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



U.S. Citizenship
and Immigration
Services

D7



File: EAC 09 073 51605 Office: VERMONT SERVICE CENTER Date: **APR 06 2010**

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 seeks to employ the beneficiary temporarily in the United States 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 Delaware corporation established in April 2008, is described as a commercial and residential construction company. It claims to be a branch office of [REDACTED] located in Almaty, Kazakhstan. The petitioner seeks to employ the beneficiary as the manager of its new office in the United States for a period of three years.¹

The director denied the petition, determining that the petitioner had failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, or that he would be employed in the United States in a primarily managerial or executive capacity.²

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 seeks to clarify the foreign

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

² Although the director denied the petition based on its merits, the AAO notes that the petition was improperly filed, and thus should have been rejected by the director at the time of filing pursuant to 8 C.F.R. § 103.2(a)(7)(i). The Form I-129 petition identifies [REDACTED] as the employer and the petitioner. The regulation at 8 C.F.R. § 103.2(a)(2) requires that the petitioner sign the petition. In this instance, no employee or officer of [REDACTED] signed the Form I-129. The only signature on that form is that of [REDACTED] who represents the petitioner as counsel. [REDACTED] signed Part 6 of the Form I-129, "Petitioner's Signature," thereby attempting to file the petition on behalf of the actual United States employer. She provided a limited power of attorney signed by the petitioner, authorizing her to "carry out all the legal immigration filings in order to obtain L-1 visa" for the beneficiary. However, the regulations do not permit [REDACTED] who is not the petitioner or an employee or officer of the petitioner, to sign Form I-129 on behalf of a United States employer. There is no regulatory provision that waives the signature requirement for a petitioning United States employer or that permits a petitioning United States employer to designate an attorney or accredited representative to sign the petition on behalf of the United States employer.

The petition was not properly filed because the petitioning United States employer, [REDACTED] did not sign the petition. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition.

Although [REDACTED] did not properly file the instant petition, all references to "petitioner" in this decision refer to this entity.

and U.S. entity's staffing levels and emphasizes that the director failed to take into account that the petitioning company is newly established in the United States. Counsel submits a brief 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 petitioning company was established as a Delaware corporation in April 2008 and filed the instant petition on January 12, 2009. Although the petitioner failed to indicate on Form I-129 that the beneficiary is coming to the United States to open a new office, there is no evidence in the record which suggests that the company has engaged in any business activities in the United States. The AAO concurs that the U.S. entity is a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F).³

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

³ The AAO notes that the petitioner indicated on Form I-129, Part 5, that the company was established in April 2002 and has 9 permanent and 22 temporary employees. The petitioner has clarified on appeal that this information pertains to the foreign entity. However, it was not unreasonable for the director to believe that this information pertained to the U.S. petitioner, particularly in light of the petitioner's failure to indicate on the L Classification Supplement to Form I-129 that the beneficiary is not coming to the United States to open a new office.

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). Accordingly, the petitioner's and beneficiary's eligibility under the regulations pertaining to new office petitions, at 8 C.F.R. §214.2(l)(3)(v), will be addressed herein.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue to be addressed is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of approval of the petition.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

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

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

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 12, 2009. The petitioner stated that the beneficiary will be employed as "manager" of the U.S. office, and "will be responsible for investments, trade site selection, acquisitions, financing, marketing construction, and management of the company."

The foreign entity submitted a brief statement regarding the beneficiary's current and proposed duties, stating: "Wages in the American branch of company (Dallas, Texas) is [*sic*] [\$144,000], and the function responsibilities are – investment, trade, management." In a separate statement, the general director of the foreign entity stated that the beneficiary has been allotted "all rights and authorities to sign all agreements and documents, to make investment, to produce the estimation of projects and to search for cash resources for realizing of projects."

The petitioner submitted a resolution of the Board of Directors of the foreign entity which indicates that the foreign company has authorized the opening of a branch office in Dallas, Texas, which is to receive funding from the foreign entity in the amount of \$500,000.

The petitioner did not submit any additional information regarding the beneficiary's proposed duties, or information regarding the proposed nature of the new U.S. office, the scope of the entity, its organizational structure, and its financial goals.

The director issued a request for additional evidence on January 16, 2009, in which he requested, *inter alia*, evidence to establish that the beneficiary will be employed in a managerial or executive capacity in the United States. Specifically, the director requested: (1) a comprehensive description of the beneficiary's proposed duties; (2) a list of U.S. employees which identifies each employee by name and position title; (3) complete position descriptions for all employees in the United States, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis, and the educational requirements for each position; and (4) a complete copy of the company's IRS Forms 941, Employer's Quarterly Federal Tax Return, for all three quarters of 2008. In addition, the director observed that the petitioner filed a second L-1A petition for the position of "manager" and requested that the petitioner "explain why your company requires two managers for nine (9) permanent employees."

The petitioner submitted a response to the request for evidence on February 24, 2009. The petitioner did not include in its response the requested comprehensive description of the beneficiary's proposed duties or any additional information regarding the proposed position of "manager." The petitioner indicated that the U.S. company currently employs a full-time project manager who has a high school diploma, and is responsible for supervising and managing each project, overseeing all subcontractors, and selecting and purchasing materials. The petitioner also stated that it employs a secretary/treasurer/bookkeeper who works 30 hours per week and is responsible for maintaining corporate documents and handling accounts payable and receivable.

The petitioner also submitted a list of "future employee requirements," which provides brief job descriptions, salaries and educational requirements for the positions of vice president of operations, director of real estate, construction supervisor, construction manager (four positions), and secretaries (three positions).

Finally, in response to the director's request that the petitioner explain its need for two managers in the United States office, counsel stated:

The reason would be to assist in establishing a branch of its company in this city and is based on project growth. If its request is granted, during the next few months it would employ a number of people in Dallas and other locations in the U.S.A. where they would establish locations. Its plans also call for expanding its activities to other cities and regions of the U.S.A., Canada and Latin America. Dallas would be the headquarters for this part of the world. The business would begin its operations as soon as the two managers arrive in Dallas.

The director denied the petition on February 26, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director noted that the petitioner failed to submit evidence to corroborate the staffing levels claimed at the time of filing, submitted inconsistent information regarding the number of employees working for the company, and failed to submit the requested evidence of wages paid to employees. The director found that the U.S. company currently employs, at most, only two employees and has not shown that it can support two managerial positions. The director concluded that the beneficiary would be engaged in the non-managerial, day-to-day operations of the business, and would not be managing an essential function or a subordinate staff comprised of supervisory, professional or managerial employees who could provide relief from performing the services of the corporation.

On appeal, counsel for the petitioner seeks to clarify the petitioner's staffing levels, noting that the foreign entity, rather than the U.S. entity, current has nine permanent employees. Counsel states that the petitioner's two employees, the project manager and secretary/treasurer, were hired in February 2009, and therefore the petitioner had not yet filed an IRS Form 941 reflecting wages paid to these employees. With respect to the beneficiary's proposed role, counsel states:

The managerial functions of [the beneficiary's] assignment within [the petitioning company] in Dallas will be to manage a department, subdivision, function or component of the organization and, in addition, supervise and control the work of other supervisory, professional or managerial employees and will manage an essential function within [the petitioner] in Dallas – the same type of functions he is presently performing at this time for [the foreign entity] in Kazakhstan. . . . [The beneficiary] is listed [on the attached organizational] chart as CEO/General Manager and would have under his authority and command a Secretary/Treasurer, Accounting, Payroll, Human Resources. The reason why [the beneficiary] is not already performing these functions in the U.S. branch is due to the fact that he is awaiting his L1 visa to be approved. As soon as it is approved he will come to Dallas to take charge of his position as manager – in accordance with the chart enclosed – and will start hiring the necessary staff to carry out the objectives of the U.S. branch of [the petitioner], in order to direct the day-to-day operations.

The petitioner submits a proposed organizational chart for the U.S. company which indicates that the beneficiary will directly supervise the secretary/treasurer, who will in turn supervise an accounting employee or department, including payroll and human resources staff. The chart shows that the beneficiary will also supervise an operations general manager, who in turn will supervise the director of operations, to whom the project manager reports. The chart also shows vacancies for the positions of director of real estate/land acquisitions, marketing, finance, construction managers, job supervisors and sub-contractors. The petitioner submitted brief position descriptions for each proposed position, and stated that the beneficiary's proposed duties include the following:

- Oversee all departments within company
- Secure all funding for projects
- Approve budgets
- Long Term Direction of Company
- Project Selection
- International Project Selection

Finally, the petitioner submitted a copy of electronic mail correspondence dated March 10, 2009 which appears to be a job posting placed by the U.S. company. It is unclear whether the advertisement is in draft or final form, and there is no indication as to when or where it was posted. The ad lists position openings for an accountant, a director of real estate land acquisition, and "someone for marketing, finance, sub contractor and job supervisor."

Upon review, the petitioner's assertions and additional evidence are not persuasive. Despite some misunderstanding on the part of the director in analyzing the petitioner's staffing levels, and the director's

failure to recognize that the petitioner is a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), the AAO concurs with the director's ultimate conclusion that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, which allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low-level 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 that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* 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.

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 described the proposed nature of the new U.S. office, the scope of the entity, its organizational structure, and its financial goals.

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, the petitioner stated that the beneficiary "will be responsible for investments, trade, site selection, acquisitions, financing, marketing, construction and management of the company," but failed to describe any duties the beneficiary would perform within these broad areas of responsibility. 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).

Accordingly, the director requested a comprehensive description of the beneficiary's proposed duties and an explanation as to how the duties will be managerial or executive in nature. While the petitioner submitted a response to the RFE, the petitioner did not respond to this specific request, or otherwise provide any additional information regarding the beneficiary's proposed job duties. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

The AAO acknowledges that counsel has sought to clarify the beneficiary's duties on appeal, noting that the beneficiary will "manage a department, subdivision, function or component of the organization," "supervise and control the work of other supervisory, professional, or managerial employees," and "direct the day-to-day operations of the company." The petitioner also adds that the beneficiary will "oversee all departments," "secure funding for projects," be responsible for the company's long-term direction, approve budgets and select projects. These nonspecific and general descriptions of the beneficiary's proposed role cannot be accepted in lieu of the comprehensive job descriptions specifically requested by the director. 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 proposed 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. As the petitioner has not provided a detailed description of the beneficiary's duties sufficient to demonstrate what will constitute the beneficiary's primary duties, it has failed to meet its burden and the petition cannot be approved.

Furthermore, 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 within one year.

The petitioner claims to have hired a project manager and a secretary/treasurer, but has failed to submit any evidence to establish that these positions have been filled. The petitioner indicates that its first IRS Form 941 does not have to be filed until after March 31, 2009; however, it could have provided alternative evidence of payments to its claimed employees. Moreover, the petitioner claims that it will hire staff to fill the positions of director of operations, finance, director of real estate, marketing, accounting, construction manager and construction supervisor. However, the petitioner has provided no timetable for hiring these employees, no hiring plan, no business plan, and no other evidence that would support a finding that the company will be fully staffed within one year of approval of the petition. The petitioner also failed to submit any evidence of the company's financial projections and objectives and therefore, the AAO has no basis to determine whether the petitioner could feasibly hire the proposed staff within one year. The e-mail correspondence submitted on appeal referencing the company's job openings, which was prepared several weeks after the denial of the petition, is insufficient to support a finding that the company will grow quickly and hire sufficient staff to relieve the beneficiary from performing the day-to-day operations of the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO cannot speculate as to when the proposed employees might be hired or otherwise determine how many employees the company would support at the end of the first year of operations, or who would be performing the day-to-day, non-managerial functions of the petitioner's construction company. There is insufficient evidence to support the petitioner's claim that the beneficiary would supervise subordinate managers, supervisors or professionals within one year.

Overall, in light of the petitioner's failure to provide the requested comprehensive job description for the beneficiary, and given the lack of detail regarding the petitioner's business plan, hiring plan and financial objectives for the first year of operations, the petitioner has not established that the beneficiary will perform primarily managerial or executive duties or that the new company could support a managerial or executive position within one year. For this reason, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that beneficiary was been employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner indicated on Form I-129 that the beneficiary is the foreign entity's chief executive officer and chairman, and that his duties include "supervision of construction projects, financial control, development of company policy and purchasing." The petitioner submitted a letter from the foreign entity, which stated the following with respect to the beneficiary's current overseas position:

[The beneficiary] is the chairman of general meeting, the member of the council of directors, achieves a supervision of the motion of activity of company in the region of building. Also he is accomplished financial control, and development of the general policy of the company.

In the request for evidence issued on January 16, 2009, the director instructed the petitioner to provide the following additional evidence to establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity: (1) an organizational chart for the company, indicating the beneficiary's position within the hierarchy; (2) a description of the typical managerial responsibilities performed by the beneficiary abroad, supported by documentary evidence; (3) the number of subordinate supervisors who worked under the beneficiary's management; (4) the job titles and duties of the employees he managed; (5) the amount of time the beneficiary allotted to executive duties and to non-executive duties; and (6) the degree of discretionary authority in day-to-day operations the beneficiary had in the overseas position.

In response, the petitioner submitted a letter from the foreign entity. In response to the director's request for a description of the beneficiary's typical managerial responsibilities, the foreign entity stated:

He supervises the Company's business activity in the field of construction. He carries out the financial control as well as development of the general company policy of Company.

Counsel responded that there were three subordinate supervisors who worked under the beneficiary's direct management, including a chief engineer, an architect and an engineer.

Finally, the petitioner submitted an organizational chart for the foreign entity on which the beneficiary's name is handwritten as "Chairman of the Committee Directors" at the top of the chart. No other individuals are named on the chart. The chart shows the beneficiary's only direct subordinate as the general director, who in turn supervises an assistant, an office manager, an accountant, a deputy assistant on legal matters, and a site manager. Other positions and departments identified on the chart include bookkeeping, cash office, internal audit, chambermaid, security guard, drivers, engineering supervision, engineering skills and workers.

In denying the petition, the director determined that the minimal evidence submitted in response to the RFE was insufficient to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The director observed that the petitioner failed to describe the typical managerial responsibilities the beneficiary performed abroad, and failed to submit an organizational chart which clearly depicts the beneficiary's position within the company's overall organizational structure.

On appeal, the petitioner provides additional information regarding the beneficiary's duties and the structure of the foreign entity. Specifically, the petitioner indicates that the beneficiary's responsibilities include the following:

- Supervision for work progress of company in construction area of activity
- Financial control
- Development of general policy of company

In addition, the petitioner stated that the beneficiary's duties include:

- Directly does finish control of done works and confirms it for finish payment
- Get an everyday report about building procedures from chief engineer
- Does everyday visual control for building procedures
- Gives a guidance for improvement a building procedures
- Does everyday planning meeting and give a guidance

The petitioner indicates that the beneficiary directly supervises a chief engineer, an architect, and an "engineer of engineering nets," who in turn supervise a chief engineer assistant, a foreman, and two additional engineers. The petitioner provides names, dates of hire and salary information for these employees.

Finally, the petitioner submits an organizational chart for the foreign entity on which all position holders are identified by name. Two of the beneficiary's claimed direct subordinates, the chief engineer, and the "engineer of engineering nets," are not listed on the organizational chart, nor do their position titles appear. The architect who is claimed to be supervised by the beneficiary is listed as "site manager" on the chart. The foreman is listed on the chart as "engineering supervision" and the chart shows that he reports directly to a site manager. The other engineers are listed as "engineering skills" and they also report to the site manager, who was not among the beneficiary's named subordinates.

As noted above, the petitioner clarifies on appeal that the foreign entity has nine employees and 20 or more temporary employees. The petitioner provides a list of permanent employees which includes the beneficiary, the general director, the chairman of the council of directors, the chief accountant, two accountants, a lawyer, a maid and a driver. The petitioner also provides a list of temporary employees, which includes two maids, two drivers, four security staff, two workers, three engineers, three accountants, a general director, an office manager, a lawyer, and an economic advisor. The AAO notes that one of the temporary engineers is listed elsewhere as "architect" and "site manager."

Upon review, the petitioner has not established that the petitioner has been employed by the foreign entity 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 either in an executive or managerial capacity. *Id.*

The petitioner initially described the beneficiary's position with the foreign entity in only general terms, noting that the beneficiary's duties included "supervision of construction projects, financial control, development of company policy and purchasing." This description provides little insight into what specific managerial or executive duties the beneficiary performs on a day-to-day basis, and no indication as to his level of supervisory authority over construction projects, the nature of his "financial control" duties, or the types of company policies he has developed. 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, without further explanation, the beneficiary's responsibility for "purchasing" appears to be an operational task, rather than a function normally performed by a manager or executive.

Accordingly, the director requested a detailed description of the typical managerial responsibilities the beneficiary performs, and requested that the petitioner "please articulate and submit documentary evidence of the managerial decisions made by the beneficiary on behalf of the foreign organization." The petitioner's response essentially restated the vague duties provided at the time of filing and offered no insight into the nature of the beneficiary's duties. The petitioner stated that the beneficiary "supervises the company's business activity in the field of construction," "carries out the financial control," and develops "the general policy of the company." These statements were non-responsive to the director's request for a detailed description of the beneficiary's typical responsibilities. Furthermore, in responding to the RFE, the petitioner omitted the beneficiary's previously stated responsibility for purchasing, a potentially non-managerial duty, and instead stated that he spends 100 percent of his time on the three ambiguous duties stated above. Finally, the petitioner did not submit any evidence in response to the director's request that the petitioner "articulate and submit documentary evidence of the managerial decisions" the beneficiary has made. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

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. As with the beneficiary's proposed U.S. position, 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. Here, the petitioner has not established with sufficient specificity what duties the beneficiary primarily performs, such that they could be classified as managerial or executive in nature. The AAO will not accept a vague job description and speculate as to what qualifying duties may be involved. A beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of broadly-cast job responsibilities.

On appeal, the petitioner once again reiterates that the beneficiary is responsible for supervising construction activities, financial control and development of the general policy of the company, a description which the director already found to be insufficient to establish the beneficiary's eligibility as a manager or executive. The petitioner states that the beneficiary's responsibilities include "directly does finish control of done works," "get an everyday report about building procedure from chief engineer," "does everyday visual control for building procedure," "give a guidance for improvement" and "does everyday planning meeting and give a guidance." These duties are poorly articulated, vague, and otherwise insufficient to establish that the beneficiary's duties are primarily managerial or executive in nature.

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 as one of the higher ranked among its nine permanent employees. However, due to the petitioner's failure to provide a sufficiently detailed 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 abroad in a primarily managerial or executive capacity.

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, 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.

Despite the petitioner's claim that the beneficiary is responsible for "financial control" and overall policy for the foreign entity, the petitioner indicates that the beneficiary's only subordinates are the chief engineer, the architect, and the "engineer of engineering nets." None of the individuals identified as the beneficiary's direct subordinates appears on the foreign entity's list of permanent employees. The "architect" and "chief engineer" appear on the temporary employee list simply as "engineer," while the "engineer of engineering nets" does not appear on the foreign entity's organizational chart, or either employee list. Therefore, while the petitioner indicates that the beneficiary supervises three employees who in turn supervise lower-level employees, the discrepancies in the record prohibit a determination as to the actual composition of the beneficiary's subordinate staff. In addition, notwithstanding the supervisory job titles assigned to some of the beneficiary's subordinates, the employee lists submitted on appeal suggest that the entire engineering and construction function within the foreign entity is carried out by temporary engineers and workers. It is not clear whether such workers are employed directly by the foreign entity or on a contract basis, or whether the beneficiary has the authority to hire and fire such workers.

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). Here, the petitioner indicates that the beneficiary qualifies as a personnel manager based on his supervision of four supervisory personnel, namely, a kitchen manager, an operations manager, and two floor managers. 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).

The petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An 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. As discussed above, the petitioner's claim that the beneficiary oversees three supervisors is not adequately supported. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of temporary employees. Furthermore, the petitioner has not provided sufficient evidence regarding the duties performed by the temporary employees sufficient to establish that the beneficiary's subordinates qualify as supervisors or professionals.⁴

Based on the lack of a sufficiently detailed position description for the beneficiary and the unresolved discrepancies in the record regarding the beneficiary's subordinate staff, the petitioner has not established that

⁴ In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record as presently constituted does not contain evidence that the petitioner had secured adequate physical premises to house the new office in the United States as of the date the petition was filed. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner stated on Form I-129 that its address is [REDACTED] in Dallas, Texas. In the request for evidence issued on January 16, 2009, the director requested photographs of the interior and exterior of its business premises, as well as a letter from the owner of the building or management company verifying the petitioner's occupancy of the premises.

In response, the petitioner submitted an "office service agreement" entered into on January 28, 2009 by the petitioner and [REDACTED]. The agreement has an initial term of seven months commencing on February 2, 2009. The agreement provides the petitioner with the use of one office with two desks, chairs and Internet connections, with access to conference rooms and kitchen facilities.

The lease agreement submitted in response to the RFE does not establish the petitioner's eligibility pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). 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). Absent evidence that the petitioner had a valid lease agreement for the premises at the address stated on the Form I-129, or some other business premises, as of January 12, 2009, the petitioner has not met this eligibility requirement and 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 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 it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.