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File: WAC 08 098 51367 Office: CALIFORNIA SERVICE CENTER Date: **MAR 30 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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Hawaii corporation engaged in general construction services, states that it is a subsidiary of [REDACTED], located in the Philippines. It seeks to employ the beneficiary as its vice president of operations for a three-year period.

The director denied the petition on May 30, 2008, concluding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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 director misinterpreted the evidence submitted and failed to understand the nature of the beneficiary's position, which counsel claims is clearly in a managerial or executive capacity. Counsel submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue address by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

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

The petitioner filed the nonimmigrant petition on February 21, 2008. The petitioner is described as a general construction service and claims to have approximately seven full-time employees, excluding subcontractors and temporary hires. It seeks to employ the beneficiary as its vice president of operations. The petitioner described the proposed position as follows:

- Oversees construction management personnel and activities occurring at project construction sites. Travel to project sites periodically to review progress and provide guidance to Site Construction Manager.
- Resolves construction related issues that cannot be resolved by Site Construction Manager and or makes recommendations to supervisor as to how to resolve major issues.
- In cooperation with or under the direction of supervisor, prepares and evaluates bid packages and negotiations contracts with construction materials suppliers and contractors.
- Assist in the development and implementation of department policies and procedures, including those related to budgeting, scheduling and construction progress tracking.
- Work with the accounting department and other Project Management Department personnel to establish project costs.
- Aids in monitoring contract requirements to verify compliance and reviews pay request from vendors and contractors.
- Responsible for preparation, monitoring and updating of project budgets and schedules.
- Provides construction issue support for other departments.
- Reviews and approves draw requests to financing parties and/or owners for construction progress payments.
- Supervises Construction Site Manager and QA/QC Managers. Carries out supervisory responsibilities in accordance with the organization's policies and applicable laws.
- Other duties as assigned by President.

The petitioner submitted an organizational chart which indicates that the beneficiary reports directly to an executive vice president, [REDACTED], who in turn reports to the company's president. There are two positions that are depicted as lateral to the beneficiary's position – a vice president, marketing and a vice president of administration and finance. The chart indicates that the beneficiary supervises [REDACTED], Manager of Construction and Engineering, and [REDACTED] Manager of Custodial Services.

The petitioner submitted a payroll check register for the payroll period ended on February 15, 2008, which shows payments to the beneficiary, the vice president of administration, the president and the manager of construction and engineering.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Accordingly, on February 25, 2008, the director issued a request for evidence (RFE) instructing the petitioner to submit: (1) a more detailed description of the beneficiary's specific duties in the United States and the percentage of time he spends performing each duty; (2) a more detailed organizational chart accompanied by information regarding each company employee including name, job title, job duties, education level, annual salary, immigration status and source of remuneration; (3) copies of the petitioner's quarterly wage reports and Federal quarterly tax returns (Form 941) for the last four quarters; and (4) evidence that the petitioner has engaged the services of independent contractors, including proof of payments, copies of contracts, and Forms 1099.

In response to the director's request, the petitioner submitted the following expanded job description:

Owners' Consultant (4%). Reports directly to the company owners. Advises owners on all aspects of all construction projects including estimating, planning, budgeting, coordinating and directing of all construction related activities. Assists in the development and implementation of department policies and procedures, including those related to budgeting, scheduling and construction progress tracking.

Bidding and Estimating (15%). Continually searches for government and private projects and recommends projects for bidding based on size, scope, schedule and complexity. Assembles list of licensed specialty contractors as required by specifications. Reviews and compares proposals from each subcontractor and suppliers for best value and negotiates as necessary. Determines direct costs and overhead and profit margins based on acceptable company practices. Attends pre-bid site visits for all contraction and non-construction projects.

Planning (15%). After award of each project and taking other projects into account (in-progress and future), prepares a schedule using bar charts, coordinating each phase of the schedule with project owners, consultants, specialty contractors, etc. Continually updates schedule and advises every person involved of any schedule changes. Secures permits and licenses required by each project[.]

Directing (45%). Oversees all construction management activities and personnel at all project sites. Visits project sites regularly to review progress and provide guidance to Site Construction supervisors and workers. Track progress of construction operations such as arrival and utilization of materials, supplies, tools, machinery, equipment, and vehicles. Resolves construction related issues that cannot be resolved by Site Construction Manager and or makes recommendations to supervisor as to how to resolve major issues. Reviews progress reports prior to submission to upper management.

Coordinating (7%). Coordinates, through subordinate supervisory personnel, all activities concerned with the construction and maintenance of structures, facilities, and systems.

Budgeting and Finance (7%). Prepares cost proposals, monitors manhours expended in relation to job progress, assigns appropriate job activities to each worker in relation to their wage rates and skills, monitors usage and wastage of supplies and material. Monitors budget versus actual job cost and advises management of any discrepancies. Monitors construction progress versus projected schedule. Prepares request for payments based on actual job progress. Approves request for payments by subcontractors based on job progress.

Supervisory Responsibilities (6%). Supervises all Construction Site managers, laborers, QA/QC Managers and non-construction personnel such as janitorial staff. Responsible for the screening and selection of qualified new employees and subcontractors. Evaluates employees performance under his supervision and prepares performance reports. Provides counseling to employees on areas needing improvements and insures only qualified and motivated employees are retained. Carries out supervisory responsibilities in accordance with the organization's policies and applicable labor laws.

Ancillary Duties (1%). Alternate Safety Officer. Alternate Training Officer. Other duties assigned by President.

The petitioner submitted an updated organizational chart which included employees not depicted on the chart provided at the time of filing. Specifically, the second chart indicates that the vice president of administration and finance supervises three personnel, the manager of custodial services supervises three personnel, the manager of engineering and construction supervises a project superintendent, [REDACTED], and [REDACTED] supervises eight personnel.

As evidence of its use of independent contractors, the petitioner submitted a list of subcontractors. To document its payments to contractors, the petitioner submitted: (1) a Western Union receipt showing a \$4,000 payment to [REDACTED] in May 2007; (2) a price quotation from Access Signs & Graphics; and (3) copies of two checks issued to Mechanical Trends in May 2008. The AAO notes that [REDACTED] appears to work for the petitioner's office in Guam. The petitioner did not provide copies of contracts or Forms 1099 evidencing its use of contract personnel.

The petitioner provided a list of twelve employees claimed to be supervised by the beneficiary, along with their job titles, education level, annual salaries and a brief description of job duties. The construction employees listed include the quality control and construction manager/safety officer, the project superintendent, three carpenters/laborers, one mason/laborer, one part-time electrician, one part-time laborer, and one employee whose job title was not identified. The petitioner indicated that the beneficiary's immediate subordinate has a bachelor's degree in civil engineering. The salaries listed for the subordinate construction employees ranged from \$66,000 for the construction manager, \$110,000 for the project superintendent, and \$83,200 for each carpenter/laborer. The beneficiary's proposed salary is \$48,000, considerably lower than that of the subordinate staff he is claimed to supervise. The employee list also included three custodians (one of which was previously identified as a manager), whose salaries range from \$4,290 to \$8,500.

The petitioner's evidence shows that in 2007, the company paid a total of \$18,600 to construction employees, including the president, the vice president of finance and administration, and the beneficiary. The petitioner paid a total of \$20,611 to five custodial personnel during 2007. The petitioner also submitted year-to-date payroll reports for its construction and custodial staff, dated May 3, 2008. The report shows payments to nine construction laborers who worked between 15 and 57 hours. [REDACTED], the project superintendent, was listed among the laborers and worked only 42 hours. The company paid total wages of \$72,687 to managerial and construction personnel through the first four months of 2008.

The director denied the petition on May 30, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner failed to provide evidence that it employed the subordinate staff claimed to be working under the beneficiary's supervision at the time the petition was filed. The director further noted that it did not appear that the petitioner has the ability to pay the salaries listed for the beneficiary's claimed subordinate employees. The director thus concluded that the petitioner did not establish that the beneficiary would be relieved from performing non-managerial duties.

On appeal, counsel for the petitioner asserts that the director misinterpreted the nature of the beneficiary's position with the petitioner, and failed to understand that he does in fact perform the high-level

responsibilities contemplated by the statutory definitions of managerial and executive capacity. Counsel further explains the beneficiary's role as follows:

[The beneficiary] has been involved in every aspect of petitioner's company. He is responsible for the supervision of daily operations of the company. His duties include overseeing particular projects, assessing their progress and attending to the various needs of the site supervisors. [The beneficiary] is often responsible for bidding and estimating potential projects as opportunities for the company arise.

Despite that fact that his main function is at the executive level of the company, [the beneficiary] is not above performing more menial duties as they arise. Such duties include ordering and delivering construction material. Should the situation demand it, [the beneficiary] is willing and able to participating [sic] in actual construction work. However, these duties are performed at the sole discretion of [the beneficiary] and in not way impinge on his primary function as supervisor. As [the petitioner] continues to grow as a business, the need for [the beneficiary] to assist in these respects will diminish altogether.

In support of the appeal, the petitioner submits letters from five of its clients and associates, who confirm the beneficiary's involvement in the petitioner's projects during 2008, and describe the beneficiary as "an invaluable asset," whose absence could delay project completion.

The petitioner submits payroll records for the months of May through July 2008. As of July 2008, the petitioner appears to employ four full-time employees, including the beneficiary, and two-part time employees.

Upon review, and for the reasons discussed below, the petition has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While it appears that the beneficiary in this matter would perform some managerial duties in his capacity as vice president of operations, the evidence of record falls short of establishing that the beneficiary would be performing primarily managerial or executive duties.

The petitioner has provided a lengthy, but vague and nonspecific description of the beneficiary's duties that is insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. For example, the petitioner generally classified the beneficiary's duties as consulting with the company owners, bidding and estimating, planning, directing, coordinating, budgeting and finance, and supervision. The petitioner indicated that all duties would be managerial and that 99% of the beneficiary's

time would be delegated to such functions. However, the petitioner identified only broad managerial functions and offered little specific information as to what the beneficiary would be doing on a day-to-day basis as the petitioner's vice president of operations. For example, the petitioner indicates that the beneficiary devotes the largest portion of his time to "directing" which includes overseeing "all construction management activities," tracking and reviewing progress, and resolving "issues." This description offers little insight into the specific tasks the beneficiary performs. 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).

Furthermore, the description suggests that the beneficiary will primarily carry out his responsibilities through subordinate personnel, yet, as discussed further *infra*, the record contains very little documentation of such employees and the job description, as a whole, is not supported by the totality of the evidence. 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 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Finally, the AAO notes that, on appeal, counsel concedes that the beneficiary "is not above performing more menial duties," such as ordering and delivering construction materials and participating in actual construction work. While counsel submits that there will be less need for the beneficiary to participate in such activities as the company grows, and claims that such duties "in no way impinge on his primary function as a supervisor." However, it must be noted that the petitioner did not include such "menial duties" in either previous iteration of the beneficiary's job duties. Thus, it is reasonable to conclude that the petitioner's description of the beneficiary's duties was either inaccurate or incomplete. 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). The AAO will not accept counsel's unsupported assertions that the "menial tasks" described are secondary to the claimed managerial tasks. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Overall, absent a clear, specific, consistent and credible description of the actual duties to be performed and the amount of time he will devote to managerial duties, it cannot be concluded that the beneficiary's position with the U.S. company will be in a primarily managerial or executive capacity.

The petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. A review of the record with respect to the petitioner's staffing levels undermines the petitioner's claim that the beneficiary will primarily perform managerial or executive duties.

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 initially indicated that the beneficiary will directly supervise site construction managers, project superintendents, site supervisors, quality assurance/quality control managers and laborers, as well as independent contractors. However, the petitioner has not corroborated its claim that it actually employed the majority of the subordinate staff as of February 2008 when the petition was filed.

At the time of filing, the petitioner claimed to have seven payroll employees including the president, an executive vice president, three vice presidents, and two managers. The petitioner did not indicate that it had any lower-level staff to perform the actual construction work, nor did the petitioner provide evidence of payments to subcontracted staff, other than two payments totaling \$20,000 paid three months after the petition was filed. At the same time, the petitioner claims to be simultaneously engaged in multiple construction projects. The beneficiary's claimed subordinate, [REDACTED] does appear to have been hired just prior to the filing of the petition, but the petitioner has not established that he was supervising subordinate employees in his capacity as engineering and construction manager.

Although the petitioner later submitted an organizational chart showing that the beneficiary supervises two managers who in turn supervise a total of 11 subordinates, 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). Furthermore, the petitioner's payroll records through May 2008 did not support its claims that its laborers and subordinate construction managers were earning the claimed wages ranging from \$66,000 to \$110,000 annually. According to the payroll records, the construction laborers were working part-time for considerably lower wages. Finally, the AAO notes that the beneficiary's offered salary of \$48,000 is considerably lower than that of his claimed direct and indirect subordinates. Although a beneficiary's salary is not indicative of his employment capacity, the discrepancy here is significant and raises questions regarding his actual level of authority in the 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 petitioner has not established that it actually employs, either directly or indirectly, the majority of the claimed subordinate staff of managers, site supervisors and laborers that the beneficiary is claimed to supervise. 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)). Therefore, notwithstanding the petitioner's assertions, the record does not support a finding that the beneficiary will supervise and control a subordinate staff composed of supervisory, professional, or managerial employees, as required by section 101(a)(44)(A)(ii) of the Act. Furthermore, the lack of evidence relating to subordinate personnel and contract staff working for the company at the time of filing raises questions as to who would be

performing the company's day-to-day activities, or, alternatively, the credibility of the petitioner's claims regarding the scope of its operations.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulates the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

While the record establishes that the beneficiary will likely have oversight authority over the day-to-day activities of construction projects secured by the company in the future, it does not contain sufficient evidence to establish that he would assume primarily managerial duties upon approval of the petition. While the petitioner's organization may eventually develop to the point where it requires the beneficiary's services in a primarily managerial capacity, 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). The petitioner did not establish that it had subordinate staff in place at the time of filing to relieve the beneficiary from primarily performing non-qualifying operational or first-line supervisory tasks associated with the petitioner's construction activities.

Overall, the petitioner's claims are undermined by its failure to provide a detailed, credible description of the beneficiary's duties, and its failure to document that it employs the beneficiary's claimed subordinate and contract staff. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the U.S. company and the beneficiary's foreign employer maintain 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 petitioner stated on Form I-129 that the U.S. company is a subsidiary of the foreign entity [REDACTED]; [REDACTED]" located in the Philippines. In a letter dated February 20, 2008, counsel for the petitioner described the relationship between the two companies as follows:

[REDACTED] began as a sole proprietorship started by [the beneficiary] in the year 2000. In January of 2004, [the beneficiary] then sold 50% of his shares to [REDACTED] of [the petitioner]. Subsequently, in November of 2004, the companies also formed a joint venture agreement called [REDACTED]. Also find attached hereto as Exhibit "9" is the Joint Venture [sic] agreement signed by both principal companies. The Joint Venture was formed between the two companies so that they could pursue jobs together in the Philippines and expand into US Federal jobs in Guam. The two companies have collaborated to work together on projects in both Guam and the Philippines abroad.

The petitioner attached a document labeled "Exhibit A, Consent Form," which refers to the "Joint Venture Agreement dated November 15, 2004 . . . by and among [REDACTED] but did not provide a copy of the actual joint venture agreement.

The petitioner also submitted a Certificate of Business Name Registration issued by the Department of Trade and Industry in the Philippines, showing that the beneficiary registered to do business as [REDACTED] [REDACTED] from May 26, 2005 until May 26, 2010. The petitioner also submitted the beneficiary's individual tax returns and independent auditor's report which show that he operates a sole proprietorship in the Philippines. The evidence of record shows that [REDACTED] is the sole owner of the U.S. company.

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

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

The petitioner has not established any common ownership and control between the foreign entity and the petitioning company. Although counsel claims that the beneficiary sold 50 percent of his "shares" in the foreign entity to [REDACTED] in January 2004, it has not explained why the beneficiary has continued to register the business and pay taxes in the Philippines as a sole proprietor. The petitioner has failed to submit documentary evidence of [REDACTED] claimed 50 percent ownership in the foreign entity. 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.

With respect to the claimed joint venture between the petitioner and the foreign entity, USCIS accepts the

interpretation that a 50-50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act. See 8 C.F.R. § 214.2(l)(1)(ii)(K). Neither the Act nor the regulations provides a definition of the term "joint venture." However, the AAO has applied a broad definition of joint venture in prior decisions. *Matter of Hughes* states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (quoting a definition from [REDACTED] *International Business Enterprise* (Prentice Hall, 1973)). *Matter of Siemens Medical Systems, Inc.* states: "Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents." 19 I&N Dec. 362, 364 (BIA 1986). In order to meet the definition of "qualifying organization," a joint venture must be formed as a corporation or other legal entity. 8 C.F.R. § 214.2(l)(1)(ii)(G). A business created by a contract as opposed to one created under corporation law is not be deemed a "legal entity" as used in section 101(a)(15)(L) of the Immigration and Nationality Act. *Matter of Hughes*, 18 I&N Dec. 289, 294 (Comm. 1982); see also *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

As noted above, the petitioner did not provide a copy of the actual joint venture agreement. It is unclear if the agreement is more than a contractual arrangement between the petitioner and the beneficiary, as there is no evidence of a bona fide "third corporation," or other legal entity created as a result of the agreement. Such evidence would include articles of incorporation or articles of organization for the company formed as a result of the joint venture agreement and evidence that the company is doing business.

Further, it is noted that, even if the petitioner and the foreign entity had formed a qualifying 50-50 joint venture prior to the date of filing the petition, the petitioner in this case is not the joint venture itself, but rather one of the partners or shareholders in the claimed joint venture. The partners or shareholders of a 50-50 joint venture do not acquire a qualifying corporate relationship by virtue of forming a joint venture; the qualifying relationship formed exists only between each individual parent and the joint venture entity. The limited evidence in the record indicates that the beneficiary, while employed abroad, was employed by his own sole proprietorship and not by the "joint venture."

Based on the foregoing discussion, the petitioner and the foreign entity do not have a qualifying relationship for the purposes of this visa classification. For this additional reason, the petition cannot be approved.

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); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.