duties was general and non-specific, providing little insight into what specific tasks the beneficiary will perform beyond generalities. For example, counsel stated that the beneficiary will "be in control of the overall operations of the business," "arrange for the strategy and conduct of the business," "be in control of the strategy of the business," and be in control of the "operational efficiency

and effectiveness of the office." 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).

In response to the director's request for a more detailed description of the beneficiary's proposed duties, the petitioner stated that the beneficiary will be charge of "overseeing the entire operation," including responsibility for making policy and financial decisions, as well as "advertising, marketing and sales." The only other duties mentioned are hiring employees, monthly dealings with an accountant, and "implementation of business plans." Again, this brief statement is insufficient to establish that the beneficiary's actual duties will be primarily managerial or executive in nature within one year. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the AAO does not doubt that the beneficiary will exercise the appropriate level of authority over the business as its president and owner, the petitioner must establish that his duties will be primarily managerial or executive in nature within one year of commencing the new business in the United States.

In the case of a new office, the AAO will view the beneficiary's proposed duties in view of the petitioner's proposed organizational structure, the nature of the business, business plans, financial projections, and other factors to determine whether the petitioner will reasonably support a managerial position within one year. The petitioner must establish that the beneficiary will be relieved from having to primarily perform the daily operational tasks of the business.

Here, the petitioner's projected staffing and profit and loss statements for the first year in operations do not demonstrate that the beneficiary would be relieved from primarily performing non-managerial duties. During the first year, the petitioner indicates that it will hire one or more drivers to transport clients to their destinations and one or more caregivers to assist the elderly clients. These non-professional employees will report directly to the beneficiary. During 2008, which would be the first full year in operation, the petitioner anticipates that it will pay \$50,400 in wages. Given that the beneficiary's proffered annual salary is \$45,000, it appears that any drivers or caregivers hired will work on a part-time basis. Moreover, the petitioner does not intend to hire any staff to handle essential functions such as sales and marketing, bookkeeping, clerical or administrative tasks, which would necessarily be performed by the beneficiary as the sole full-time employee. Collectively, this brings into question how much of the beneficiary's time could actually be devoted to managerial or executive duties after the first year in operations. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the

Act. Based on the evidence submitted, it is evident that the beneficiary will perform every operational function of the company apart from driving a transport vehicle.

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties will comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). Here, the record fails to establish that the majority of the beneficiary's duties within one year will be primarily directing the management of the organization or a component or function of the organization.

In addition, as noted by the director, the petitioner has not met the evidentiary requirement at 8 C.F.R. § 214.2(l)(3)(v)(C), which requires the petitioner to submit evidence to establish the size of the financial investment in the United States company. At the time the petition was filed, and for five months thereafter, the petitioner had no bank account and no funding. The fact that the beneficiary had several thousand dollars in a personal savings account is irrelevant. He had been residing in the United States as a visitor for pleasure for an entire year at the time the petition was filed and presumably required savings or other funds to support himself during this stay. Furthermore, the petitioner's business plan does not identify the company's anticipated start-up costs or capital requirements. Although the petitioner indicates that it intends to purchase up to five transport vehicles, its projected financial statements make no allowances for such expenses. 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.

While the petitioner eventually opened a business checking account with a deposit of \$20,000, the AAO notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Regardless, since the petitioner did not provide documentation of its projected start-up costs, it is impossible to conclude that \$20,000 would be sufficient to meet the company's needs. The AAO acknowledges evidence that the beneficiary and his spouse have savings accounts in the Philippines, but the petitioner did not provide conversion rates for the foreign currency or explain what portion of the funds would potentially be available as an investment in the U.S. company. The lack of evidence of the investment made in the U.S. company further undermines any 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.

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

Beyond the decision of the director, the petitioner has not established that 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, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

The petitioner indicates that the beneficiary owned and managed a sole proprietorship known as "S Teodoro Trucking" in Bulacan, Philippines since January 1, 1999. The petitioner submitted a "Certificate of Business Name Registration" issued to the beneficiary by the Philippines Department of Trade and Industry (DTI) on February 23, 2005, along with a copy of the application for sole proprietorship submitted to DTI. The beneficiary indicated that it was a "new" application as opposed to a renewal. He also indicated on the application that the business had one employee. There is no evidence to corroborate the existence of an entity known as "S Teodoro Trucking" prior to February 23, 2005. 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 beneficiary came to the United States in B-2 status on March 15, 2006, less than 13 months after establishing the sole proprietorship in the Philippines. While the petitioner indicates that the foreign business currently employs eight workers, there is no evidence of the staffing levels that existed between February 2005 and March 2006, which is the relevant period for determining whether the beneficiary was employed in a primarily managerial or executive capacity.² The petitioner has not provided a description of the beneficiary's duties while employed with the foreign entity beyond indicating that he served as president of the company. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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.

Therefore, the petitioner has not established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity for one year within the three years preceding the filing of the petition. Accordingly, the petition will be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The 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

² Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A), periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad, but such periods shall not be counted toward fulfillment of that requirement.

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.