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**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**



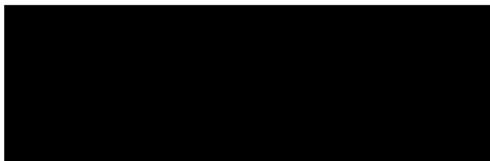
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DATE: **DEC 16 2011** Office: VERMONT SERVICE CENTER FILE:

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:



**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,

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 extend the beneficiary's employment as a 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 Georgia corporation, states that it operates a business that invests in retail convenience stores and is currently operating a grocery store. It claims to be an affiliate of [REDACTED] located in Hyderabad, India. The petitioner has employed the beneficiary in L-1A status since January 2008 and now seeks to extend his status so that he may continue to serve in the position of president.

The director denied the petition, concluding that the petitioner failed to establish that it has sufficient executive/managerial work to be performed to require the services of a full-time president/chief executive officer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary's position is executive in nature. Counsel submits a brief 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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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 it has sufficient executive/managerial work to be performed to require the services of a full-time president/chief executive officer.

### *Facts and Procedural History*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 27, 2009. The petitioner indicated on the Form I-129 that it operates a business that invests in retail convenience stores without indicating the number of current employees and a gross annual income of \$2,273,340. The petitioner submitted a letter of support stating that the beneficiary performs the following duties:

[The beneficiary] has been serving our company as proprietor and General Manager since August 2002. [The beneficiary] is in charge of all administrative operations and management of the company. He has assumed overall responsibility of purchasing the goods, expanding the company's product lines and distribution channels. He enters into contracts on behalf of the company's advantage. He enters into contracts with suppliers and wholesalers as well as with banks. He supervises sales personnel, establishes new business contracts, negotiates with corporate clients and purchasers, and administers new and existing business contracts. requirements [*sic*], delivery schedules, and estimation of costs of materials and production as well as ensuring completeness and accuracy, prepares bids, tests and prepares progress reports, reviews [*sic*] bids for conformity to contract requirements, plans and directs sales programs to promote new markets, and improve fast and efficient customer service. He also has exclusive authority of hiring, firing and promoting employees.

. . . His duties include supervision of all financial and marketing operations for the company, as well as entering in contracts, over which he will exercise complete discretionary authority. He is in charge of training marketing representatives to procure orders and improve their performance. Negotiate contracts with banks and clients; requests and approves amendments and or extensions to contracts. He is also responsible to direct activities of personnel in sale accounting, inventory, record keeping, receiving and shipping operations to implement fulfillment of contracts. Ultimately, it will be his responsibility to establish [the petitioner] on a sound footing. He recruits and trains the staff and have [*sic*] hiring and firing authority over them. Since transferring on the L-1A, he has successfully negotiated business

acquisitions and entered into contractual obligations on behalf of the company with vendors and distributors.

The petitioner also submitted the following list of duties for the beneficiary:

- **Marketing Management:** His duties will include supervision of all Market and administrative operations for the company, as well as entering into contracts, over which he will exercise complete discretionary authority. He will be responsible for major decision making for Petitioner relating to marketing, personnel administration, etc. He will negotiate delivery contracts with manufacturers. He will hire professional advertising agencies to promote the new business with ad campaigns and special promotions in connection with exposing the new market segment. Educate staff on promotions and organizes employee meetings regarding policy on customer service, dress code, etc. Develop expansion plans and instruct his subordinates to deal with municipal and state agencies, making the business decisions on how to comply with the licensing requirements, preparing and submitting the required applications.
- **Management Decisions:** possesses all rights to execute all the managerial decisions of the Company, including purchasing goods and equipment and hiring, firing and promotion of employees; assess managers [sic] performance and assist with management issues;
- **Company Representation:** acts in the name of the Company in all kinds of business contacts and relations; coordinate with state governmental office to ensure compliance [with] regulations;
- Has total managerial and executive authority over the company and all of its activities and employees without limitation.
- Directs and formulate financial strategy to provide funding in developing and continuing the operations to maximize returns on investments; set sales and product cost targets for managers and monitor progress;
- Supervision of the company's day-to-day operations; oversee store standards regarding food quality and customer satisfaction policy; provide support to Sales managers and support staff;
- **Organizational Development:** projects the company's future development and executes steps to accomplish the desired growth; prepare publicity and promotional campaigns; plan business strategy and target new business investments[.]

The petitioner's letter of support also states that they currently have five employees and they expect to expand to ten employees before the end of 2009. The petitioner provided a brief, single paragraph job description for the store manager, staff accountant, assistant store manager, sales clerk, and helper/cashier. The petitioner submitted a second letter of support that lists the beneficiary's duties for the foreign company. The duties listed are almost identical to the beneficiary's duties listed for the U.S. company.

The petitioner's quarterly federal tax return Form 941 for the third quarter of 2008 lists four employees and total wages, tips, and other compensation paid to employees as \$25,500. According to documents submitted in response to the RFE, the employees are the beneficiary, a general manager, and two managers. The Form 941 submitted for the fourth quarter of 2008 lists five employees and total wages, tips, and other

compensation paid to employees as \$30,000. According to documents submitted in response to the RFE, the employees are the same as the previous quarter plus one cashier.

The director issued a request for additional evidence ("RFE") on February 20, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) the total number of employees at the U.S. location where the beneficiary will be employed; (2) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees he supervises by name and job title; and (3) a more detailed description of the beneficiary's duties indicating the percentage of time spent performing each of the listed duties.

In response to the RFE, the petitioner submitted a letter detailing the beneficiary's duties as follows:

1. He absolutely makes all the decisions for the Petitioner relating to financial and marketing management. He is responsible for the financial soundness of [the petitioner]. Specifically, he oversees the financial and banking processes with Petitioner's bankers regarding garnering loans and lines of credit as well as with distributors. He directs the managers on dealing and negotiating with bankers, distributors and manufacturers. He doesn't specifically negotiate directly with the distributors and manufacturers. There are three locations and the purchasing needs is too high for [the beneficiary] to directly deal by himself with dozens of suppliers and distributors. He imparts his vast purchasing and negotiating knowledge to his managers [*sic*] so that they are able to negotiate prices and terms of payment. He directs the hiring [of] professional advertising agencies to promote the stores with ad campaigns and special promotions in connection with marketing to new market segment;
2. He approves renovations, remodeling and repairs of the stores; taking reports of maintenance problems from the managers, deciding when it is appropriate to hire outside service to perform repairs or maintenance and choosing what repair services to use. The employees contact the landlord and contractors to have said repairs and other issues attended to;
3. He educates managers on promotions and directs employee training regarding policy on customer service, dress code, etc. He holds meeting [*sic*] with the senior employees on this issue and directs them on proper protocol in order for them to educate other employees;
4. He has wide latitude and discretionary power with developing expansion plans (where to open other outlets, etc. . . .);
5. He hires, fires and reviews performance of managers. He confers with the managers who determine salary increases, when necessary, and has the authority to terminate employment. There are employees managing the outlets;
6. As the President of the U.S. operations, he reports to the parent corporation in India on the company's performance, business activities, plans to expand, current profit, loss and overall performance. This is not done on a daily basis but on a periodic basis as needed. Specifically, decisions to expand is [*sic*] discussed with the Indian parent;
7. As President, he has discretionary responsibility to enter into contractual agreements on behalf of the Petitioner, including loans, lease space, and being responsible for investigating opportunities to open similar stores at other locations. He possesses complete discretionary authority over expansion and growth of the business; and

8. In addition to the many functions alluded to above, [the beneficiary] also functions as the company's financial manager. It is his responsibility that company's manages [*sic*] its cash flow, debts and other obligations and in general remain solvent. This is an essential component to the survival of the company and he has done a good job because the company has continuously realized profits; and

As detailed above, the beneficiary operates at a senior-most level within the organizational hierarchy and exercises discretion over the day-to-day operations of one or more functions within the organization. He also has sole authority over strategic policy decision for the stores regarding which market area to open up the stores, the type of products for that locality based on consideration and analysis of demographics and evolution of the national market and decisions and advertising agencies to promote the store.

\* \* \*

The following is the percentage of time spent on each duty each day:

Management Decisions	8.0 hrs
Company Representation	5.0 hrs
Financial Representation	10.0 hrs
Supervision of the company day-to-day operations	13.0 hrs
Business Negotiations	1.0 hrs
Organizational Development	3.0 hrs

The AAO notes that the number of hours above equal 40.

In the same letter, the petitioner listed each of the beneficiary's subordinate employees and a brief description of their job duties. The petitioner also submitted an organizational chart for the U.S. company depicting the beneficiary as the chief executive officer, [REDACTED] two managers, and four cashiers.

The director denied the petition on August 10, 2009, concluding that the petitioner failed to establish that it has sufficient executive/managerial work to be performed to require the services of a full-time president/chief executive officer. In denying the petition, the director observed that the record contained several photographs of the convenience store including three of an employee, who looks very similar to the beneficiary, behind the cash register and the Georgia lottery ticket machine. The director further found that it appears that the beneficiary has been, and will continue to be, primarily performing the day-to-day duties of a convenience store employee or a first-line supervisor.

In support of the appeal, counsel submits a brief in which he lists the beneficiary's duties as follows:

[The beneficiary] is offered by [the petitioner] as president/CEO to direct its business operation in the United States. He has autonomous control over and wide latitude for the successful direction of [the petitioner]. His primary job duties include:

1. 10% Direct the corporate financial and budget policies to fund operations, maximize investment, and increase efficiency;
2. 50% Direct and implement policies, objective and activities of corporate and businesses to ensure continuing operations, to maximize returns on investment, and to increase efficiency;
3. 25% Negotiate or approve contracts and agreement with suppliers, customers, and other business entities;
4. 15% Direct human resource activities, including the approval of human resource plans and activities, the selection of managers and other high-level staff, and establishment and organization of major departments.

The petitioner submits an offer of employment letter for the beneficiary listing the exact same duties detailed above. The petitioner also submits a job description for the position of "Managers of Convenience Stores" that report to the president/CEO and an organizational chart depicting the beneficiary as the president/chief executive officer, [REDACTED], two managers, and three cashiers.

The petitioner's quarterly federal tax return Form 941 for the third quarter of 2009 lists six employees and total wages, tips, and other compensation paid to employees as \$30,000. According to documents submitted in response to the RFE, the employees are the beneficiary, a general manager, two managers, and two cashiers. The Form 941 submitted for the second quarter of 2009 lists the same six employees and total wages, tips, and other compensation paid to employees as \$36,000. The Form 941 submitted for the first quarter of 2009 lists the same six employees and total wages, tips, and other compensation paid to employees as \$32,600.

#### *Discussion*

Upon review, and for the reasons stated herein, the petitioner has not established that it has sufficient executive/managerial work to be performed to require the services of a full-time president/chief executive officer.

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 owner and president. However, 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"). The petitioner must still establish that the beneficiary's duties are primarily managerial or executive in nature. *See* sections 101(a)(44)(A) and (B) of the Act.

Counsel and the petitioner describe the beneficiary's proposed position in very broad terms, noting he "approves renovations, remodeling and repairs of the stores;" "educates managers on promotions and directs employee training regarding policy on customer service, dress code, etc.;" "has wide latitude and discretionary power with developing expansion plans;" "hires, fires and reviews performance of managers;" and "possesses complete discretionary authority over expansion and growth of the business." Some of these duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

The petitioner's description of the beneficiary's duties fails to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. On appeal, counsel further breaks down the beneficiary's duties in equally general and vague terms, noting that the beneficiary "direct[s] the corporate financial and budget policies," "direct[s] and implement[s] policies, objective[s] and activities," "negotiate[s] or approve[s] contracts and agreement[s] with suppliers," and "direct[s] human resource activities." The AAO notes that the petitioner previously provided additional descriptions for the beneficiary's duties; however, the descriptions are not sufficient to establish that the beneficiary is an executive or manager. While these tasks are undoubtedly necessary in order to establish the U.S. operations, the petitioner has not indicated how such duties qualify as either managerial or executive in nature. 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 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).

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).

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a

bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

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 submitted an organizational chart depicting himself as the second tier of managerial employee, supervising a general manager, who supervises two managers, who supervise cashiers. While the subordinates perform some of the non-qualifying duties required for day-to-day operation of a small grocery store, the petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as that of a personnel manager under the statutory definitions.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act; 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 he manages an essential function of the U.S. company.

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 under the extended petition. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the

organization rather than day-to-day operations. In fact, the petitioner has not established that it has sufficient executive work to be performed to require the services of a full-time executive.

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his time on non-qualifying duties. 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 Int'l*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

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).

At the time of filing the petition, the petitioner was a one and a half-year-old investment business that claimed to have a gross annual income of \$2,273,340. The company operates a grocery store and employed the beneficiary as president, a general manager, two managers, and one cashier. The AAO notes that all but one of the employees have managerial or executive titles. Based on the petitioner's representations, it has not established that the beneficiary's subordinate staff could relieve him from performing non-qualifying duties associated with operating a grocery store seven days per week. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO will uphold the director's determination that the petitioner has not established that it has sufficient executive/managerial work to be performed to require the services of a full-time president/chief executive officer. Accordingly, the appeal will be dismissed.

### III. Qualifying Relationship

Beyond the decision of the director, there is inconsistent evidence as to the ownership of the petitioner, which raises the issue of whether there is a qualifying relationship between and U.S. entity and a 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 an affiliate of the foreign entity.

Although the petitioner submitted the articles of incorporation and a stock certificate indicating that the beneficiary owns 100% of the petitioner's stock, the petitioner's 2008 U.S. Corporation Income Tax Return, IRS Form 1120, is incomplete. The Form 1120 does not indicate an answer to the question asking "at the end of the tax year, did any individual or estate own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote?" at Schedule K. In the instant matter, the petitioner claims that the beneficiary wholly owns and controls both the petitioner and the foreign entity. However, the inconsistent evidence in the record casts doubt on the evidence presented.

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 inconsistencies detailed above, the petitioner has not met its burden to establish that the petitioner is an affiliate of the foreign entity. 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.