

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation, intends to operate a moving business. It claims to be an affiliate of [REDACTED], located in Israel. The petitioner seeks to employ the beneficiary as the vice president of its new office in the United States for a period of one year.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. The director based the decision, in part, on a conclusion that the petitioner did not establish who would be providing the services of the U.S. company.

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, the petitioner asserts that it submitted sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval. The petitioner emphasizes that the U.S. entity is a new office and, as such, is not required to establish that it has already hired subordinate personnel to perform the non-managerial functions of the company.

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) 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.

As a preliminary matter, the AAO notes that the director erred by adjudicating the instant matter as a petition involving an established U.S. entity, rather than applying the regulations pertaining to new offices at 8 C.F.R. § 214.2(l)(3)(v). When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

Although the director acknowledged in the request for additional evidence issued on October 31, 2008 that the petitioner is a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), the director nevertheless based the adverse decision, in part, on the petitioner's staffing levels at the time of filing, rather than applying the regulatory provisions applicable to new offices at 8 C.F.R. § 214.2(l)(3)(v). Accordingly, the director's analysis of the beneficiary's proposed position was flawed as it did not take into account the petitioner's business plan and other evidence submitted to establish that the U.S. company would support a managerial or executive position within one year. Although the director's analysis with respect to the petitioner's current staffing levels will be withdrawn, the AAO concurs with the director's ultimate conclusion that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). 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 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 primary issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the 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 October 3, 2008. In an attachment to Form I-129, the petitioner described the beneficiary's proposed duties as vice president of the petitioner's newly-established moving business as follows:

Proposed duties include setting up new company, hiring and firing of employees including other management and executives; management and control of the budget and arranging all other financial matters including investment. He will be responsible for setting up business target and plans and for deciding how to achieve our goals and maximum profit. He will develop organizational policies and establish company objectives.

He will also be responsible for supervision, coordination, organization, building and running of the marketing sales force. As this is a new company, he is also responsible for administration, sales operations, sales staff recruiting, training of staff and other management personnel including coordination of management groups.

The petitioner did not submit a business plan, information regarding the proposed nature of the new office describing the scope of the entity, its organizational structure, and its financial goals, or evidence of 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. *See* 8 C.F.R. 214.2(l)(3)(v)(C)(1) and (2).

On October 31, 2008, the director issued a request for additional evidence (RFE) advising the petitioner that, based on the initial evidence, it is unclear how the petitioner will support an executive or managerial position within one year. The director requested that the petitioner submit: (1) a business plan for commencing the start up company, giving specific dates for each proposed action for the next two years; (2) a more detailed description of the beneficiary's proposed job duties; (3) information regarding the size of the United States investment; and (4) documentation of any funds transferred to the U.S. entity from the foreign entity.

In response to the RFE, the petitioner submitted a letter dated January 22, 2009, in which it further described the beneficiary's proposed role as follows:

[The beneficiary] is the person who will be solely responsible for the New York office. [The beneficiary] will be one hundred percent (100%) responsible for the running of the New York office. Although our New York office is new and still quite a small office, the responsibility that [the beneficiary] has is large due to the large amount of business that our company plans to do in

the United States and which he is responsible for. He is to be solely responsible for the New York office, one hundred percent (100%) responsible for all necessary company decisions meaning that he has total discretionary authority in day-to-day running of the operations.

In his capacity, and in accordance with board directives and corporation charter, [the beneficiary] plans business objectives and develops organizational policies to coordinate functions. He directs personnel, does hiring and firing. He is in charge of annual sales strategy, has control on policy decisions, company finances and investment. He oversees development and expansion of the company. He develops organizational policies.

The petitioner further stated that it is "impossible to determine the percentage of time allocated to each job duty," but noted that the beneficiary will devote "virtually all of his time in the United States to the continued operation, growth and management of the U.S. business." Finally, the petitioner stated that the beneficiary will be "responsible for setting up business target and plans," developing organizational policies and establishing company objectives.

The petitioner also submitted a one-page business plan, in which it stated:

At the beginning we are small company working 2 people inside of the office as a sales persons [sic] and me as the manager of this office[.] [T]here will be 2 more guys to do the outside work such as doing the labor[.] [A]ll this will be done with one truck. There will be also 2-3 carriers to do the cross-state deliveries. The advertising it will be around the tri[-]state area with a good budget.

At this point what I'm talking about is only the first year.

At the second year I'm planning to have a good amount of money saved to advertise at least double of the budget from the first year and to expend [sic] to more states. Get 2 more trucks.

I will hire more sales reps therefore the office will increase by more than 5 sales people. We will get a dispatcher manager to handle all the transportation and deliveries requests. The office is big enough to have all these workers.

For the two additional trucks there will be more drivers and helpers[.]

Of course there will be 3 Forman [sic] that will get the training during the first year[.]

We have an interline agreement with 10 different carriers to do the cross state deliveries. At the end of the 2nd year we are planning to move to a bigger office grow up more and also get a storage to expend [sic] our business.

In response to the director's request for information regarding the size of the United States investment and evidence of wire transfers or other documentation of funds transferred from the foreign entity, the petitioner submitted a transaction history for the petitioner's checking account. Counsel stated that the submitted bank transaction history shows "transfer of money into account." The AAO notes that the bank records show one wire transfer deposit in the amount of \$4,972. The petitioner also highlighted several customer deposits in the amounts of \$4,000, \$1,100, \$2,500, and \$5,313. The account balance as of August 31, 2008 was approximately \$18,700.

The director denied the petition on February 6, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. As discussed, inasmuch as the

director's decision was partially based on a finding that the petitioner had not established that it currently has staff to provide the services of the company, the director's comments regarding the staffing of the company will be withdrawn.

On appeal, the petitioner emphasizes that it is a new company established in March 2008. The petitioner asserts that the beneficiary's duties "will be purely executive and managerial," while any other duties will be "done out of pure necessity and will be incidental to his executive duties." The petitioner further asserts that the beneficiary "will be responsible for hiring and firing of employees including other executives," and that "he and only he will have exclusive control" over the company's employees, which will include: an accountant/controller, a general manager/account executive, a supervisor, two sales personnel, an office manager, a clerical worker and two laborers. The petitioner indicates that the general manager and accountant will have "at least a college education."

In support of the appeal, the petitioner submits an evaluation report issued by [REDACTED] who states that the beneficiary, based on his employment experiences since 1990 and management training, has a background equivalent to that of an individual with a bachelor's degree in management from an accredited U.S. college or university. The AAO notes that the fact that the beneficiary's employment background has been in management is insufficient to establish that he will be employed in the United States in a primarily managerial or executive capacity.

Upon review, the petitioner in this matter has failed to establish how the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner has failed to sufficiently describe the beneficiary's proposed duties after the petitioner's first year in operation; has failed to sufficiently describe the nature, scope, organizational structure, and financial goals of the new office; and has failed to establish that a sufficient investment has been made in the United States operation, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

First, the petitioner has failed to establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

Here, the petitioner's descriptions of the beneficiary's proposed duties are vague and provide little insight into what types of duties the beneficiary would primarily perform as vice president of the company at the end of one year. The petitioner's general breakdown of the beneficiary's duties merely paraphrased the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. For example, the petitioner stated that the beneficiary's role will entail "hiring and firing of employees," "setting up business target and plans," "develop[ing] organizational policies," and "establish[ing] company objectives." 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.).

In response to the director's request for a more detailed job description that does not merely paraphrase the statutory definitions of managerial and executive capacity, the petitioner reiterated that the beneficiary will plan business objectives and develop organizational policies, "oversees development and expansion," "has control on policy decisions," "will be solely responsible for the New York office," "will be 100% responsible for the running of the New York office," will be "100% responsible for all necessary company decisions," and will have "total discretionary authority in day-to-day running of the operations." This description did not provide any additional insight into the beneficiary's duties, and, like the previous description, is replete with generalities. 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 it appears that the beneficiary would exercise the requisite level of authority over the U.S. company as its vice president, the vague position descriptions provided fall significantly short of establishing that the beneficiary's primary duties would be managerial or executive in nature.

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(1) requires the petitioner to provide evidence regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals. The petitioner must also establish that there is a realistic expectation that sufficient staff will be hired within one year to relieve the beneficiary from performing the non-qualifying duties associated with operating a moving business.

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.

While the regulations for new office L-1A petitions do not specifically require the submission of a formal business plan, the petitioner must provide some evidence related to the structure and objectives of the new entity. The petitioner has submitted a one-page business plan which fails to adequately address the company's proposed hiring plan or intended staffing, and the record contains no evidence of the petitioner's financial projections or goals for the first year of operation. 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)). Given that the petitioner claims that the beneficiary will manage subordinate professionals and managers, evidence regarding the petitioner's hiring plans, the positions to be filled, and the petitioner's requirements for such positions, is critical to a determination as to whether the beneficiary will be employed in a qualifying capacity within one year.

The petitioner's minimal business plan indicated that, as of January 2009 the company had one truck in service, already employed two sales people, intended to hire two laborers, and planned to use the services of two or three carriers for cross-state deliveries during the first year of operation. The petitioner noted that it would later hire foremen, additional sales staff, drivers, helpers and a dispatch manager during the second year. On appeal, counsel asserts that "staff is in place to provide the services of all included moving." The petitioner indicates on appeal that it intends to hire an accountant, a general manager/account executive, a supervisor, two sales personnel, an office manager, a clerical worker and two laborers, but does not provide a timeline for hiring this staff or indicate whether such staff would be hired during the first year of operations. Furthermore, this proposed staffing structure bears little resemblance to the hiring plans mentioned in the petitioner's business plan. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner did not initially indicate that it would hire any administrative personnel or lower-level managers or supervisors during the first year of operations, but instead suggested that the beneficiary would directly supervise sales staff and laborers.

Although the petitioner claims to have already hired staff to perform the services of the U.S. company, it has provided no documentary evidence corroborating their employment, nor has it identified the number of workers hired, their job titles or their job duties. Similarly, the petitioner has not provided copies of contracts with interstate carriers or identified with specificity the services they will provide, although it claims to have "an interline agreement with 10 different carriers." Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to describe its financial goals or to provide information regarding the size of the U.S. investment. 8 C.F.R. §§ 214.2(l)(3)(v)(C)(1) and (2). The petitioner provided evidence that it has a bank account with a balance of less than \$19,000. As noted above, the petitioner's one-page business plan contains no information regarding the start-up costs and initial operating expenses associated with the new office, such that it could be determined whether it has sufficient funds to carry out its plans for the first year of operation.

Overall, the lack of evidence regarding the anticipated staffing of the U.S. company, and the petitioner's financial ability to support the proposed organizational structure, undermines the petitioner's claim that the petitioner will hire sufficient staff within the first year of operations to relieve the beneficiary from performing primarily non-managerial and non-executive duties.

Based on the foregoing discussion, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for that reason.

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

The petitioner indicated at the time of filing that the beneficiary's duties as owner/executive of the foreign entity, which operates a fitness club, were the following:

Duties for the past 3 years involved overseas companies management, invest, etc. Also he is in charge of making our annual sales strategy, marketing strategy, purchase plan, overseas development plan, and in working out the annual financial budget for the company and supervising the process of that. He plans, develops and establishes policies and objectives for the organization. He develops organizational policies and has final control on policy decisions and company finances.

In the RFE, the director instructed the petitioner to provide an organizational chart for the foreign entity, to describe the typical managerial responsibilities performed by the beneficiary abroad, and to provide complete position descriptions for the beneficiary and each of his subordinates, including a breakdown of the number of hours each employee devoted to his or her duties on a weekly basis.

In response, the beneficiary described his duties with the foreign entity as the following:

1. Ensuring that my staff was providing optimal client engagement to clients in order to achieve optimal fitness results.
2. Organized employee payrolls and company checkbook.
3. Supervising staff in order to ensure efficiency.
4. Providing customer service to new gym members and assisted in the application/sign-up process.

5. Gave clients guided tour and introduction to the gym.
6. Organizing weekly schedule for employees and reviewed workout plans designed by employees.
7. Ordered supplies such as towels, energy drinks and bars, and other health and energy products.
8. Distributed tasks evenly and appropriately to staff members.

The beneficiary further stated:

During the standard 8 hour day, the entire time was allotted to managerial and executive supervisory duties in order to ensure the proper functioning of the facility. However many of my tasks throughout the day entailed other non-executive functions such as assisting clients when needed with customer service and preparing plans. I even cleaned the office at times.

The beneficiary noted that he managed the business with an equal partner, and supervised a staff which included: (1) a night manager/gym instructor who worked 20 hours per week in addition to teaching four classes; (2) a gym instructor who worked 20 hours per week and taught four classes; (3) a customer service worker/special instructor who worked 10 hours per week and taught two classes; (4) a fitness specialist who worked 20 hours per week; and (5) a special instructor who taught four sessions/classes per week. The beneficiary stated that his position required managerial experience, good communication skills, knowledge of workout techniques, and the ability to design fitness plans and offer sound advice to meet clients' fitness and specialized needs.

Based on these job descriptions, the AAO cannot conclude that the beneficiary's position with the foreign entity was primarily managerial or executive in nature. While the AAO does not doubt that the beneficiary, as general manager and part-owner of the foreign entity, exercised managerial authority for establishing plans, strategies and objectives for the company, the beneficiary's own description of his day-to-day duties indicates that he spent a significant portion of his time performing non-qualifying administrative and operational tasks, such as banking, bookkeeping, customer service, and purchasing functions. Furthermore, while the petitioner has established that the beneficiary supervised lower-level personnel, the record does not establish that the beneficiary's subordinates, which included fitness instructors and a part-time customer service worker, were professionals, managers or supervisors, and thus his supervisory duties cannot be considered managerial in nature. See section 101(a)(44)(A)(iii) of the Act. The beneficiary conceded that "many of my tasks throughout the day entailed . . . non-executive functions," such as directly providing services to customers. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). For this additional reason, the petition cannot be approved.

One remaining issue not addressed by the director is whether the petitioner established that the petitioner 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 petitioner stated on Form I-129 that the U.S. company is owned by the beneficiary and [REDACTED] and the Israeli company is owned by the [REDACTED] family." The petitioner submitted the "laws and regulations" of the foreign entity, [REDACTED], in Hebrew with English translation, which are dated June 5, 2006. The foreign entity's regulations indicate that the beneficiary owns one share of the company, [REDACTED] owns one share, and [REDACTED] owns one share.

In response to the RFE, the petitioner submitted the U.S. company's stock certificates, which indicate that the beneficiary and [REDACTED] each own 50 percent of the petitioner's shares. The petitioner re-submitted the same "laws and regulations" for the foreign entity dated June 5, 2006. The petitioner also submitted what appears to be a later amendment or revision to the foreign entity's laws and regulations, which identifies the beneficiary and [REDACTED] as equal partners in the foreign entity. However, the petitioner only provided an English translation of the final page of the document. The original Hebrew document and the remainder of the translated document are not in the record of proceeding. The AAO notes that the partial document is dated "12-08-2008."

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.

Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(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. Here, the petitioner has submitted evidence that it is owned equally by two individuals, the beneficiary and [REDACTED]. In order to establish the claimed affiliate relationship with the foreign entity, the petitioner must establish that the foreign entity is at least 50 percent owned by one of these two individuals. If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. However, here, the evidence submitted at the time of filing indicated that the foreign entity is owned equally by three individuals, with no one individual holding more than a one-third interest in the company. Therefore, the evidence submitted at the time of filing indicated that the companies are not affiliates according to the regulatory definition. Although the petitioner indicated on Form I-129 that the foreign entity is owned by members of the [REDACTED] family," a familial relationship is insufficient to establish a qualifying relationship under the regulations.

While the evidence submitted in response to the RFE suggests that the beneficiary may currently be a 50 percent owner of the foreign entity, the petitioner has provided insufficient evidence of the change in

ownership and the date on which the change occurred. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The AAO cannot accept a partial copy of a translated document as evidence of the foreign entity's current ownership structure. Absent clear and probative evidence that the beneficiary obtained his 50 percent ownership in the foreign entity prior to the filing of the petition, the AAO cannot conclude that the petitioner and the foreign entity were qualifying affiliates at the time the petition was filed. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(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.