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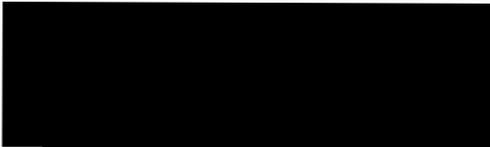
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File: WAC 08 242 50189 Office: CALIFORNIA SERVICE CENTER Date: **OCT 16 2009**

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

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

ON BEHALF OF PETITIONER:



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).


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Nevada corporation established in 2008, states that it intends to provide business consulting services. The petitioner claims to be a subsidiary of Promotores Profesionales del Noroeste, SA de CV, located in Mexico. The petitioner seeks to employ the beneficiary as the chief executive officer of its new office in the United States for a period of three years.¹

The director denied the petition on two independent grounds, concluding that the petitioner failed to establish: (1) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity; and (2) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity within one year of approval of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the petitioner submitted evidence that "showed unquestionably" that the beneficiary has been and would be performing duties that are executive and managerial in nature. Counsel contends that the director did not take into account the reasonable needs of the Mexican or U.S. entities in light of their overall purpose or stage of development. The petitioner submits 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 established that the beneficiary has been employed by the foreign entity 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.

The petitioner filed the nonimmigrant petition on September 9, 2008. In a letter dated August 22, 2008, counsel for the petitioner described the beneficiary's position with the foreign entity as follows:

For at least one of the preceding years, [the beneficiary] has been employed in an executive capacity for the foreign entity. Since 2001, he has directed the management of [the foreign entity], established the goals and policies of the company, and exercised wide latitude in discretionary decision-making with no supervision from anyone. This meets the definition of executive capacity under 8 CFR § 214.2(I)(1)(ii)(C).

In support of the initial filing, the petitioner provided a copy of the foreign entity's organizational chart, which indicates that the beneficiary, as president, directly supervises a general manager, an accounting and finance manager, a business development manager and a legal affairs employee. The chart indicates that the general manager supervises two office managers, a payroll employee, two customer service employees, and two assistants. The chart shows that the accounting and finance manager supervises a tax manager and an assistant. The petitioner submitted copies of photo identification for the employees listed on the chart, as well as copies of CPA licenses for the general manager, the accounting and finance manager, and office manager.

On September 16, 2008, the director issued a request for evidence (RFE), instructing the petitioner to provide, *inter alia*, additional evidence to establish that the beneficiary was employed by the foreign entity in an executive or managerial capacity for one continuous year within the three years preceding the filing of the petition. Specifically, the director requested: (1) a more detailed description of the beneficiary's duties abroad and the percentage of time the beneficiary spends in each of his listed duties; (2) job titles and job duties for all employees managed by the beneficiary; and (3) an organizational chart for the foreign entity. The director also requested copies of the foreign company's payroll records pertaining to the beneficiary for the year preceding the filing of the petition.

In a letter dated December 8, 2009, counsel for the petitioner provided the following information in response to the director's request for a more detailed description of the beneficiary's duties:

Beneficiary is the 98% owner of the parent company, and served as chairman of the board of chief executive officer. As a small business, he performed the day-to-day management operations of the business, including preparation and review of all transactional documents, development of marketing strategies, execution of business strategies, risk assessment, personnel planning.

The petitioner submitted a letter dated November 24, 2008, from the U.S. company's accountant, [REDACTED] who stated that the foreign entity does not have payroll. He stated that "the company has outsourcing with two other companies that carry the employees and their corresponding payroll." Mr. [REDACTED] noted that as a shareholder of the foreign entity, the beneficiary was not treated as an employee and therefore was not on the payroll for the outsourcing companies. [REDACTED] stated that the beneficiary did receive guaranteed payments. In support of this statement, the foreign entity submitted a chart summarizing payments made to the beneficiary from January through December 2007. The petitioner submitted copies of the beneficiary's bank statements as evidence that the funds from the foreign entity were deposited in his account.

The petitioner submitted a new organizational chart for the foreign entity, showing the same structure outlined in the previously submitted chart. The petitioner also submitted a chart depicting the foreign entity as "parent company" with dotted-line authority over "Administracion en Accion SA de CV, (Independent Contractor, Outsourced Employees)," and "Comercializadora de Clubes y Desarrolles, SC, (Independent Contractor, Outsourced Salespersons)." The petitioner did not submit the requested position descriptions for the foreign entity's employees.

The director denied the petition on December 12, 2008, concluding that the petitioner failed to establish that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the petitioner provided minimal documentation describing the beneficiary's position with the foreign entity, and submitted a vague job description that merely paraphrased the statutory definition of executive capacity. The director further found that the petitioner failed to establish that the beneficiary has been primarily managing a staff of professional employees, as the petitioner did not provide the educational levels for the foreign entity's employees.

On appeal, counsel for the petitioner asserts that the director failed to take into account evidence "that showed unquestionably that the beneficiary performed duties normally associated with both a manager and an executive for the Mexican entity." Counsel states:

[T]he beneficiary was the sole responsible party for entering into contracts on behalf of either entity, for hiring and firing in the Mexican entity, for opening up bank accounts, interfacing with outside professionals, including accountants and attorneys, for filing all required corporate tax and licensing documents. Given this, it is incredulous to assert that the beneficiary is not primarily a manager or executive. . . .

Counsel asserts that the director applied a higher standard of proof than that allowed by law and emphasizes that the petitioner need only establish by a preponderance of the evidence that the beneficiary has been employed in a primarily managerial or executive capacity.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary has been employed by the foreign entity in a managerial or executive capacity.

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

Here, the petitioner's initial description of the beneficiary's duties consisted of counsel's statement that the beneficiary "has directed the management of [the foreign entity], established the goals and policies of the company, and exercised wide latitude in discretionary decision-making with no supervision from anyone." Counsel asserted that such duties meet the definition of "executive capacity." As noted by the director, counsel simply paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Contrary to counsel's assertion, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Accordingly, the director requested a detailed description of the beneficiary's duties while employed by the foreign entity, and a clear explanation as to how his time was allocated among his duties. In response, counsel stated that the beneficiary "performed the day-to-day management operations of the business including preparation and review of all transactional documents, development of marketing strategies, risk assessment, personnel planning." This brief statement provides little insight into the nature of the beneficiary's actual duties and falls significantly short of being responsive to the director's request for a detailed position description. Furthermore, the petitioner failed to include the specific breakdown of the percentage of time the beneficiary devotes to specific duties. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In the notice of decision, the director clearly advised that the petition was being denied, in part, based on the petitioner's failure to provide a meaningful description of the beneficiary's specific job duties. Despite this

finding, the petitioner has not provided any additional information regarding the beneficiary's duties on appeal, and instead, counsel focuses on the beneficiary's level of authority within the foreign company as its majority owner and president.

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).

Thus, the fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity as defined by sections 101(a)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties fall within the statutory definitions of managerial or executive capacity. The AAO does not doubt that the beneficiary exercises the requisite level of authority over the foreign entity. However, due to the petitioner's failure to provide a meaningful description of the beneficiary's day-to-day duties, and a breakdown of how the beneficiary's time has been allocated among managerial and non-managerial tasks, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity. 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)).

Moreover, 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. When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

The petitioner has submitted organizational charts indicating that the foreign entity has a multi-tiered personnel structure and employs a staff of 13 employees in addition to the beneficiary. 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).

In the request for evidence, the director specifically requested that the petitioner provide job descriptions and educational qualifications for the beneficiary's subordinate employees. Such information is critical in

determining whether the beneficiary supervises professionals, managers or supervisors. The petitioner failed to submit evidence of the employees' duties or educational credentials. An employee will not be considered to be a manager or supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, the record contains insufficient evidence to establish that the foreign entity actually employs the claimed workers. The petitioner indicated in response to the RFE that the foreign entity has no payroll and instead "has outsourcing agreements with two other companies that carry the employees and their corresponding payroll." The petitioner did not provide any evidence regarding these "two other companies" or their relationship with the petitioner. The petitioner submitted a chart suggesting that the foreign entity utilizes the services of independent contractors employed by "Administracion en Accion SA de CV" and "Commercializadora Clubes y Desarrollos, SC," but it is not clear whether the petitioner was attempting to demonstrate that the employees on the foreign entity's organizational chart are employees of these two, apparently unrelated, companies. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of the beneficiary's job title, placement on a general organizational chart or broadly-cast business responsibilities. The petitioner's description of the beneficiary's duties is insufficient to establish that the beneficiary has performed primarily executive duties while employed by the foreign entity.

Finally, the AAO notes that the information provided in the beneficiary's resume indicates that he has been self-employed as a consultant and real estate dealer, and working for two employers, in addition to the foreign entity, since 2002. Specifically, the beneficiary indicates that he has served as "Partner-Director" of the foreign entity since 2001. The beneficiary also indicates that since 2001, he has served as a business consultant responsible for strategy and development of new markets for "Administracion en Accion, SA de CV," a payroll and human resources company. In addition, the beneficiary states that since 2002, he has served as a business consultant responsible for strategy and sales training, for a company called "Comercializadora de Clubes y Desarrollos, SC." Finally, the beneficiary indicates that he has been self-employed as a business consultant and

real estate dealer since 2002. This information raises questions as to whether the beneficiary has been employed by the foreign entity on a *full-time* basis for one continuous year during the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

Based on the foregoing discussion, the petitioner has not submitted sufficient evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the beneficiary would be employed by the United States entity in a qualifying managerial or executive capacity within one year.

The petitioner stated on Form I-129 that the beneficiary will "oversee design, marketing, promotion, delivery and quality of programs, products and services" in his proposed role as chief executive officer of the U.S. entity.

Counsel indicated in his letter dated August 21, 2008 that the beneficiary will "direct the management of the organization, establish the goals and policies of the company, and exercise wide latitude in discretionary decision-making with no supervision from anyone."

The petitioner submitted a detailed business plan for the U.S. company, in which it indicates that it anticipates that the company will grow to a staff of three full-time employees within the first two years of operation. The petitioner stated that it "plans to develop and train 2 new salespeople by year two," but that the beneficiary will be the primary sales contact until revenues increase." The petitioner indicates that its revenues will be derived from consulting services, business management services and agency services.

The petitioner's business plan further describes the company's personnel plan as follows:

The company will rely on its president for the most of its first 2 years of operations, then a junior sales person and an assistant will be hired.

While this business unit becomes profitable, the Mexican office will handle information, most of the accounting and other chores using the internet.

Other positions such as public relations or marketing are likely to be outsourced. . . .

The petitioner indicates that the beneficiary would be the only employee in fiscal year 2009, and that an "assistant" would be hired in fiscal year 2010. The petitioner's plan calls for the hiring of a sales person in fiscal year 2011. The petitioner also submitted an organizational chart indicating that an assistant would be hired in July 2009 and a sales person hired in December 2009. According to the petitioner's pro forma profit and loss statement, the beneficiary would be the only employee paid between August 2008 and July 2009.

In the request for evidence issued on September 16, 2008, the director instructed the petitioner to submit a more detailed description of the beneficiary's proposed duties in the United States, including the percentage of time he will spend in each of the specific listed duties. The director also requested that the petitioner provide the job titles and position descriptions for employees the beneficiary will supervise.

In response to the director's request, counsel for the petitioner provided the following description of the beneficiary's proposed duties:

As Chief Executive Officer of the U.S. entity, the beneficiary will implement the strategic goals and objectives of the organization. With the chair, enable the Board to fulfill its governance function. To give direction and leadership toward the achievement of the organization's philosophy, mission, strategy and its annual goals and objectives. The beneficiary will oversee design, marketing, promotion, delivery and quality of programs, products and services. He will actively seek new business opportunities needed for sustained growth. He will recommend yearly budget and manage the organizations resources within those budget guidelines according to current laws and regulations. He will manage the human resources of the organization according to authorized personnel policies and procedures that fully conform to current laws and regulations. He will be the face of the organization and will present a positive image for the corporation before the local community and seek to build a positive brand in the community.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. In denying the petition, the director observed that the petitioner provided a vague and non-specific description that fails to demonstrate what the beneficiary will do on a day-to-day basis. The director further noted that, based on the duties described, it appeared that the beneficiary would be performing the marketing functions of the organization, and that the petitioner had failed to submit evidence that it will employ individuals within one year who will relieve the beneficiary from performing the non-qualifying duties of the organization.

On appeal, the petitioner objects to the director's decision and asserts that "there is nothing in the statute or the regulations that prevents the issuance of an L-1A status to the beneficiary of a start-up business with no other employees." Counsel asserts that the petitioner submitted ample evidence to establish that the beneficiary would be performing primarily managerial or executive duties in the United States. Counsel notes that the beneficiary has signed the petitioner's lease, incorporation documents, licenses, insurance and bank documents and that only an executive or manager has such authority. The petitioner submits letters from its contracted accountant, and a letter from a company director, [REDACTED], who confirm the beneficiary's authority to manage the U.S. company.

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

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(1)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a

manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

Here, the petitioner has submitted a detailed business plan, provided evidence of the foreign entity's investment in the United States entity, and demonstrated that the beneficiary will have managerial or executive authority over the new operation. However, the petitioner has failed to sufficiently describe the beneficiary's proposed duties, and has failed to establish that how the beneficiary would be relieved from performing non-qualifying duties within one year.

First, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.* The AAO will then consider this information in light of the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

As noted by the director, the petitioner has provided a general description of the beneficiary's proposed duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after one year in operation. The position description submitted at the time of filing merely paraphrased the statutory definition of executive capacity and provided no insight into the nature of his actual duties. As stated above, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Accordingly, the petitioner was instructed to provide a detailed description of the beneficiary's specific proposed duties and the amount of time he is expected to allocate to each task. The position description submitted in response was not substantially more detailed than the description submitted at the time of filing and included primarily broad and nonspecific duties. For example, the petitioner indicated that the beneficiary will "implement the strategies goals and objectives of the organization," and "give direction and leadership toward the achievement of the organization's philosophy, mission, strategy and goals." 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.

Moreover, as noted by the director, some of the duties described, without further explanation regarding the specific tasks to be performed, suggest that the beneficiary may be directly involved in marketing and client services operations. The AAO will not speculate as to what qualifying duties may be involved in seeking new business opportunities and "overseeing" "design, marketing, promotion, delivery and quality of programs,

products and services," particularly in light of the petitioner's personnel plan, which does not contemplate the hiring of any subordinate staff to perform these services during the first year of operations. If the beneficiary will be personally involved in selling or providing the petitioner's consulting, management and agency services to clients, such duties would not be in a managerial or executive capacity. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

As noted above, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While it appears that the beneficiary would exercise the requisite authority over the U.S. company as the senior member of its one or two-person staff, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his responsibilities and to the operation of the business in general. As noted above, the petitioner's business plan calls for the beneficiary to be the company's primary sales contact until additional sales people can be hired. The petitioner does not intend to hire a sales person until some time during the second year of operations. Nor does the petitioner intend to hire any personnel to provide the services of the company which will include consulting, business management and agency services. In fact, the petitioner states that "the company will rely on its president for the most of its first 2 years of operations." The petitioner indicates that the Mexican company will "handle information, most of the accounting and other chores using the Internet," but the petitioner has not explained with any specificity how the foreign entity's staff would relieve the beneficiary from primarily performing non-managerial duties associated with the day-to-day operations of the U.S. business. Although it appears that the petitioner may hire an assistant near the end of the first year of operations, the petitioner did not indicate what duties the assistant would perform. The director specifically requested that the petitioner provide the job titles and job duties of employees who would be supervised by the beneficiary. 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).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a

manager.” *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company’s small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a “shell company” that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The AAO acknowledges that a sole employee, in some circumstances, may provide primarily managerial or executive services for a petitioner. However, the petitioner must establish that someone other than the beneficiary would be responsible for performing the non-managerial tasks inherent to the business, such that the beneficiary would be able to devote the majority of his time to qualifying duties. Upon review of the record in this matter, the petitioner has not provided substantiating evidence that the petitioner, within one year, would rely on anyone other than the beneficiary to carry out the necessities of marketing and selling the petitioner's services to its prospective clients, or to provide the company's actual consulting, management and agency services.

Overall, as the petitioner fails to clearly explain what tasks the beneficiary would perform after the petitioner's first year in operation, how much time the beneficiary will devote to performing non-qualifying tasks, or who would be performing the routine, non-managerial duties of the business, it cannot be confirmed that he will be "primarily" employed as a manager or executive within one year. 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. 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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.