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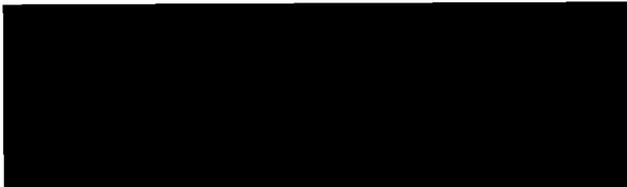
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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File: EAC 08 210 51464 Office: VERMONT SERVICE CENTER Date:

MAR 12 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 Appeal 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, states that it operates several retail stores. The petitioner claims to be an affiliate of [REDACTED] located in Mumbai, India. The petitioner seeks to employ the beneficiary as the president and chief executive officer for a period of three years.

The director denied the petition on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity; and (2) that the U.S. and foreign entities have a qualifying relationship.

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 misstated the nature and scope of the petitioner's business and failed to consider the petitioner's reasonable need for a bona fide president. Counsel further contends that the director overlooked evidence submitted to demonstrate that the U.S. entity has an affiliate relationship with the foreign employer. Counsel submits a brief and evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), 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 July 28, 2008. The petitioner indicated on Form I-129 that the U.S. company was established in 2000 and has six employees. In a letter dated July 22, 2008, the petitioner stated that the company "is engaged in marketing and retail distribution of wireless telecommunications products, liquor, gas, automotive and household products under the business name [REDACTED] and [REDACTED]. The petitioner stated that the beneficiary will perform the following duties as the petitioner's president and CEO:

[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 operations; 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 provided an organizational chart for the U.S. company, which indicates that the beneficiary will supervise a vice president and general manager, who in turn supervises a staff accountant, a retail manager, and a market research analyst. The organizational chart indicates that the accountant supervises a bookkeeper/purchase clerk, and the retail manager supervises an assistant manager. The petitioner also provided job descriptions for each position listed on the organizational chart.

The petitioner provided copies of its Texas Forms C-3, Employer's Quarterly Report, for all four quarters of 2007 and the first two quarters of 2008. The records show that the petitioner typically employed 6-8 employees during 2007, five employees in the first quarter of 2008, four employees in April 2008, three employees in May 2008, and only one employee in June 2008. The petitioner submitted a business plan in which it indicated that it intends to hire 20 employees and establish two new locations within three years.

In support of the petition, the petitioner submitted assumed name certificates indicating that the company does business as [REDACTED] at [REDACTED]; and as [REDACTED] at [REDACTED] in Beaumont Texas. The petitioner also submitted a Certificate of Ownership for Unincorporated Business for a business known as [REDACTED]," filed in May 2004. The certificate

indicates that the business is owned by [REDACTED], a shareholder of the petitioning company. The petitioner also submitted a lease for a gas station and convenience store known as [REDACTED] located at [REDACTED] in Lumberton, Texas. Finally, the petitioner submitted evidence related to a business known as [REDACTED]

The director issued a notice of intent to deny the petition on September 12, 2008. The director questioned whether the petitioner, as a convenience store, requires the services of a market research analyst and staff accountant. The director instructed the petitioner to submit copies of its IRS Forms W-2, Wage and Tax Statement, for 2006 and 2007, and copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2008.

In a letter dated October 9, 2008, counsel for the petitioner explained that the petitioner has been doing business since 2003 as [REDACTED] and [REDACTED], and, in 2007, became a nonexclusive dealer of a wireless company. The petitioner submitted a chart indicating that the U.S. company's businesses include [REDACTED] and [REDACTED]

Counsel further described the beneficiary's duties as the following:

[The beneficiary] will be responsible for all our planning, expansion, banking, budgeting, and marketing. In addition, he will hire and train other managers and employees and is incharge [sic] of increasing the sales of the company. He will be employed at the highest executive level and will have complete authority to establish goals 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 and are consistent with Sec. 101(a)(44)(A) and (B) of the Immigration and Nationality Act.

Counsel emphasized that pursuant to section 101(a)(44)(C), the petitioner's reasonable needs must be considered in conjunction with the company's purpose and stage of development. Counsel stated that the petitioner employs six workers including an executive-level employee (the vice president/general manager), two professionals (an accountant and market research analyst), a first-line retail manager, and two clerical staff (bookkeeper and assistant manager). Counsel stated that the beneficiary would serve in an executive position and would immediately hire a secretary, while "the first line managers and assistant managers handle all the administrative functions."

Counsel also discussed the petitioner's future plans, noting that the petitioner intends to open two additional locations in the next three years, each of which will requires the services of a first line manager, assistant manager and two cashiers/clerks, thus increasing the petitioner's staff by eight. At the same time, counsel

stated that the petitioner intends to hire 20 employees within three years. The petitioner submitted a slightly revised organizational chart in which it identified the names and educational qualifications of the staff accountant and market research analyst. The petitioner provided evidence that the individual identified as the staff accountant has a master of commerce degree, while the market research analyst has a master of business administration degree.

The petitioner also submitted additional lease agreements, a lease for 1,200 square feet of space at a Beaumont, Texas shopping mall, and a license for a 168 square foot kiosk at a different Beaumont, Texas mall. Finally, the petitioner submitted the requested copies of its IRS Forms W-2 and 941.

The director denied the petition on December 22, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director observed that, according to the petitioner's Form 941 for the third quarter of 2008, the U.S. company has only one employee. The director further found that the position descriptions submitted for the beneficiary were vague and identified only general managerial functions. The director concluded that, given that the U.S. company appears to have one employee, the petitioner did not establish that the beneficiary would be supervising a subordinate staff comprised of managers, supervisors or professionals, or that he would be relieved from performing the day-to-day non-managerial tasks associated with operating the business.

On appeal, counsel asserts that the petitioner operates several separate businesses and is not merely operating a gas station/convenience store as stated by the director. The petitioner submits a list of the names and address of five businesses operated by the petitioner including [REDACTED], [REDACTED], and [REDACTED]. Counsel emphasizes that the beneficiary will be employed at the highest level and "will oversee supervisors and managers who supervise employees running day-to-day operations."

Counsel concedes that the petitioner had only one employee in June 2008, but states that as of July 2008, when the petition was filed, the petitioner had six employees. Counsel submits an updated employee list indicating that the petitioner has five payroll and four contract employees as of January 2009, including the vice president, accounts manager, finance manager, market research analyst, and a secretary. The four contract employees include two sales associates, a sales supervisor and an area manager.

Counsel further asserts that the director unreasonably assumed that the petitioner's accountant and market research analyst are not performing professional duties. Counsel states that the petitioner provided detailed position descriptions and evidence of educational credentials for both employees and that such evidence was sufficient to establish that the employees hold professional positions.

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.

In support of the appeal, the petitioner submits a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2008, which indicates that the petitioner had five employees as of December

2008. The petitioner also submits copies of six IRS Forms 1099, Miscellaneous Income, issued in 2007. The petitioner paid \$1,000 or less in non-employee compensation to three individuals identified as area manager, sales supervisor and sales associate.

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

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

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 decisions," "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 petitioner's retail operations. Reciting the beneficiary's vague job responsibilities or broadcast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's 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. Furthermore, beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner claims that "all day-to-day operations" are performed by the company's subordinate employees.

The evidence of record suggests that the petitioner operates retail businesses at up to five separate locations. At the time of filing, the petitioner claimed to employ a total of six employees. However, of these employees, only two were claimed to perform duties associated with the actual operation of the petitioner's stores – the retail manager and assistant manager. The AAO notes that the petitioner indicated that it anticipates opening additional locations and staffing each location with at least one manager, one assistant manager, and two cashiers. Given that the petitioner indicates that it operates five stores, it is reasonable to assume that it would require a total of 20 employees to staff these stores alone. The petitioner has not explained how it was able to operate multiple retail locations with one retail manager, one assistant manager, and no cashiers or salespeople.

Furthermore, the record remains devoid of evidence of the actual number of employees working for the petitioner as of the date the petition was filed in July 2008. Counsel concedes that the petitioner had only one employee as of June 2008, but offers no documentary evidence in support of his assertion that five additional employees were working for the company at the time of filing. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Although the petitioner's state and federal quarterly wage reports for the third quarter of 2008, which were requested by the director, were not available when the petitioner responded to the notice of intent to deny, the petitioner could have made this evidence available for review on appeal. The petitioner has opted not to do so. Thus, the petitioner has not corroborated its claim that it employed six workers as of the date of filing.

Counsel claims for the first time on appeal to utilize the services of four contract workers in the positions of area manager, sales supervisor, and sales associate. However, the petitioner has failed to establish that any of these positions were filled by contractors at the time the petition was filed, such as copies of any Forms 1099 issued by the company in 2008. Nor have counsel or the petitioner explained why such contract workers were not mentioned at the time the petition was filed or in response to the notice of intent to deny. 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)).

While the petitioner now claims to employ ten employees and contractors, and indicates that it intends to hire between eight and 20 additional workers in the next three years, 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).

Therefore, despite the claims of counsel and the additional evidence provided on appeal, the petitioner has not corroborated the employment of multiple employees and contactors working for the company as of July 2008. As of June 2008, the only employee on the payroll appears to have been the market research analyst.¹

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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)(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)(ii)(B)(3).

The petitioner claims that the beneficiary will supervise an executive (the vice president), two professionals (staff accountant and market research analyst), and at least one first-line retail manager. As noted above, the petitioner has not submitted evidence to corroborate the employment of most of these employees. Further, when analyzing whether a beneficiary will supervise managers, supervisors or professionals, the evidence must substantiate that the duties of the beneficiary and those of 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.

Even if the petitioner had documented the employment of the six workers claimed at the time of the filing, the totality of the record would not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates would be required to perform the actual day-to-day tasks of operating the petitioner's five retail stores. 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 non-professional employees.

The AAO acknowledges the petitioner's claim that the petitioner's staff accountant and market research analyst are both degreed professionals. As discussed, it is unclear whether the accountant was employed by the petitioner as of July 2008. The petitioner has submitted a position description for the market research analyst position which is questionable at best. The petitioner indicated that this employee's duties include "reviewing market trends and competition in the jewelry industry." The petitioner's retail businesses include a gas station, conveniences stores, and wireless communications stores. It does not claim to be engaged in the

¹ This assumption is based on the total wages paid to this individual during the second quarter of 2008, which were significantly higher than those paid to workers who worked for only part of the quarter.

jewelry business or to have any intention of engaging in the jewelry business. Without an accurate description of the duties performed by this employee, the AAO cannot evaluate whether the position would qualify as professional.

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. Given the lack of employees to perform the day-to-day tasks of operating five retail stores, and the questionable content of the job description provided for the market research analyst, the petitioner has not established that it employs any workers in a professional capacity.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner has not clearly articulated a claim that the beneficiary will manage an essential function of the petitioning company. As discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that he will perform primarily managerial duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the

enterprise as the owner or sole supervisory employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* In this case, while the petitioner's general description suggests that the beneficiary would have the appropriate level of authority, the petitioner has not shown that he would spend the majority of his time focused on the broad goals of the organization. As discussed further below, the petitioner has not established that it has subordinate staff in place to relieve the beneficiary from many day-to-day aspects of operating the business.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner claims to operate five retail stores. It claims to employ a vice president, accountant, bookkeeper, market research analyst, one retail manager, and an assistant manager. The petitioner does not claim to have any employees to perform the day-to-day sales and customer service duties of its claimed businesses, and it is unclear how it staffs five stores with one manager and one assistant manager. Collectively, the lack of staff to perform the essential functions of the business brings into question how much of the beneficiary's time could actually be devoted to managerial or executive duties, and also raises questions as to the claimed job duties of the employees identified. Considered in light of the fact that the petitioner has corroborated the employment of only one worker, the petitioner has not established that it has a subordinate staff to relieve the beneficiary from performing non-managerial functions.

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

The second issue to be addressed is whether the petitioner established that the U.S. company and the foreign entity have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner stated on Form I-129 that the foreign entity, [REDACTED] owns 50 percent of the petitioner's shares. The petitioner submitted a copy of the U.S. company's Articles of Incorporation dated August 2, 2002, which indicates that the company is authorized to issue 2,000 shares. The petitioner also submitted the minutes of a "reorganizational meeting" held on July 10, 2008, in which it is stated that the company president, [REDACTED] resolved to transfer his 50% ownership in the company to the beneficiary, with shareholder [REDACTED] holding the remaining shares.

In addition, the petitioner submitted the foreign entity's Deed of Partnership, identifying the beneficiary as one of two equal partners in company.

In the Notice of Intent to Deny issued on September 12, 2008, the director requested additional documentary evidence of the qualifying relationship between the two entities, including, but not limited to, stock certificates, stock ledgers, by-laws and articles of incorporation.

In response, the petitioner resubmitted the foreign entity's partnership deed, as well as copies of the U.S. company's stock certificates and stock transfer ledger. Stock certificate number 1, issuing 1,000 shares to [REDACTED] is canceled. Stock certificate number 2 indicates that [REDACTED] owns 1,000 shares of the company. A third stock certificate identifies [REDACTED] as the owner of 1,000 shares. However, the certificate is partially illegible and the certificate number and company name cannot be read. The accompanying stock ledger indicates that stock certificate number 3 was issued to [REDACTED] in July 2008.

The director found the evidence insufficient to establish a qualifying relationship between the United States and foreign entities. On appeal, counsel re-submits the petitioner's articles of incorporation, three share certificates and the minutes of the company's reorganizational meeting. Counsel asserts that the documentation previously submitted demonstrates the existence of an affiliate relationship between the foreign and U.S. companies.

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

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

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

While the director appears to have overlooked some documents submitted in response to the notice of intent to deny, the AAO finds the evidence submitted insufficient to establish that the foreign entity owns 50 percent of the U.S. company.

First, there is a discrepancy between the minutes of the petitioner's reorganizational meeting and the stock certificate that was ostensibly issued as a result of the resolution made during the meeting. The petitioner's president resolved to resign his office as president to the beneficiary and to transfer his 50 percent ownership in the company to the beneficiary. The stock certificate issued identifies the foreign entity, and not the beneficiary, as the owner of the shares.

Second, the petitioner has not submitted a legible copy of the stock certificate that was allegedly issued to the foreign entity. The AAO notes that the certificate, although issued after [REDACTED] resigned as president, was signed by [REDACTED]. The stock ledger is incomplete and does not provide pertinent information such as the consideration paid by each shareholder in exchange for the issued shares, and there is no mention in the record as to the means by which the foreign entity acquired 50 percent ownership of the U.S. company.

Finally, the AAO notes that public records made available by the Texas Secretary of State indicate that [REDACTED] and [REDACTED] remain as the only officers and directors of the corporation. *See* <<https://ourcpa.cpa.state.tx.us/coa/servlet/cpa.app.coa.CoaOfficer>> (last accessed on February 16, 2010).

Again, 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). In light of these discrepancies, the AAO finds the petitioner's stock certificates and stock registry alone to be insufficient evidence that the foreign entity acquired 50 percent ownership of the U.S. entity. As ownership is a critical element of this visa classification, USCIS may reasonably look beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Here, there is no evidence that would bolster the claimed qualifying relationship beyond an illegible stock certificate and incomplete stock ledger. For this additional reason, the appeal will be dismissed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.