

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



57

DATE: **DEC 16 2011**

Office: VERMONT SERVICE CENTER

FILE:

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: SELF-REPRESENTED

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, 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, with a fee of \$630. 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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**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 Rhode Island corporation, states that it operates a food mart. It appears that the petitioner is a subsidiary of [REDACTED] located in Canada. The petitioner seeks to employ the beneficiary as the manager of its new office in the United States.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity or that the petitioner could currently support such a position.

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 "do[es] need a bona fide executive manager to perform executive level duties and to make high level decisions which, in no way or form, an individual store supervisor can perform as it effects [*sic*] the performance of the whole organization." The petitioner submits a letter and additional evidence in support of the appeal.

## **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(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

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

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.

## II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a primarily executive or managerial capacity or that the petitioner could currently support such a position.

### *Facts and Procedural History*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March 30, 2009. The petitioner indicated on the Form I-129 that it is operating a food mart with three employees and a gross annual income of \$2,275,630.

The petitioner submitted a letter in support of the petition detailing the beneficiary's duties as follows:

[The beneficiary] has to perform supervisory responsibilities to achieve the organizations' goals. He is responsible to look after business in Rhode Island. His responsibilities are to keep the daily store sale, inventory up to the mark. He has five years of experience and also holding sixty five percent (65%) shares, which will motivate the petitioner to show more interest in the business. He has managerial authority/control to hire staff and have wide latitude in making decisions about the goals and management of the organization.

The petitioner did not submit any additional information on the beneficiary's duties, the duties of any of his subordinates, an organizational chart for the U.S. company, or a business plan for the U.S. company.

The petitioner submitted IRS Form 1120S for 2008 indicating that it paid \$35,800 in compensation of officers and \$13,000 in salaries and wages. The petitioner also submitted IRS Form 1120S for 2007 indicating that it paid \$17,000 in compensation of officers and \$10,500 in salaries and wages. The petitioner submitted payroll records for the U.S. company from January to December of 2007 and January to May of 2008. The payroll records indicated that the petitioner employed [REDACTED] beginning in May 2007 through December 2008 and [REDACTED] beginning in January 2007 through July 2007 and again beginning in October 2007 through

May 2008; the total wages paid in 2007 were \$17,000 to [REDACTED] and \$10,500 to [REDACTED]. According to the organizational chart later submitted in response to the request for evidence, [REDACTED] is the manager/executive of two Massachusetts stores and [REDACTED] is a supervisor at one of the Rhode Island stores.

The petitioner submitted the beneficiary's resume listing his work experience as follows:

- 2007-Till Today [REDACTED] [REDACTED]  
*Things done at work*
  - Making the invoice for every week
  - Supervise & Manage Convenience Store Business
  - Keep record of Inventory Every month
  
- 2003-2007 [REDACTED] [REDACTED]  
*Things done at work*
  - Making the invoice for every week
  - Supervise & Manage Convenience Store Business
  - Keep record of Inventory Every month
  
- 1987-2002 [REDACTED] [REDACTED]  
*Things done at work*
  - Panel Connectioning
  - Motor Repair
  - Assembly of Electrical Equipments [*sic*]

The director issued a request for additional evidence ("RFE") on April 1, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties for the U.S. company; (2) a list of all employees identified by name and position title in the beneficiary's department for the U.S. company; (3) complete position descriptions for all proposed employees in the U.S., including one for the beneficiary's position; (4) a breakdown of the number of hours devoted to each of the employees' job duties for the U.S. company on a weekly basis, including one for the beneficiary; (5) evidence showing the management structure and personnel structure of the U.S. company; and (6) a copy of the petitioner's organizational chart depicting where the beneficiary's position fits into the organization.

In response to the RFE, the petitioner submitted a list of current employees and job descriptions as follows:

All employees are on [a] flexible schedule. . . .

- [REDACTED] 40 Hours P/Week
- [REDACTED] 45 Hours P/Week
- [REDACTED] 45 Hours P/Week
- [REDACTED] 40 Hours P/Week
- [REDACTED] 40 Hours P/Week
- [REDACTED] 45 Hours P/Week
- [REDACTED] 45 Hours P/Week
- [REDACTED] 45 Hours P/Week

There are 3 subordinate supervisors under the beneficiary's management.

**Job duties of...**

**Store Supervisor:**

- Supervising & training employees and running their store at a profit.
- Must solve problems, make informed decisions and manage the workforce and time wisely in order to achieve maximum results.
- Responsible for ensuring the highest level of customer service throughout the store.
- Assist in the recruitment and hiring of the most qualified applicants to meet the store's needs.
- Ability to work a full-time schedule including nights, weekends, and holidays
- Availability to work the hours necessary to open and/or close the store
- Retail management experience preferred
- Lock and secure the store. Ability to handle high cash volume
- Strong interpersonal, communication, organization and follow-through skills
- Availability to travel, as needed
- Submit bookkeeping and sales reports to manager/executive.

**Store employee (shift runner):**

- Provide and inspire outstanding service to our customers.
- Ability to work a full-time schedule including nights, weekends, and holidays
- Availability to work the hours necessary to open and/or close the store
- Lock and secure the store.
- Any other tasks as assigned from time to time.

The petitioner also provided the following information on the beneficiary's job duties:

**Duties required for Manager/Executive**

- To oversee store supervisor(s)
- Make sure smooth running of each store operations (hiring personnel, accounting and bookkeeping, advertising and promotion).
- Administer and review operational and sales reports [to] ensure adherence to Company policies and procedures.
- Monitor the accuracy of receiving, transfers, debits/damages, returns-to-vendor (RTV's).
- Oversee compliance of store supervisors and all associates with established Company policies and standards.
- Help solve problems that affect the store's service, efficiency, and productivity.
- Strong interpersonal, communication, organization and follow-through skills
- Availability to travel, as needed.

Beneficiary usually spends about 90% of his time for the Managerial/Executive duties and 10% for other non-executive functions.

Beneficiary's job has [the] following discretionary authorities[:]

- Authority/Control to hire/fire staff and have wide latitude in making decisions about the goals and management of the organization.
- Quarterly performance valuations of each store supervisors.
- Has the power to direct and control the work schedule & authority of store supervisor.
- Authority to give orders or instructions on the execution of day to day tasks which the store supervisor is obliged to obey.

The petitioner submitted an organizational chart that lists the beneficiary as manager/executive of three store locations in Rhode Island. Each store location has one listed supervisor and one shift runner. The petitioner also listed [REDACTED] as manager/executive of two store locations in [REDACTED]. The petitioner stated on the organizational chart that the store hours are 5:00 am to 11:00 pm daily.

The director denied the petition on April 21, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity or that the petitioner could currently support such a position. In denying the petition, the director observed that the petitioner failed to establish that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who could provide him relief from performing the services of the corporation. The director further stated that it appears that the beneficiary would be engaged in the non-managerial, day-to-day operations of the establishment, such as providing a service or selling a product.

In support of the appeal, the petitioner submits a letter in which he asserts that the director reached an inappropriate conclusion. The petitioner describes the beneficiary's job duties as follows:

Following are some duties that an executive manager will perform[:]

#### **Accounting Services**

Executive manager ensures that...

- Pay roles [*sic*] are done twice a month.
- Daily financial information is provided for the creation of general ledger.
- Monthly financial reports are accurate and are issued each and every month.
- Daily entry of accounting transactions – vendor bills, customer invoices, bill payments, customer payments and deposits, and other disbursements and withdrawals are done properly.
- Each individual store supervisor provides complete and up-to-date daily or weekly sales reports.
- Store supervisor are fully trained in how to prepare daily financial activity reports and other related issues.
- [R]egular contact with CPA is established, almost every day, for other critical business issues/concerns.

#### **Dealing with Banks**

Being a small business we want to have a person who can establish a personal kind of relationship with banks so we have smooth banking transactions which a store supervisor won't be able to perform as he/she already has so much on their plate. As our business has a

high volume of cash flow and it is not advisable to have store supervisor(s) involve with any kind of cash activities so an

Executive manager conduct following [sic] with banks[:]

- Spends about eleven hours (to operate 9 accounts) each week dealing with bank. Most of that time is so costly (idling in traffic, wasting gasoline, and standing in the queue for an ATM or teller) which a store supervisor won't be able to spare.
- Daily deposits of sales from all stores and order coins & currency.
- Arrange direct deposit/withdrawal accounts for vendors.
- [C]heck all bank accounts' status and maintain record of monthly paper statements for accountant.
- Other bank related activities as needed that require a lot of paper work.

#### **Dealing with Gas company**

- Special focus on relationships with gasoline company, dependability and accuracy of Gas products purchased.
- Make sure prompt services are available by the vendor for maintenance/repair of equipment.
- Schedule and arrange maintenance/repair of equipment, in case of equipment failure.
- Extensive market research to find a best possible company for the gas product and do through reference check for the appropriate one.
- Administer and review operational and sales reports of gasoline.

The petitioner went on to describe additional duties for the beneficiary that are identical to those already provided in response to the RFE. The only duty listed on appeal that was not listed previously is "[p]urchase/up gradation of all hardware equipment (computer & security systems) including service contracts."

The additional evidence submitted by the petitioner consists of the following: (1) an illegible copy of a Master of Arts degree for someone; (2) a letter from the Assistant Manager of [REDACTED] dated May 11, 2009 confirming that [REDACTED] owner of the petitioner, has business accounts with the bank; (3) a letter from a Certified Public Accountant dated May 12, 2009 confirming that he provides the services of monthly bookkeeping, maintenance of the general ledger, payroll, sales tax, and corporate and personal tax returns for the petitioner; (4) a letter from the director of wholesale fuels at [REDACTED] confirming that the petitioner has been a customer since January 2001 and "[REDACTED] [sic] checks market updates" to ensure the best prices; (5) multiple bank statements; and (6) invoices for fuel.

#### *Discussion*

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a bona fide executive or managerial capacity within one year of the beginning of operations for the United States business entity.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the

regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that, "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the startup of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

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

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 in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its manager. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational 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 or 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)(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").

The petitioner provided several statements on the beneficiary's duties. The only percentage breakdown of the beneficiary's duties provided vaguely states that the beneficiary will spend 90% of his time on managerial/executive duties and 10% of his time on other non-executive functions. Such a vague representation of how the beneficiary divides his day among all of his duties is not sufficient to demonstrate that his day-to-day duties are primarily managerial or executive in nature. The petitioner describes the beneficiary's duties in very broad terms, noting he will "[have the] authority/control to hire/fire staff," "have [a] wide latitude in making decisions about the goals and management of the organization," "oversee store supervisor(s)," "make sure smooth running of each store operations [*sic*]," and "[have] the power to direct and control the work schedule [and] authority of store supervisor." Some of these duties merely paraphrase the statutory definition of managerial capacity and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Additionally, the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's identified tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

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 the petitioner claims that the beneficiary will be employed as a personnel manager, the petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job 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. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner did not indicate that the beneficiary performs as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary spends on duties that would clearly demonstrate that he manages an essential function of the U.S. company. The beneficiary appears to be responsible for the operation of three convenience stores, rather than performing qualifying managerial or executive duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-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.* The beneficiary in this matter has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will focus on the broad goals and policies of the organization rather than day-to-day operations. In fact, the petitioner has not established that the beneficiary has sufficient subordinate employees to relieve him from performing non-qualifying duties.

The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, 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)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not

conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner's organizational chart indicates that the store hours are [REDACTED], daily. As such, the stores will be open 126 hours per week. According to the petitioner, it only employs the beneficiary, one supervisor, and one shift runner per store location. The petitioner provided a breakdown of the hours worked by each employee; but the hours listed do not add up to the duration of time the stores are open for business. The petitioner has not explained how one supervisor and one shift runner could fully staff each store for the duration of time it is open for business. The petitioner has not indicated that it employs any other staff to perform administrative/clerical duties.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary will be employed in a bona fide managerial or executive position within one year of the beginning of operations for the U.S. business entity. Accordingly, the appeal will be dismissed.

### III. Qualifying Relationship

Beyond the decision of the director, the minimal documentation of the foreign company's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). When considering the totality of the evidence presented, the petitioner has not sufficiently demonstrated that it is a subsidiary of the foreign company.

As evidence of ownership of the U.S. entity, the petitioner submitted the following documents:

- A corporate stock certificate, issued on February 11, 2005 and signed by [REDACTED] [sic] as president, vice-president, treasurer, and secretary, indicating that [REDACTED] [sic] owns 1000 shares of the petitioner (100% ownership).
- An attachment to the corporate stock certificate, dated February 11, 2009 and signed by [REDACTED] as shareholder, which appears to be a certificate of transfer of shares; however, the blank lines are not completed to indicate the individual transferring the shares and the individual receiving the shares. The document also states that it is a transfer of "the number of shares represented by this certificate," which would be all 1000 shares.
- A letter from a certified public accountant, dated September 25, 2008, confirming that [REDACTED] [sic] owns 100% of all the outstanding shares of [REDACTED].
- The first page of a document titled "Joint Venture Agreement," dated December 31, 2008, between the petitioner and [REDACTED] of Canada. This document is incomplete as the record contains only the first page.
- A document titled "Resolution of the Board of Directors of [REDACTED] dated February 2009, indicating that [REDACTED] [sic] will resign as of February 2009 and transfer her shares (65%) to [REDACTED].

██████████ for \$114,900. The mode of payment listed is: (1) August 15, 2008- \$35,000; (2) August 27, 2008- \$32,900; and (3) September 11, 2008- \$47,000.

- A confirmation notice from ██████████ indicating that the petitioner received \$34,985 from ██████████ on August 19, 2008.
- A confirmation notice from ██████████ indicating that the petitioner received \$32,885 from ██████████ on August 27, 2008.
- A confirmation notice from ██████████ indicating that the petitioner received \$46,985 from ██████████ on September 11, 2008.
- A letter from the Assistant Manager of ██████████ dated May 11, 2009, confirming that ██████████ [sic], owner of the petitioner,” has business accounts with the bank.

Although the petitioner provided all of the above documentation, the record does not contain the articles of incorporation for the petitioner, stock certificates illustrating new ownership of the petitioner, or a stock ledger. In fact, the record contains conflicting evidence as detailed above. In the instant matter, the petitioner claims that the foreign entity majority owns and controls the petitioner. However, sufficient evidence has not been provided. In this case, the record contains insufficient evidence to establish the current ownership of the petitioner and that the foreign entity is affiliated to the petitioner. The lack of evidence presented to support the petitioner's claims of ownership and affiliation to the foreign entity raises serious doubts regarding the claim that the petitioner is a subsidiary of the foreign entity.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Due to the deficiencies detailed above, the petitioner has not met its burden to establish that the petitioner is an affiliate of the foreign company. For this additional reason, the petition cannot be approved.

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 AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9<sup>th</sup> Cir. 2003).

#### IV. Conclusion

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

**ORDER:** The appeal is dismissed.