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



**U.S. Citizenship  
and Immigration  
Services**

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File: [REDACTED] Office: VERMONT SERVICE CENTER

Date:

NOV 18 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Please read the entire decision and the legal analysis closely. If you believe the law was inappropriately applied by us in reaching our decision you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

  
Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO upholds the decision of the director and dismisses 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 limited liability company engaged in concert promotion and management, states that it is an affiliate of Sports Marketing Monterrey, located in Mexico. The petitioner seeks to employ the beneficiary as the chief executive officer of its new office in the United States for a period of one year.

The director denied the petition on three independent and alternative grounds. Specifically, the director determined that the petitioner had failed to establish: (1) that the U.S. company and the foreign entity have a qualifying relationship; (2) that the beneficiary has been employed abroad in a managerial or executive capacity with a qualifying entity for one continuous year during the three years preceding the date the petition was filed; and (3) that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity within one year or that the new office would support such a position within one year. In denying the petition, the director observed that the petitioner failed to submit a complete response to a request for additional evidence ("RFE") issued on March 15, 2010.

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 new counsel for the petitioner asserts that the director made many errors in reviewing the petition and evidence, while acknowledging that former counsel did not properly respond to portions the director's request for evidence. New counsel requests that the AAO consider her own response to the request for evidence, which is submitted in support of the appeal. Counsel further requests oral argument before the AAO.

## **I. The Law**

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(1)(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 (1)(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.

## II. The Issues on Appeal

As a preliminary matter, the AAO will address the introduction of new counsel's response to the director's request for evidence on appeal. Counsel alleges that prior counsel did not properly respond to the request for evidence, and requests that the AAO accept new material evidence on appeal pertaining to the ownership and control of the U.S. and foreign entities and to the beneficiary's current and proposed employment capacity.

The AAO notes that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has not provided evidence that its former counsel has been informed of the allegations leveled against him and been given an opportunity to respond, nor does the appeal reflect whether a complaint has been filed with appropriate disciplinary authorities. Thus, the petitioner has not adequately supported a claim that it received ineffective assistance from former counsel.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence that purports to respond to a Service Center director's request for evidence offered for the first time on appeal. Prior decisions clearly state this point. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO need not and does not consider the sufficiency of previously requested evidence submitted for the first time on appeal.

#### **A. Qualifying Relationship**

The first issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. 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 pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (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 (l)(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 filed the Form I-129, Petition for a Nonimmigrant Worker, on March 8, 2010. The petitioner stated on Form I-129 that the U.S. company is an affiliate of a Mexican company, Sports Marketing Monterrey. In an attachment to Form I-129, the petitioner described the ownership and control of each company as follows:

- [REDACTED] [the petitioner]
- 50% Ownership of company by [REDACTED]
  - 50% Ownership of company by [REDACTED]
  - [REDACTED] is the CEO of the company and has the primary and ultimate management of all business decisions for [the petitioner].

Sports Marketing Monterrey:

- 50% Ownership of company by [REDACTED]
- 50% Ownership of company by [REDACTED]

- [REDACTED] is the Chief Operating Officer of the company and is an Executive Manager involved in all business decisions for [REDACTED]

In support of the petition, the petitioner submitted a "certificate of filing" from the Office of the Secretary of State from the State of Texas indicating that the petitioner was formed as a domestic limited liability company on January 28, 2010. The petitioner did not submit the company's articles of organization, operating agreement or other corporate documents identifying the ownership and control of the company.

The petitioner also provided the corporate constitution of the Mexican company [REDACTED] [REDACTED] was which formed in January 2007 with the following ownership: [REDACTED] - 51 shares; [REDACTED] 49 shares. The petitioner did not submit any documentation for the entity [REDACTED] nor did it provide evidence, such as a fictitious name certificate or equivalent document, indicating that [REDACTED] are one and the same entity.

In the request for additional evidence issued on March 15, 2010, the director advised the petitioner and its previous counsel that the initial evidence was insufficient to demonstrate that the petitioner has a qualifying relationship with the beneficiary's foreign employer. The director requested that the petitioner submit copies of all relevant articles of incorporation, share certificates, stock ledgers or other equivalent evidence documenting the ownership and control of each company.

In response to the request for evidence, former counsel stated that [REDACTED] is "registered as [REDACTED] under Mexico's law." Counsel referred the director to review the "business formation documentation" submitted at the time of filing for both entities and provided nothing further.

The director denied the petition on June 21, 2010, in part, due to the contradictory information in the record regarding the ownership and control of the foreign entity. Specifically, the director noted that, while the petitioner claimed that the beneficiary and [REDACTED] are equal owners of both entities, the evidence submitted shows that the beneficiary in fact owns only 49 percent of the foreign entity, and not 50 percent as stated by the petitioner.

Upon review, the AAO concurs that the record before the director did not contain evidence of a qualifying relationship between the U.S. and foreign entity.

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.

Upon review, there were two critical deficiencies in the evidence submitted to establish the requisite corporate qualifying relationship. First, the record as of June 21, 2010 contained no documentary evidence of the ownership and control of the U.S. company. Instead, the petitioner and counsel relied on unsupported assertions that the company is jointly owned in equal proportions by [REDACTED]. 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)). 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 Obaighena*, 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).

Second, as noted by the director, the record contained contradictory information regarding the ownership of the beneficiary's claimed foreign employer. The petitioner and counsel claimed that [REDACTED] is equally owned by [REDACTED] and [REDACTED] and ultimately controlled by the beneficiary, [REDACTED]. At the same time, the petitioner submitted persuasive evidence that [REDACTED] allegedly the same business entity, is in fact majority owned by [REDACTED] who has a 51 percent interest in the company.

Counsel has submitted evidence to correct both of these deficiencies as part of the "new request for evidence response" submitted on appeal. However, as discussed above, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The evidence before the director did not include evidence of a qualifying relationship.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). The petitioner and its prior counsel failed to submit the necessary documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Further, the AAO notes that the record remains devoid of any documentary evidence that [REDACTED] are in fact one and the same entity. Former counsel's assertions that both names refer to the same legal entity cannot be accepted in lieu of documentary evidence, such as a fictitious name certificate or other evidence that [REDACTED] is a registered name of that Mexican entity.

Based on the foregoing, the petitioner has not established that the petitioner has a qualifying relationship with the beneficiary's former employer. Accordingly, the appeal is dismissed.

**B. Employment in a Managerial or Executive Capacity Abroad**

The second issue addressed by the director is whether the petitioner established that the beneficiary has been employed by the foreign entity for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

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 stated on Form I-129 that the beneficiary's duties for the past three years have included the following:

Sports & Entertainment Management of Professional Soccer Players and Olympic Athletes;  
Production & Organization of Sporting/Entertainment Events; Scouting New Talent/Clients

In a letter submitted in support of the petition, the petitioner indicated that the beneficiary has been continuously employed by [REDACTED] since 2007. The petitioner stated:

[The beneficiary] is a very innovative, skilled, expert in the area of entertainment related to celebrities, production of shows and sports business. His exclusive clients in the sport business include the captain of the Mexico National Soccer Team, over 14 professional soccer players in Mexico and South America and 4 Olympic athletes, one of them recently won the Gold Medal in Taekwondo in Beijing 2008 [REDACTED]. He has experience establishing concert tours and events for artists such as: [REDACTED] and many other artists.

The petitioner submitted evidence from the foreign entity's web site which indicates that its services include consulting in various sports-related areas, athlete management, other sports business services, and entertainment industry services such as artist booking, event management, sponsor programs, elite event planning, live entertainment, outdoor music festivals and corporate planning.

In the request for evidence issued on March 15, 2010, the director requested: (1) a description of the typical managerial responsibilities performed by the beneficiary during his employment abroad, accompanied by documentary evidence of his managerial decisions; (2) an organizational chart for the foreign entity with complete position descriptions for all employees; (3) information regarding the amount of time the beneficiary allots to executive duties versus non-executive duties; (4) an explanation of the degree of discretionary authority the beneficiary exercises in the overseas job; and (5) a copy of the beneficiary's last annual tax return and tax withholding statement reflecting the employer, or other unequivocal evidence establishing the beneficiary's employment with the foreign entity.

In response to the director's request for evidence, the petitioner stated that the foreign entity employs two people in Mexico, including [REDACTED] who serves as managing director. The petitioner submitted an organizational chart depicting the positions of CEO and President at the top of the hierarchy, jointly supervising the COO, who in turn supervises a CPA, a lawyer, "Scouts World Wide," and other temporary staff hired for specific events. The organizational chart did not identify a "managing director," nor did it identify any employees by name.

The petitioner stated that the beneficiary and [REDACTED] are the owners of the company and described their duties as follows:

Their main executive tasks consist in developing new strategies to increase revenues, find new clients (companies to offer consulting, sale [sic] a sponsorship or to recruit a new athlete) and also to create new and creative projects that would lead the company into leadership in their market.

The petitioner provided an explanation of specific sponsorship deals that the beneficiary had secured on behalf of the foreign entity's represented athletes.

The petitioner further indicated that the foreign entity's chief operating officer performs the following duties:

In charge of all the operation and develops of strategies to increase revenues, he is also in charge of sales and pitching new clients to the company. He is also in charge of managing any other area that involves controlling, planning, administrating, motivation, sales and many things involving the sports and artist business and also to create new and creative projects that would lead the company into leadership in their market. He responds to the owners and is the one that runs the company when the owners are in any business travels/vacations or out of the country.

Finally, the petitioner stated that the "Scouts World Wide" are "in charge of finding new talent in countries like Chile, Brazil, Argentina, Spain," and "to contact the talent and pass the information and videos of their performance to our COO."

The director concluded that the petitioner had not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. In denying the petition, the director emphasized that the foreign entity has only two employees, and noted that "simply being a majority owner of a business entity is not sufficient to demonstrate that the beneficiary . . . has been functioning as primarily [*sic*] executive or manager." Rather, the director determined that the beneficiary and the company's other owner were "likely involved in the day-to-day production of securing and providing services and the general all encompassing duties of operating a small business." The director stressed that the specific duties and the scope of the company's operations must be examined in determining whether the beneficiary is eligible for the benefit sought.

On appeal petitioner's new counsel rejects the director's findings and asserts that the petitioner never claimed that the beneficiary is eligible as a manager or executive based on his ownership of the business, but rather asserts that the beneficiary is qualified based on his duties and the fact that he devotes 90 percent of his time to executive functions. Counsel provides a list of 12 duties attributed to the beneficiary in his role as a director of the foreign entity and indicates the amount of time the beneficiary allocated to each responsibility. The petitioner also provides a letter dated August 15, 2010, in which it provides a list of the foreign entity's staff, which is stated to include 17 employees, two interns and subcontractors, a lawyer and a CPA. Specifically, the petitioner states that the foreign entity employs a general manager [REDACTED], a sports director [REDACTED], a four-person sales and marketing team, eight or more scouts throughout Mexico, a graphic designer, a secretary and the beneficiary's personal assistant, in addition to the beneficiary and the company's other owner, who serve as director and CEO, respectively.

In her brief, counsel states "for the umpteenth time," that the beneficiary does not perform tasks to produce a product or provide the services of the organization, but rather devotes approximately 90 percent of his time to performing managerial actions.

Upon review, counsel's assertions are not persuasive. As discussed above, the petitioner was given an opportunity to describe the beneficiary's duties with the foreign entity and the organizational structure of the foreign entity prior to the adjudication of the petition, and did not fully avail itself of this opportunity. For

example, although requested by the director prior to the adjudication of the petition, the petitioner provided no information regarding the amount of time the beneficiary devotes to managerial or executive duties, nor did it provide the complete position description specifically requested. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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

The 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). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercised discretion over the foreign entity's day-to-day operations and had the appropriate level of authority as a co-owner of the organization, the petitioner has failed to show that his actual duties were primarily managerial or executive in nature.

At the time of filing, the petitioner stated that the beneficiary is responsible for "management of Professional Soccer Players and Olympic Athletes; Production & Organization of Sporting/Entertainment Events; Scouting New Talent/Clients." This brief statement provides little insight into the specific managerial or executive tasks the beneficiary performed in his position abroad and is indistinguishable from the petitioner's description of the foreign company's business activities. 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 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

In response to the director's request for detailed information regarding the beneficiary's position with the foreign entity, the petitioner responded with a description that was equally vague, noting that the beneficiary and the foreign entity's co-owner are jointly responsible for "executive tasks" such as "developing new strategies," finding new clients and creating "new and creative projects." The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The information the petitioner submitted in response to the request for evidence clarified nothing with respect to the beneficiary's actual job duties or the amount of time he devotes to managerial or executive duties. Again, 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The director properly determined that the petitioner failed to demonstrate whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties did not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel now attempts to clarify the beneficiary's duties on appeal by submitting a list of twelve specific tasks and the percentage of time the beneficiary devotes to each task. Counsel asserts that the evidence establishes that the beneficiary devotes 90 percent of his time to managerial or executive functions and thus clearly demonstrates his eligibility. As discussed above, the AAO need not consider new counsel's "supplemental" request for evidence response, which contains the newly-provided position description. However, even assuming *arguendo* that such evidence were considered, *the AAO would still be unable to conclude that the beneficiary's duties with the foreign entity have been primarily managerial or executive in nature*. Counsel attributes more than 50 percent of the beneficiary's time to broad responsibilities that merely paraphrase the statutory definition of "executive capacity." For example, counsel states that the beneficiary devotes 30 percent of his time to "the plans, direction and coordination of operational activities at the highest level of management"; 10 percent of his time to "exercising discretion over the day-to-day operations"; 10 percent of his time to "the overall direction of the company"; and six percent of his time to "the determination and formulation of all policies." Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

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 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.

In response to the request for evidence, the petitioner stated that, in addition to its owners, the foreign entity employs two regular employees, a chief operating officer, whose duties were similar to those attributed to the beneficiary, and a managing director, whose duties were not described and whose position was not identified on the company's organizational chart. The petitioner also claimed that the petitioner utilized the services of "Scouts World Wide," an accountant, a lawyer and temporary employees. The petitioner now claims that the foreign entity employs seventeen employees, not including a lawyer, an accountant, interns and subcontractors. Moreover, the employee previously described as the foreign entity's chief operating officer is

now designated "sports director," while the employee previously designated "managing director" is now described as the "general manager," and is attributed with performing duties previously attributed to the "chief operating officer." 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. at 591-92.

Neither the petitioner nor counsel provides a sufficient explanation for the different descriptions of the foreign entity's structure, nor has the petitioner provided any objective documentary evidence that would establish the actual number of employees working for the foreign entity. Moreover, the AAO notes that the petitioner has submitted on appeal a copy of the foreign entity's current lease agreement executed in August 2010. The agreement indicates that the foreign entity rents an office with a maximum capacity of two people and that the only authorized users of the office are the beneficiary, Jorge Villalobos and Sebastian Enoch. Thus, the foreign entity's office does not appear to be able to accommodate 17 employees, or even the nine employees who would appear to make up the regular office staff.

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).

While the AAO does not doubt that the beneficiary has carried out some of his functions with the support of lower-level employees or contractors, and has the authority to hire subordinates, the petitioner has not described or documented the beneficiary's duties or the structure of the foreign entity sufficiently to establish that the beneficiary has been primarily engaged in supervising and controlling a subordinate staff comprised of managerial, professional or supervisory employees. Accordingly, the evidence of record does not establish that the beneficiary has been employed primarily as a personnel manager.

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 an employment offer 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. In other words, while it is not necessary for the beneficiary to directly supervise

employees, it is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary.

In this matter the petitioner has neither claimed nor established that the beneficiary is employed as a function manager. The foreign entity is engaged in a variety of sports and entertainment promotions and management activities, consulting and other business areas, while initially claiming to employ as few as three to four full-time employees and attributing only vague executive functions to the beneficiary and the other claimed employees. The petitioner has offered little insight into how work is allocated within the organization and thus has not established that the beneficiary primarily manages one or more functions of the organization. It is not sufficient to broadly state that the beneficiary manages "all functions" as an executive or co-owner of the organization. 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 (Comm. 1998).

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. The beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary 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.*

Here, the foreign entity is owned and operated by the beneficiary and his brother who both participate in its decision-making and day-to-day operations. However, the petitioner has not shown that the beneficiary and his brother, as owners, are primarily focused on establishing goals and policies for the company. As discussed above, the petitioner has not adequately described the beneficiary's actual duties nor provided a consistent account of the structure of the foreign entity, such that it could be determined that the beneficiary has been relieved of performing non-qualifying duties. The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity as defined by sections 101(a)(44)(A) and (B) of the Act. Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. *See* section 101(a)(44)(A)(iv) of the Act; see also 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799). The record must establish that the majority of the beneficiary's duties fall within the statutory definitions of managerial or executive capacity. As discussed above, the petitioner has not met this burden.

Based on the foregoing discussion, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal is dismissed.

### **C. Employment in a Managerial or Executive Capacity in the United States**

The third and final issue addressed by the director is whether the petitioner established the U.S. company will employ the beneficiary in a primarily managerial or executive capacity within one year of commencing operations, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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).

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.*

The petitioner indicated on Form I-129 that the beneficiary, as CEO of the new U.S. company, will be the "executive in charge of Production & Organization of Concert and Entertainment Events." The petitioner described the proposed activities of the U.S. company as follows:

[The petitioner] is a company focused on the production and booking of concerts with American and International Artists in many countries around the world with emphasis on Mexico and South America. It will also offer consulting in all the categories in order to book or/and produce the perfect show: band selection, logistics, ticket sales, sponsorships, equipment, security, insurance, ROI for each project, timing, venues, administration, merchandising, image rights and many more aspects.

The company will also offer the possibility to book celebrities and athletes for any kind of appearances for events and parties.

The petitioner submitted a seven-page business plan in support of the petition in which it indicates that it "will start up as a consulting, booking and production company," and that the "USA business community" will be the primary market for the company. The petitioner describes its proposed services as:

- Production of concerts
- Booking of artists for shows
- Consulting (band selection, logistics, ticket sales, sponsorships, equipment, security, insurance, venues, ROI and others)
- Booking of celebrities and athletes for appearances

The petitioner's business plan indicates that the company will require start-up funding in the amount of \$115,000. With respect to the proposed staffing of the U.S. company, the business plan states:

For the present time, until there is real growth, services will be delivered by the founders, but [the beneficiary] will be in charge of the company in USA and supported with the Mexican based offices and employees. The idea of 1 executive assistant will be immediately done.

The business plan indicates that the beneficiary, as CEO, will be "responsible for decisions on all hires and expenses," and "will also do the work behind the scenes, structuring a system that will enable other future employees to scale the business as clients are added."

In the request for evidence issued on March 15, 2010, the director instructed the petitioner to submit the following additional evidence with respect to the new office and the beneficiary's proposed role within the office: (1) a copy of the business plan for the start-up company including a timetable for each proposed action for one year starting with the date of filing of the petition; (2) evidence of the financial status of the U.S. company; (3) additional evidence to show the proposed management and personnel structure of the U.S. entity; and (4) a description of the proposed staff of the new office including the number of employees, their job titles and duties, and their proposed salaries or wages. The director further requested that the petitioner specify how many subordinate supervisors will be under the beneficiary's management, indicate the amount of time the beneficiary will allocate to managerial/executive functions, and indicate the degree of discretionary authority the beneficiary will have over the day-to-day operations of the U.S. entity.

In response to the director's request for evidence, the petitioner provided the following description of the duties to be performed by the beneficiary and [REDACTED] in their positions as co-owners, CEO and president of the new company:

Their main executive tasks consist in developing new strategies to increase revenues, find and create a network of relationships with managers and artists to produce shows and also to create new and creative projects that would lead the company into leadership in their market.

The petitioner submitted an organizational chart which shows that the beneficiary and [REDACTED] will jointly supervise, the chief operating officer of the Mexican entity, [REDACTED] who in turn will perform the following duties:

[REDACTED] will be doing the same activities operating the company in Mexico . . . and supporting [the beneficiary] with any information or necessity he would have. Example: even an affiliate [h]as to have good communication with his main company so [the beneficiary] could ask the COO [REDACTED] to call or find some of the investors from South America and arrange a meeting for him in Dallas, TX in order to present them a special project for USA. This will only be tasks that required some executive/confidentiality and past experience that the PR and assistant coordinator would not have.

With respect to the hiring of regular employees, the petitioner stated:

The company will only hire one person for the moment because the CEO/owner will only need someone that can assist him with operational tasks, public relations and a few marketing ideas.

- PR and assistant coordinator: [REDACTED] This person will be in charge of many tasks such as finding new prospective clients, calling and finding suppliers, assist in any operational activity in order to close a sale or to assist the CEO/owner, answer phones and arrange owner schedule and meetings.
- Salary of this employee: 24,000 a year + 15% of commissions.

The organization chart also indicates that the petitioner will use the services of a U.S.-based CPA, lawyer, and "other temporary staff per season/events."

In response to the director's request that the petitioner describe the managerial/executive and technical skills required for the position of CEO, the petitioner stated:

- Be able to find the artists and their managers and convince them to make business with [the petitioner]. There are hundreds of companies calling this agencies and managers and only a few get to do business with them, so the ability to negotiate the influence and persuasive techniques are require to pitch these artists and managers.

- Ability and creativity to create new projects and ideas that leads [the petitioner] to achieve their goals and success.
- Be able to know the market, economic condition, political, marketing skills, sales skills to persuade the managers and (if applies) any investor.
- Be able to build a business plan with macro and micro factors that can be of interest of clients and (if applies) potential investors.
- Knowledge not only of the USA market but South America countries in order to persuade artists to play in other countries.

Finally, the petitioner stated:

90% of the time the beneficiary will be spending time in executive functions, the operational work or non executive duties will be handle by the PR and assistant coordinator. The other 10% are in case that [the beneficiary] requires to do any non executive task.

With respect to the director's request for a more detailed business plan for commencing operations in the United States, former counsel referred the director to the business plan submitted with the initial filing.

The director denied the petition, concluding that, while the petitioner indicates that it has prospects in the United States, it has not adequately demonstrated that the beneficiary will be performing primarily managerial or executive duties within one year. The director acknowledged that the petitioner intends to hire one employee, but questioned whether that employee could perform all of the day-to-day non-managerial duties necessary for the business to function. The director further noted that the petitioner had failed to provide requested evidence of the financial status of the U.S. or foreign entity. The director determined upon review of the totality of the evidence that "it does not appear likely the proffered position is or will be qualifying within the required timeframe."

On appeal counsel once again acknowledges that petitioner and prior counsel did not appropriately provide all required information in support of the petition or in response to the request for evidence. Counsel for the petitioner provides additional background information regarding the U.S. company, noting that the owners of [REDACTED] have actually established two U.S. affiliates, including [REDACTED] established in Texas in 2009, and the petitioning company, established in Texas in January 2010. Counsel indicates that [REDACTED] concentrates solely on the sports marketing side of the U.S. industry, while the petitioning company will concentrate only on the entertainment marketing and promotion side of the business.

Counsel asserts that the petitioner claims that it does not know what information was previously submitted to USCIS by prior counsel, and thus it is providing an updated business plan, evidence of the financial status of the U.S. and foreign entities, and a description of the beneficiary's proposed duties in support of the appeal. The new proposed job description is identical to that submitted for the beneficiary's position with the foreign entity and includes the following:

1. the representation of clients in contract negotiations – 10% of the time;

2. the development and contractual promotional Press releases for all entertainment business Activities – 2% of the time;
3. the organizational and financial affairs of the company – 7% of the time;
4. the promotion of the careers of the clients – 7% of the time;
5. the organization and promotion of all live performing arts productions and concerts – 10% of the time;
6. the facilitation of the locations where the productions and concerts take place – 1% of the time;
7. the staff that operate the areas, stadiums, theaters, or other related facilities where the artists will perform – 2% of the time;
8. in the production, promoting, and facilitating of musical entertainment with artists who perform entertainment in front of a live audience – 5% of the time;
9. the determination and formulation of all policies – 6% of the time;
10. the overall direction of company as set forth in the Articles – 10% of the time;
11. the plans, direction and coordination of operational activities at the highest level of management and directing the help of subordinates and lower-level managers – 30% of the time;
12. Exercising discretion over the day-to-day operations of the activity or function as Managing Member of the LLC and travel as required to conduct business – 10% of the time.

Counsel asserts that this description establishes that 90 percent of the beneficiary's time will be devoted to executive duties and that such duties are "extensive and clearly not those of a staff member." Counsel further contends that the beneficiary has hired an assistant in the United States and "has the assistance of his 17 or more employees who are located in Mexico and who carry out the duties required to assist in this business." Counsel emphasizes that "there is no preclusion for Beneficiary to use only the U.S. company when performing business in the United States and under the United States business entity.

In addition, counsel asserts that the petitioner is now providing evidence of the financial status of the foreign entity and evidence of the size of the investment in the U.S. entity, noting that the petitioner believed that such documentation was previously submitted. The petitioner submits the foreign entity's bank statements and most recent tax returns and bank statements for the U.S. company's account. Counsel asserts that the petitioner has sufficient assets to support the business, has hired an employee and has commenced business operations by signing singer [REDACTED] to hold a concert in Chile in December 2010. Counsel asserts that "the Service's assessment of the potential for this U.S. business is wrong," and states that "if you would look at the number of employees that the foreign parent company has, you will see that this U.S. company has the potential to grow into a multi-million dollar company over the next few years" as "more and more people are spending money on having fun, and concerts are fun."

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year. This finding is based primarily on the petitioner's failure to provide a description of the beneficiary's proposed duties that establishes that such duties will be primarily

managerial or executive in nature, failure to establish the proposed staffing levels of the U.S. entity within one year, and the inconsistencies addressed above with respect to the staffing of the foreign entity.

The descriptions of the beneficiary's proposed duties with the U.S. entity, as submitted at the time of filing, in response to the request for evidence, and on appeal, are essentially identical to those submitted with respect to his role with the foreign entity, and therefore we incorporate our discussion of the deficiencies of this evidence. Although the petitioner and counsel emphatically state that 90 percent of the beneficiary's time will be devoted to managerial or executive tasks, we note that even the most detailed of the three descriptions submitted fails to provide any meaningful insight into what the beneficiary does or will do on a day-to-day basis. In an attempt to clarify the nature of the beneficiary's duties on appeal, counsel states that the beneficiary will devote more than 50 percent of his time to "exercising discretion over the day-to-day operations or function"; "the plans, direction and coordination of operational activities"; "the overall direction of company"; and "the determination and formulation of all policies." The AAO cannot accept vague assertions regarding the beneficiaries' duties that merely paraphrase the statutory definitions of managerial and executive capacity, and then speculate as to the beneficiary's actual duties. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, despite counsel's repeated assertions that the beneficiary does not and will not perform duties related to providing the services of the company, the petitioner's own business plan states that "services will be delivered by the founders" of the company, and that the beneficiary "will also do the work behind the scenes." The petitioner indicates that the beneficiary will directly represent clients in contract negotiations, develop press releases, oversee the organization and financial affairs of the company, promote the careers of clients, and organize and promote productions and concerts. Given that the petitioner intends to produce and promote concerts, book artists for shows, and provide concert-related consulting services, these are in fact the services of the business and the petitioner indicates that the beneficiary will perform them directly. The petitioner explains that it would not be reasonable for the beneficiary to delegate such duties to the assistant that he has hired; however, that is not tantamount to a conclusion that such duties must be managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

As previously discussed, the fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. Pursuant to the strict statutory definitions, section 101(a)(15) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons who perform the management activities involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. *See* section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799). The record

establishes that the beneficiary has been successful in the areas of management, marketing and promotion for artists and athletes and production of live events for the foreign entity, and that he has negotiated two major contracts on behalf of the petitioning company. The AAO does not question the viability of the U.S. and foreign entities or the beneficiary's abilities as a concert promoter and producer and artist manager. However, it is reasonable to question whether a concert promotion and production company with two employees would reasonably require its "chief executive officer" to perform primarily managerial or executive duties, especially in light of the petitioner's failure to describe the beneficiary's actual duties with specificity.

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 (9<sup>th</sup> 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 CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner has hired an assistant for the beneficiary and has not indicated any plans to hire additional employees within the first year of operations. The petitioner states that "services will be delivered" by the beneficiary with the support of the foreign entity's employees, but, as discussed at length above, the record contains materially inconsistent claims regarding the number of employees the foreign entity actually employs, and no objective evidence to establish the actual structure of the company. Therefore, the actual amount of "support" the beneficiary will receive in performing the operational, administrative and other non-managerial aspects of running the company is unclear. As such, the claim that the beneficiary will devote 90 percent of his duties to qualifying managerial or executive duties is largely unsupported and the AAO cannot determine that the beneficiary's duties would be primarily managerial or executive within one year.

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; however the petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. Based on the petitioner's failure to provide a detailed description of the beneficiary's actual day-to-day duties, and its failure to provide critical substantiating documentation regarding the company's organizational structure, the AAO concurs that the petitioner has failed to support its claim that the beneficiary will be employed in a primarily managerial or executive capacity within one year. We emphasize that our holding is based on the petitioner's failure to submit requested evidence needed to establish eligibility; our decision does not rest on the size of the petitioning entity.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year. According, the appeal is dismissed.

### III. Request for Oral Argument and Conclusion

Finally, the AAO acknowledges counsel's request for oral argument. The regulations at 8 C.F.R. § 103.3(b) provide that the requesting party must explain in writing why oral argument is necessary. USCIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. In this instance, counsel identified no unique factor or issue of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument will not be granted.

The petition is denied 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.