

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

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**

Δ7



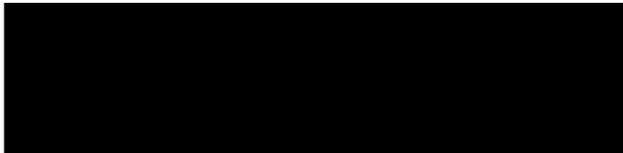
FILE: EAC 09 011 50592 Office: VERMONT SERVICE CENTER Date: **APR 29 2010**

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, 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 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 Texas corporation established in October 2008, intends to operate a retail business. The petitioner claims that it is a subsidiary of [REDACTED], located in India. The petitioner seeks to employ the beneficiary as the president and chief executive officer of its new office in the United States for a one-year period.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director placed undue emphasis on the size of the petitioning company in determining whether the beneficiary would be employed in a managerial or executive capacity within one year. 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 regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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 involved 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 sole issue addressed by the director 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.

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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation, that 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(1)(3)(v). 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 8, 2008. In a letter dated September 5, 2008, the petitioner described the beneficiary's proposed duties as president and CEO as follows:

[The beneficiary] will have overall executive responsibility for developing, organizing, and establishing the purchase, sale and marketing of merchandise for sale in the U.S. market. His other duties will include: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. retail market; (ii) negotiating and

supervising the drafting of purchase agreements; (iii) marketing products to consumers according to [the foreign entity's] guidelines; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by [the foreign entity]; (vi) developing and implementing plans to ensure [the petitioner's] profitable operation; and (vii) negotiating prices and sales terms, developing pricing policies and advertising techniques.

The petitioner further indicated that the beneficiary's time would be allocated as follows:

Management Decisions	40%
Company Representation	15%
Financial Decisions	10%
Supervision of day-to-day company functions	10%
Business Negotiations	15%
Organizational Development of Company	10%

The petitioner stated on Form I-129 that it intends to hire eight employees. The petitioner provided a proposed organizational chart indicating that the beneficiary would supervise a vice president and general manager, who in turn would supervise a sales and marketing manager, a retail manager, and an accountant. The next tier of employees depicted on the chart includes a purchase clerk, an assistant manager, and a bookkeeper. Finally, according to the organizational chart, the assistant retail manager would supervise a cashier/stocker. The petitioner provided brief position descriptions for each of the proposed positions.

The petitioner submitted a two-page business plan which indicates that the company's goal is "to establish retail sales of gas, automotive and household items that has been purchased with an initial investment of \$100,000.00." The petitioner indicated that its initial business would be open 12 hours per day, seven days per week, would employ 10 workers and would pay salaries of approximately \$7,500 per month.

The director issued a request for evidence (RFE) on October 29, 2008, in which he advised the petitioner that additional evidence would be necessary to establish how the new company will grow to be of sufficient size to support a managerial or executive position within one year. Specifically, the director requested: (1) a comprehensive description of the beneficiary's proposed duties; (2) a detailed description of the type of business to be operated; (3) a business plan for the first two years of operation, including specific dates for each proposed action; (4) evidence that establishes the size of the United States investment and the financial ability of the foreign entity to commence doing business in the United States; (5) evidence of the financial status of the U.S. company, including a letter from the petitioner's bank; and (6) a description of the staff of the new office, including the number of employees anticipated, their job titles and duties; and their anticipated wages.

Counsel for the petitioner submitted a letter dated January 22, 2009 in response to the director's RFE. Counsel emphasized that eligibility for the L-1 visa classification is not limited to large U.S. companies or to beneficiaries with extensive supervisory responsibilities. Counsel noted that the petitioner has acquired 50% of the shares of [REDACTED], which operates a gas station and convenience store known as "[REDACTED]"

With respect to the beneficiary's duties, counsel stated:

[The beneficiary] will serve as the President and CEO of our U.S. subsidiary . . . and continues to establish our U.S. operations. He is responsible for all our planning, expansion, banking, budgeting and marketing. In addition, he will hire and train other managers and employees and is in charge of increasing the sales of the company. He is employed at the highest executive level and will have complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] will assume sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation.

[The beneficiary] will supervise other professional and managerial employees, establishes goals and policies for the U.S. investment, and exercises wide latitude in discretionary decision-making under the direction of directors and shareholders of the Parent Company. Beneficiary's duties are clearly "Executive or Managerial" in nature. . . .

Counsel indicated that the beneficiary will serve as president and chief executive officer of both the petitioner and its newly-acquired subsidiary, and will oversee supervisors and managers who supervise employees running the day-to-day operations. Counsel noted that [REDACTED] currently has six employees and "projects to employ additional 20 fulltime employees within that end of three-year period." The petitioner submitted a copy of [REDACTED] Texas Form C-3, Employer's Quarterly Report, for the fourth quarter of 2008, which lists a total of six employees, five of which earned wages of less than \$2,000 over the three-month period. According to the petitioner's IRS Forms W-2, Wage and Tax Statement, the company paid total salaries and wages of \$26,200 in 2008.

The petitioner submitted an organizational chart for [REDACTED] that closely resembles the organizational chart submitted at the time of filing. It did not identify any employees by name. The petitioner submitted evidence that three employees identified on the Employer's Quarterly Report for [REDACTED] received Bachelor's degrees in India, but it is unclear which positions these employees hold. According to the petitioner's brief job descriptions, [REDACTED] requires a bachelor's degree for the positions of general manager, retail manager and staff accountant.

As evidence of its ownership of [REDACTED] the petitioner submitted copies of the company's stock certificates numbers 1 through 3. The evidence shows that 500 shares each were issued to [REDACTED] and [REDACTED] on October 27, 2007. The petitioner submitted the minutes of [REDACTED] minutes of corporate meeting of directors and shareholders held on November 8, 2007, at which [REDACTED] agreed to sell her shares to [REDACTED]. The petitioner submitted a Minutes of Reorganizational Meeting indicating that on December 15, 2008, [REDACTED] transferred half of his interest in [REDACTED] to the petitioning company and resigned as president, electing the beneficiary as president. The petitioner's stock certificates number one for 500 shares, originally issued to [REDACTED] bears the handwritten notation "Transferred to [REDACTED]." Stock certificate number two was issued to [REDACTED] on October 27, 2007, and stock certificate #3 was issued to the petitioning company on December 15, 2008. All three stock certificates indicate the number of shares issued as 500 shares and none of the certificates have been canceled. The total number of shares authorized by [REDACTED] is 1,000 shares.

Finally, in response to the director's request that the petitioner submit evidence of the financial status of the U.S. company and a letter from its bank, the petitioner submitted a financial statement for [REDACTED] and various banking documents pertaining to that company.

The director denied the petition on February 25, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year. The director emphasized that the beneficiary's duties were described in "abstract form" with insufficient description of the actual duties to be performed. The director determined that the evidence was insufficient to establish that the beneficiary's proposed subordinate employees would be managers or professionals, notwithstanding their job titles and educational credentials. The director concluded that, while the beneficiary's proposed job title is president, the petitioner failed to establish that he would be engaged in primarily managerial or executive duties, or that he would be relieved from performing the non-managerial, day-to-day operations involved in producing a product or providing a service.

On appeal, counsel argues that the petitioner is not subject to the "new office" regulations because it purchased a controlling interest in a fully-operational U.S. company, [REDACTED], which has been doing business in the United States for more than one year and was fully staffed and operational at the time of filing. The petitioner submits copies of [REDACTED] IRS Forms 941, Employer's Quarterly Federal Tax Return, and Texas Forms C-3, Employer's Quarterly Report, for all four quarters of 2008 in support of its claim.

Counsel reiterates the beneficiary's previously provided position description and arguments made in response to the director's request for evidence. Counsel emphasizes that the L-1 visa category is available to small companies, and argues that USCIS is required to consider the petitioner's "reasonable needs" and its stage of development.

With respect to the beneficiary's management of the subordinate supervisors, professionals and managers, counsel emphasizes that [REDACTED] (accountant), and [REDACTED] (sales manager) both have obtained bachelor's degree. Counsel asserts that "USCIS officers have routinely considered employees in positions that require degrees to be 'professional employees.'"

Counsel concludes that, based on the evidence submitted, it is "very clear" that the beneficiary will supervise other professional and managerial employees, establish goals and policies for the U.S. investment, and exercise wide latitude in discretionary decision-making.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year.

As a preliminary matter, the AAO acknowledges counsel's claim on appeal that the petitioner is not subject to the regulations governing "new offices" at 8 C.F.R. 214.2(l)(3)(v) because it purchased a controlling interest in [REDACTED], a U.S. company which counsel claims was fully staffed and operating in the United States for over one year as of the date of filing. Counsel's assertion is not persuasive. The evidence of record shows that [REDACTED] was established as a Texas corporation on October 25, 2007, less than one year before the instant petition was filed on October 8, 2008. Furthermore, as discussed further

below, the petitioner has not submitted sufficient evidence to establish that the petitioning company has acquired a controlling interest in [REDACTED]

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.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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. The petitioner's 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).

In the instant matter, counsel and the petitioner have repeatedly described the beneficiary's proposed position in very broad terms, noting his "complete authority to establish goals and policies," his "discretionary decision-making authority," and his "overall responsibility of planning and developing the U.S. investment." These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. 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.).

Similarly, although the petitioner provided a breakdown of how the beneficiary's time would be allocated among his various responsibilities, this description was even more vague, indicating that the beneficiary would devote his time to "management decision," "company representation," "financial decisions," "business negotiations," "organizational development," and "supervision of day-to-day operations." The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. 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. at 1108.

The petitioner also addresses the beneficiary's responsibility for "developing, organizing, and establishing the purchase, sale, and marketing of merchandise" and notes that the beneficiary will be involved in negotiating and supervising the drafting of purchase agreements, "marketing products to consumers," "developing trade and market strategies," negotiating prices and sales terms, overseeing financial issues, and "developing pricing policies and advertising techniques." The petitioner's description does not clearly identify the managerial or executive duties to be performed with respect to the purchase, marketing, sales, finance, and advertising functions of the proposed retail operations. 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.

Thus, while several of the duties generally described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on such factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

The petitioner seeks to rely upon its claimed acquisition of a controlling interest in an existing retail business, [REDACTED], in lieu of submitting a detailed business and hiring plan. While the evidence does show that [REDACTED] is operating a gas station/convenience store, the petitioner has not fully documented its ownership of this claimed subsidiary company. Although the minutes of a meeting allegedly held on December 15, 2008 indicate that the company's shareholder agreed to sell 50 percent of his stock to the petitioning company, the petitioner has not identified the purchase price or provided evidence of a payment from the petitioner to the claimed subsidiary company for the stock to corroborate its claim that the acquisition actually occurred. The petitioner's initial business plan, submitted two months prior to the claimed acquisition of [REDACTED] indicates that the company had already made a \$100,000 investment in a retail operation, but the record is completely devoid of any evidence of this investment or evidence of the financial status of the U.S. petitioner, despite the director's request for such evidence. 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). There is no evidence in the record to establish that the petitioning company has even established a bank account in the United States.

Furthermore, although the corporate documentation for [REDACTED] indicates that [REDACTED] served as company president from November 2007 until December 2008, at which time the beneficiary was elected president, the record shows that the company's state quarterly wage reports for the last three quarters of 2008 were signed by [REDACTED] in his capacity as president of [REDACTED] including one form signed in January 2009. [REDACTED], who resigned as president of [REDACTED] on December 15, 2008, signed the company's 2008 IRS Form 940 as "President" on January 5, 2009. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the foregoing, the AAO is not persuaded that the petitioner has acquired a controlling interest in [REDACTED] or that the beneficiary will serve in a dual role as president of both the petitioner and [REDACTED]

Even assuming *arguendo* that the petitioner had sufficiently documented its purchase of [REDACTED] the AAO agrees with the director's determination that the record does not establish that the beneficiary would serve in a primarily managerial or executive capacity within one year.

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).

The petitioner has confirmed that [REDACTED] had six employees as of December 2008, however, it has failed to identify with any specificity what position most of these employees hold. 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)).

Counsel indicates on appeal that [REDACTED] employs an accountant with a bachelor's degree in sociology and a sales manager with a bachelor's degree in economics. A third employee, whose job title has not been identified, has a bachelor's degree in English. 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 a 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. In the instant case, the petitioner has not, in fact, established that a bachelor's degree in sociology, English or economics is necessary to work as an accountant or sales manager for a gas station.

Furthermore, the record shows that while [REDACTED] employed six employees during the last quarter of 2008, only one employee earned wages commensurate with full-time employment, while four of the remaining staff earned between \$300 and \$400 per month and are clearly not full-time staff as suggested by counsel. 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 managerial position.

While the petitioner has submitted an organizational chart depicting four tiers of proposed managerial employees supervising a staff of two cashiers, a two-person accounting department, a sales and marketing manager, and a purchase clerk, the petitioner has not shown how a single gas station would support this staffing structure. The petitioner's stated need for five or more managers and as few as two cashiers is not entirely plausible given the nature of the petitioner's business. Finally, the AAO notes that the minimal information provided in the petitioner's business plan indicates that the company anticipates paying \$7,500 in salaries per month. The beneficiary's proposed monthly salary is \$3,000. The petitioner did not indicate how \$4,500 would be sufficient to pay the nine additional employees depicted on the petitioner's proposed organizational chart. It is reasonable to assume that the beneficiary's subordinates would primarily be part-time workers who would perform the actual day-to-day tasks of operating the gas station and convenience store. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The AAO's analysis of this issue is severely restricted by the petitioner's failure to submit an adequate business plan. While a business plan is not explicitly required in the regulations, counsel has specifically acknowledged that a detailed business plan is typically provided to establish that a new office will support a managerial or executive position within one year. 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.

In this matter, excluding the evidence submitted with respect to [REDACTED], the totality of the evidence submitted provides very little evidence regarding the number of employees to be hired, the timeline for hiring employees, the financial position of the U.S. company and the foreign entity, the petitioner's anticipated start-up costs and financial objectives for the first year of operations, and the physical premises

secured by the U.S. company. Although some of these deficiencies will be discussed in more detail below, the AAO notes that the petitioner's submission of a vague job description for the beneficiary, a proposed organizational chart, a two-page business plan, and a lease for physical premises of unidentified size and type, falls significantly short of establishing that the company will be able to support a primarily managerial or executive position within a twelve-month period. The regulations require the petitioner to present a credible picture of where the company will stand in exactly one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. 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*, 14I&NDec. 190 (Reg. Comm. 1972)). While the AAO acknowledges that the petitioner chose to rely on its acquisition of [REDACTED] in lieu of much of the supporting documentation, it has not adequately documented either its acquisition of the claimed subsidiary or the current and proposed staffing of [REDACTED].

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. However, 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).

Overall, the vague job description provided for the beneficiary, considered in light of the petitioner's business and hiring plans for the first year of operations, prohibits a determination as to whether the petitioner could realistically support a managerial or executive position within one year. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record does not establish that the petitioner had secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A), as of the date the petition was filed. The petitioner has not described its anticipated space requirements for its chain of gas stations/convenience stores. The lease agreement provided in support of the petition, for a premises located [REDACTED] in Kirbyville, Texas, does not identify the amount of space secured, or indicate the authorized use for the premises, and there is nothing in the agreement to suggest that it is in fact for a gas station and retail store. The petitioner subsequently provided the lease agreement held by G & G International for a gas station and convenience store, but, even assuming that the petitioner had documented its acquisition of the claimed subsidiary in December 2008, it is still required to establish that it had secured sufficient physical premises for operation of its intended business as of October 2008 when the petition was filed. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner had secured sufficient space to house the new office as of the date the petition was filed. For this additional reason, the petition may not be approved.

Another deficiency not discussed by the director is the lack of evidence of the size of the United States investment, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The petitioner indicates that it made a \$100,000 investment in a U.S. retail business, but as discussed above, the record is completely devoid of evidence of this transaction. The record contains no evidence of a bank account held by the petitioner and no evidence that any funds have been transferred from the foreign entity as an initial investment in the U.S. company. Again,

going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.