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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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Services



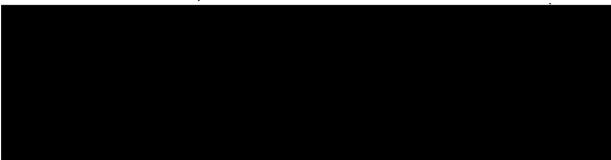
D7

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: FEB 10 2011

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker under 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 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 Georgia corporation, claims to be a subsidiary of [REDACTED] located in Mumbai, India. The petitioner seeks to employ the beneficiary as the vice president of its new office in the United States for a period of three years.¹

The director denied the petition on two independent and alternative grounds. Specifically, the director determined that the petitioner had failed to establish: (1) that the petitioner had secured sufficient physical premises to house the new office; and (2) that the beneficiary would be employed by the U.S. company in a primarily managerial or executive capacity within one year of the approval of the petition.

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 asserts that the director appears to have misunderstood the nature of the business in determining that the petitioner has not secured the required physical premises for its business. Counsel further asserts that the petitioner provided ample evidence establishing that the beneficiary will be employed in the United States in a primarily managerial or executive capacity, and that the director provided insufficient reasoning for concluding otherwise.

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.

¹ The regulations at 8 C.F.R. § 214.2(l)(7)(i)(A)(3) provide that if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

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

II. The Issues on Appeal

A. Sufficient Physical Premises

The first issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office, pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 4, 2008. The petitioner indicated that the type of business it intends to operate is "restaurant, retail, textile and garments." On the Form I-129, the petitioner indicated the company's address as [REDACTED] and indicated

under Part 5 that the beneficiary will work at this address. The AAO notes that the petitioner listed this same address as the beneficiary's current residential address in the United States.

The petitioner submitted a lease for the premises at [REDACTED] with a commencement date of July 1, 2008. According to a Certificate of Business Registration and Board of Health Permit issued to the petitioner, the company operates a restaurant known as [REDACTED] at this address.

According to the organizational chart submitted at the time of filing, the beneficiary will not be involved in the restaurant operations, but rather will be supervising an operations manager, sales, warehouse and delivery personnel, presumably as part of the "textile and garments" division of the business. The beneficiary's foreign employer is a clothing manufacturer and the petitioner indicates that one goal of the United States office is to "develop a stable branch office . . . to diversify the parent' company's income."

Accordingly, on November 21, 2008, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, additional evidence to establish that the petitioner has secured sufficient physical premises to house the new office, including an original lease agreement, the square footage of the office and warehouse premises, a floor plan, photographs of the interior and exterior of the premises secured, and addresses and detailed directions to each facility.

In response, the petitioner submitted a lease for the premises located within [REDACTED]. According to the terms of the agreement, the petitioner has leased 630 square feet of space that is to be used as an office. The first page of the lease is dated January 1, 2009, with a commencement date of January 1, 2009. The final page of the lease agreement is a guaranty and is dated July 1, 2008. The petitioner submitted a check dated October 28, 2008 in the amount of \$1,000 issued to [REDACTED] along for a receipt dated December 29, 2008 for payment of \$1,000 for first month rent and security deposit for Suite 690. The petitioner submitted photographs, but no floor plan, for this location.

Counsel stated in a letter dated December 31, 2008 that the petitioner "is negotiating a second lease agreement for warehouse space." The petitioner submitted photographs of a building identified as [REDACTED] a floor plan for what appears to be an automobile dealership and repair shop, as well as interior photographs of an unidentified location.

The director denied the petition on February 11, 2009, concluding that the petitioner failed to establish that it had leased space sufficient to operate the intended business. With reference to the lease submitted in response to the RFE, the director noted that it was "not clear what this leased space at the mall will be used for office space, retail space for the imported clothing, or restaurant." The director also observed that the lease contains two different dates (January 1, 2009 and July 1, 2008) which call into question the validity of the lease. Finally, the director emphasized that the evidence must demonstrate that the petition had secured sufficient physical premises to house the new office as of November 4, 2008.

On appeal, counsel for the petitioner emphasizes that "this petition is based only on the Beneficiary's role as vice president over the company's clothing and textile operations, and therefore the photographs included in

the response to the request for evidence were only of the office space required for that part of the business, as well as the warehouse space that [the petitioner] will secure as soon as it is rezoned (it was originally a car dealership)." Counsel asserts that the petitioner's office space "will suffice also as storage space, and the warehouse pictured will be available for [the petitioner's] use once the company's sales require it."

Counsel also addresses the conflicting dates on the lease submitted for [redacted] noting that the July 2008 date appears on the final, unexecuted page of the lease. Counsel indicates that this page includes a personal guaranty that the landlord chose not to execute, and therefore it was not revised. Counsel asserts that this small inaccuracy should not cast doubt on the petitioner's evidence as a whole. In support of the appeal, the petitioner submits original color photographs of its claimed premises, copies of which were previously provided.

Upon review, the AAO upholds the director's finding that the petitioner had not secured physical premises to house the office and warehouse functions of its clothing import and wholesale business at the time the petition was filed on November 4, 2008. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner's office lease was signed on January 1, 2009, nearly two months after the petition was filed. As noted above, the petitioner indicated at the time of filing that the beneficiary would be working at a residential address. The petitioner clearly had not secured physical premises to house the office and warehouse functions of the business as of the date of filing.

Although the petitioner did have a valid lease for a restaurant at the time of filing, the petitioner concedes that the beneficiary will not work at this address or be involved in the restaurant's operation. As such the AAO concurs with the director's conclusion that the petitioner had not secured physical premises to house the portion of the business which the beneficiary is claimed to manage. Accordingly, the appeal will be dismissed.

B. Employment in a Managerial or Executive Capacity in the United States

The second issue addressed by the director is whether the petitioner established that 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(I)(3)(v)(C).

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.

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(I)(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(I)(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.

In a letter dated October 27, 2008, the petitioner indicated that the beneficiary will perform the following duties in his position as vice president:

His primary responsibility is to initiate the operation of this new establishment and solidify our presence in the United States. Specific duties include planning and formulating policies and strategies, setting up company objectives and goals and guiding the parent company to make decisions that will take advantage of new trends in the United States market. In addition, [the beneficiary] will oversee the management of the various functions of the company. He will also have authority to exercise a wide latitude in discretionary decision-making concerning the components for which he is responsible. He will have a general manager and various supervisors and independent contractors that will report to him to carry out our business objectives in the United States.

The petitioner submitted a proposed organizational chart for the U.S. company which depicts the beneficiary as vice president, reporting to the company president. The chart indicates that the beneficiary will supervise the foreign entity's operations manager, who in turn supervises an Indian-based designer and her two subordinates. With respect to the proposed U.S. staff, the chart indicates that the positions of operations manager, store/warehouse manager, sales team lead, sales team members, and packaging/delivery are "to be hired." The company president, in addition to supervising the beneficiary, also oversees two web developers and all restaurant staff. The petitioner did not submit a business plan or other evidence of the proposed nature of the office describing the scope of the entity, a lease for an office or warehouse, or evidence of the size of the U.S. investment, as required by 8 C.F.R. § 214.2(I)(3)(v).

In the RFE issued on December 21, 2008, 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 comprehensive description of the beneficiary's proposed duties; (2) complete positions descriptions for all

proposed employees, including a breakdown of the number of hours devoted to each of their specific job duties on a weekly basis; and (3) additional evidence to establish that the petitioner is prepared to commence doing business in the United States, including the company's business license, phone listing, advertisements or other promotional materials, evidence of assets purchased for the U.S. entity, evidence that the petitioner has secured customers, import and export brokers, and evidence of funds transferred by the foreign entity.

In response to the RFE, the petitioner submitted the following proposed job description for the beneficiary:

Responsibilities: Provide leadership and coordination of company sales and marketing functions. Develop and implement sales and marketing strategy. Monitor and analyze sales and marketing activity against goals.

1. Direct and coordinate sales and marketing functions.
2. Develop and coordinate sales selling cycle and methodology.
3. Direct and oversee the company marketing function to identify and develop new customers for products and services.
4. Research and develop strategies and plans which identify marketing opportunities, direct marketing, and new project development.
5. Analyze and evaluate the effectiveness of sales, methods, costs and results.
6. Develop and manage sales and marketing budgets, and oversee the development and management of internal operating budgets.
7. Plan and coordinate public affairs, and communications efforts, to include public relations and community outreach.
8. Directly manage major and critical developing client accounts, and coordinate the management of all other accounts.
9. Participate in the development of new project proposals.
10. Establish and implement short- and long-range goals, objectives, policies, and operating procedures.
11. Supervise the planning and development of company marketing and communications materials.
12. Represent the company at various community and/or business meetings to promote the company.
13. Supervise the preparation, issuance, and delivery of sales materials, exhibits, and promotion programs.
14. Promote positive relations with partners, vendors and distributors.
15. Recommend and administer policies and procedures to enhance operations.
16. Work with department managers and corporate staff to develop five year and ten year business plans for the company.
17. Establish and implement short- and long-range departmental goals, objectives, policies and operating procedures.
18. Serve on planning and policy-making committees.
19. Other duties as assigned.

The petitioner's response to the RFE included a revised organizational chart indicating that the beneficiary will supervise the following proposed U.S. staff: two web developers; an operations manager who will

supervise a shipping manager and a quality assurance manager; and a marketing manager who will supervise a sales team leader (USA), who will, in turn, oversee three regional sales team leaders, for a total of ten staff under the beneficiary's supervision. All staff are listed as "to be hired" with the exception of the web developers, who are identified by name.

The petitioner provided the requested job descriptions for the beneficiary's proposed subordinates, including descriptions for the positions of marketing manager, sales team leader, sales representative, web developer, operations manager, and quality assurance manager, and noted that several of these positions would require a Bachelor's degree as a minimum educational requirement.

The petitioner also submitted its business plan in response to the RFE. According to the business plan, the petitioner intends to market garments produced by the beneficiary's foreign employer and other manufacturers "starting in 2009." Specifically, the petitioner "intends to operate in the capacity of a supplier for high-quality branded and unbranded garments to a variety of customers" in the United States. The business plan indicates that the company intends to market clothing wholesale to retail shops in the southeastern United States, through a regional sales force in other parts of country, and through direct marketing on the petitioner's web site.

The business plan indicates that "the Company expects 3-4 employees initially," and will add three to five full-time employees, additional sales and warehouse staff "based on business needs." According to the petitioner's 12-month profit and loss projection, the company anticipates that its monthly payroll for all operations will be \$17,000 as of January 2010.

With respect to start-up expenses and capitalization, the business plan indicates that "an initial investment of approximately \$25,000 is expected in order to obtain legal entity licensure and certificates, business visa processing fees, lawyer fees, establishing leases and equipment for facilities, and obtaining samples for showroom." The petitioner indicates that the company will require an additional investment of \$15,000 for initial advertisement, marketing, traveling and recruitment.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year. The director observed that the evidence did not establish who would be performing the non-managerial, day-to-day operations associated with operating a restaurant, retail and textile/garment business. The director also questioned whether the beneficiary would be supervising professional personnel, in light of the nature of the businesses the petitioner intends to operate.

On appeal, counsel asserts that the director provided insufficient support for his conclusion that the beneficiary would be involved in the day-to-day and non-managerial activities associated with operating the business. Counsel states that the beneficiary "will oversee operations managers for operations in India and the United States, who will in turn oversee designers, marketers and sales teams." Counsel acknowledges that the beneficiary may be involved in day-to-day duties "in the early stages," but asserts that the petitioner "has a very clear business plan that should, within one year, allow the Beneficiary to move away from those details to allow him to focus on the executive and managerial roles at which he is expert."

Counsel states that the beneficiary "will be managing all of the major departments, subdivisions or functions of the organization and controlling the work of 'other supervisory, professional or managerial employees,' as well as managing the essential function of deciding on the strategy for the company's growth in this country."

In support of the appeal, the petitioner submits an advisory opinion letter from [REDACTED] [REDACTED] indicates that he reviewed the director's adverse decision, the petitioner's business plan, information regarding the beneficiary's background with the foreign entity, and organizational charts for the U.S. and foreign entities in reaching his conclusions. [REDACTED] discusses the beneficiary's professional background and states:

In these types of entrepreneurial enterprises, knowledge of everything from the manufacturing process, the supply chain, and the customer retail experience is critical to success. As such, it is important for owners and senior managers to know all aspects of the operation and this is often accomplished by getting involved in the day-to-day operations in addition to executive and managerial activities. Entrepreneurial startups grow from a few dozen employees to several hundred in a relatively short period of time as business and reach expands. In this context, senior managers do occasionally play an operational role when necessary, particularly during inception, but also the role of an owner and leader in guiding production managers, designers, and regional sales managers across geographies, particularly as the business expands.

[The petitioner] falls perfectly into the category of start up enterprises as I have described above and [the beneficiary's] experience and executive level of authority in running [the foreign entity] is exactly what [the petitioner] needs to expand in the US.

Therefore, it is my opinion based on my education, my experience with start up enterprises and the facts that I have reviewed that [the beneficiary's] role as Owner of [the foreign entity] and Vice President of [the petitioning company] does meet the requirements of someone in a managerial capacity and not just in a supervisory role.

Upon review, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year. As discussed below, this finding is based primarily on the petitioner's failure to establish the proposed staffing levels of the U.S. entity at the end of the first year of operations, and the petitioner's failure to establish that it is prepared to commence business activities immediately upon approval of the petition.

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 will exercise discretion over the proposed clothing import and wholesale operations of the petitioner's business, and that he will have an appropriate level of authority as a co-owner of the organization, the petitioner has failed to establish how the petitioner will grow to the extent that the beneficiary would be relieved from performing primarily non-managerial tasks within one year of approval of the petition.

The petitioner's initial description of the beneficiary's position essentially paraphrased the statutory definitions of "managerial capacity" and "executive capacity" at section 101(a)(44)(A) and (B) of the Act. For example, the petitioner stated that the beneficiary's duties will include "planning and formulating policies and strategies"; "setting up company objectives and goals;" overseeing "the management of the various functions"; and having authority "to exercise a wide latitude in discretionary decision-making," while supervising "a general manager and various supervisors and independent contractors." 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 more detailed description of duties provided in response to the request for evidence presented a position that is focused almost entirely on management of sales, marketing and advertising functions. However, according to the petitioner's organizational charts, the beneficiary would also be responsible for overseeing Indian operations, as well as U.S. operations, warehousing, and shipping and delivery functions, which were left entirely out of the position description. Therefore, while the petitioner provided a lengthy list of duties related to sales and marketing functions, the petitioner has not outlined in detail the full scope of the beneficiary's proposed position, nor has it provided the requested information regarding the percentage of time he is expected to devote to specific tasks. 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

The most glaring deficiency with respect to the petitioner's evidence is its failure to provide a clear and consistent account of its intended staffing levels and organizational structure within one year. See 8 C.F.R. § 214.2(l)(3)(v)(A). In its letter dated October 27, 2008, the petitioner stated that the beneficiary "will have a general manager and various supervisors and independent contractors that will report to him." The petitioner's initial organizational chart indicates that the beneficiary's U.S.-based subordinates will include an operations manager, a store/warehouse manager, packaging/delivery staff, and sales team member(s). The U.S. organizational chart submitted in response to the request for evidence indicates that the beneficiary will supervise a marketing manager, two web developers, an operations manager, a shipping manager, a quality assurance manager, a sales team leader and regional sales team leaders. The petitioner offered no explanation as to why it would significantly change its proposed staffing levels and organizational hierarchy prior to

commencing operations. 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).

The petitioner's business plan offers little insight into the petitioner's proposed staffing levels for its first year of operations. The plan simply states that the company "expects to employ 3-4 employees initially" and will add "up to 3 to 5" full-time employees at some undisclosed time in the future. The petitioner claimed to employ four employees at the time of filing, but such workers presumably work in the petitioner's restaurant, which was already operational. It is unclear whether the petitioner intends to initially hire three to four employees for the clothing import and distribution division of the business, or whether it will simply add "up to 3 to 5" employees to its existing four-person workforce. Given the vague nature of the business plan and the inconsistent organizational charts, the AAO cannot discern what positions might reasonably be filled within twelve months from the date the petition was filed. Thus, while the petitioner indicates that the beneficiary will manage all of the functions of the clothing import and distribution business, the petitioner has not established that he can do so without considerable support from lower-level employees in the areas of operations, marketing, sales, warehousing, and shipping, and has also not accounted for who would perform administrative and financial functions for the business. Overall, the petitioner's business plan does not support a finding that the multi-tiered organizational structure depicted on the organizational charts will be in place within one year. The AAO is unable to conclude that the beneficiary would be relieved from performing non-qualifying duties associated with the functions of the clothing import and distribution business within one year. 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).

Such finding is further supported by the petitioner's lack of office and warehouse space at the time of filing, as discussed above. In addition, the petitioner has not shown that it had a formal business plan in place at the time of filing, as the plan submitted in response to the request for evidence provides projections commencing in February 2009, three months after the petition was filed. If a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. 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 commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner indicates that it will require an investment of at least \$40,000 to cover expenses associated with the start-up of its clothing import and distribution business. It has provided evidence that the company president made an initial contribution to the company in the amount of approximately \$29,000 on July 3, 2008, well before the petitioner drew up its business plan for the clothing import division of the business. The record contains no evidence of the present availability of the funds needed to carry out the business plan.

The AAO acknowledges the submission of the advisory opinion letter from [REDACTED], offered as evidence that the beneficiary will perform in a qualifying managerial capacity. [REDACTED] concludes that the U.S. company requires the beneficiary's "experience and executive level of authority" in order to expand its U.S. operations.

The AAO may, in its discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

indicates that he reviewed the petitioner's business plan, proposed organizational chart and the director's notice of decision. The deficiencies of the petitioner's business plan and organizational charts have been discussed above. The petitioner submitted conflicting organizational charts and a business plan that did not support a finding that either proposed organizational hierarchy would be in place within one year. also provides no indication that he is aware of provisions for new offices set forth at 8 C.F.R. § 214.2(l)(3)(v)(C), which require USCIS to look beyond the beneficiary's job description for evidence that the new U.S. company will realistically be capable of supporting a managerial or executive capacity within one year. We concur with opinion that the beneficiary has the experience and level of authority required to manage the clothing import and distribution aspect of the petitioner's business; however, the critical issue is whether the evidence supports a finding that the beneficiary's duties would be primarily managerial in nature within one year from the date the petition was filed. We must conclude that opinion was primarily based on a vague business plan, the beneficiary's status as partial owner of the business, and an organizational chart that is inconsistent with other information in the record. Therefore, in this case, the expert opinion submitted is insufficient to overcome the valid objections of the director or the deficiencies discussed in detail above.

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.

C. Qualifying Relationship

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

The 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 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.

The petitioner stated on Form I-129 that the beneficiary's foreign employer, [REDACTED], has 51 percent ownership of the U.S. company and "100% managerial control." However, the petitioner's stock certificate number 1001 indicates that [REDACTED] "is the registered holder of 49% of the Shares of the Capital Stock" of the U.S. company, thus directly contradicting the petitioner's claims that it is majority-owned by the beneficiary's foreign employer. No other documentary evidence of the ownership and control of the petitioning company has been submitted.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of

outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this case, the evidence indicates that the claimed foreign company owns only a minority interest in the petitioning company. Absent documentary evidence such as voting proxies or agreements to vote in concert with other shareholders so as to establish a controlling interest, the petitioner has not established that the foreign entity actually controls the U.S. company based on its minority ownership of the company. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003). The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

III. Conclusion

The petition is denied and the appeal is dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.