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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

87

[Redacted]

DATE: **JUL 28 2011** Office: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

[Redacted]

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, California Service Center, denied the nonimmigrant visa petition.<sup>1</sup> 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 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 is incorporated in the State of Washington and operates a raspberry and blueberry farm. It claims to be an affiliate of Green Valley Development Ltd., located in British Columbia, Canada. The petitioner seeks to employ the beneficiary as its general manager for a period of three years.

The director denied the petition on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that there is a qualifying relationship between the U.S. company and the beneficiary's foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director's decision was based on errors of law and errors of fact with respect to both grounds for denial and should be overturned. Counsel submits a brief and an affidavit from the beneficiary 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.

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<sup>1</sup> On October 20, 2009, pursuant to the regulation at 8 C.F.R. § 214.2(l)(17)(i), the beneficiary, a Canadian citizen, filed the Form I-129, Petition for a Nonimmigrant Worker in conjunction with his application for admission to the United States with a U.S. Customs and Border Protection (CBP) officer at the Sumas, Washington port of entry. The inspecting CBP Officer forwarded the petition with a recommendation for denial to the California Service Center for final action, in accordance with 8 C.F.R. § 214.2(l)(17)(iv).

- (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.

## II. The Issues on Appeal

### A. *Employment in a Managerial or Executive Capacity*

The first 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(l)(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.

The petitioner stated on the Form I-129 that the beneficiary will be employed by the U.S. entity as general manager, with responsibility to direct and manage the company's berry farming operations. The petitioner indicated that the company employs up to 25 workers during peak season. The petitioner noted that the beneficiary currently holds an E-2 visa as co-investor of the U.S. company, for which he works part-time on a seasonal basis while maintaining his position as full-time president and manager of the Canadian affiliate.

The petitioner described the beneficiary's duties as general manager of the U.S. company as follows:

[The beneficiary] will continue to establish goals and policies and direct the general management of the entire farming enterprise. He will enjoy full discretionary authority to operate all aspects of the business. He will continue to insure that the U.S. farm complies with the requirements of all government agencies, including taxing authorities, employment authorities and farmland regulatory agencies. [The beneficiary] will control the companies [*sic*] personnel functions, with power to hire and fire employees or take other personnel actions. He will also control the budget regarding purchase of equipment and goods needed for the daily operations of the company. The Field Boss of the U.S. farm, Antonio Jose Pablo, reports to [the beneficiary]. [The beneficiary] primarily directs the farm through the Field Boss, who in turn directs the mostly Spanish-speaking farm workers. At peak seasons, up to 25 farm employees including the Field Boss will work under [the beneficiary].

The petitioner submitted an organizational chart identifying the beneficiary as president and general manager, supervising a vice president (the other 50 percent shareholder of the company), and the field boss, who in turn supervises up to 25 seasonal farm workers. The petitioner provided a copy of its Washington State Unemployment Insurance Report for the second quarter of 2009, which reflects wages paid to 23 employees between April and June. Specifically, the report indicates that the petitioner paid 16 workers in April, zero workers in May, and 12 workers in June.

As noted above, the inspecting CBP Officer recommended denial of the petition and forwarded it to the Director, California Service Center, for final action. The director denied the petition on December 30, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director denied the petition, in part, based on the

petitioner's failure to establish that the beneficiary's subordinates are professionals. The director further found that the petitioner's description of the beneficiary's duties suggests that "the beneficiary is performing more as a first-line supervisor of non-professional employees, rather than as a manager or executive." The director observed that the petitioner had not demonstrated that it has a level of organizational complexity that would require the beneficiary to be engaged primarily in hiring/firing personnel, discretionary decision-making and setting company goals and policies on a day-to-day basis.

On appeal, counsel for the petitioner asserts that the director mistakenly determined that the beneficiary's supervision of a Field Boss was insufficient to satisfy the requirement for managerial capacity because the Field Boss is not a professional. Counsel emphasizes that, although the Field Boss is not a professional employee, USCIS completely ignored the fact that he is a supervisory employee. Counsel asserts that, pursuant to section 101(a)(44)(A) of the Act, a managerial employee must supervise a subordinate staff of supervisory, professional or managerial workers, and there is not absolute requirement that the beneficiary's subordinates be professional employees. Counsel contends that the beneficiary, as president, general manager, and co-owner of the U.S. entity's farm, clearly has authority over the day-to-day operations of the company beyond the level normally vested in a first-line supervisor, and, contrary to the director's finding, is at the top of the company's organizational hierarchy.

Counsel emphasizes that the petitioner paid a total of 56 workers in 2009, and therefore has demonstrated that it has a need for at least one supervisory employee, i.e., the Field Boss, to supervise and control the lower-level farm workers. Counsel notes that the beneficiary himself is not directly engaged in supervising the Spanish-speaking seasonal workers, as he himself does not speak Spanish. Counsel further contends that the director erred in concluding that the beneficiary does not, alternatively, manage an essential function of the farming enterprise.

In support of the appeal, the petitioner submits a four-page affidavit from the beneficiary in which he details the structure of the U.S. entity and the nature of his duties as general manager. He describes these duties as follows:

As noted in the L-1A application, I have directed the general management of the entire farming operation. I have full discretionary authority to operate all aspects of the business. I direct the farm's personnel functions, with power to hire and fire employees and to take other personnel actions. I also am engaged in the training of farm workers. As General Manager, I regularly give reports in meetings of the Directors which occur in Canada. At the U.S. farm, I make day-to-day operational decisions. I am responsible for the compliance of the farm with requirements of all governmental agencies. I control the budget regarding the purchase of equipment and goods needed for the daily operation of the farm.

I manage the on-site operation of the farm primarily through the farm's Field Boss who reports to me. . . . most of our farm workers speak only Spanish. Accordingly, it is essential for us to have a bilingual Field Boss through whom we can direct the workers. At peak seasons, we have up to 25 farm workers including the Field Boss performing duties on the

farm. Because I do not speak Spanish, it is impossible for me to directly supervise the farm workers. . . . On-site farm activities I direct through the lower Field Boss include field preparation, tying and pruning of plants, application of chemical fertilizers, irrigation, harvesting the fruit, and transporting the harvested fruit.

Additionally, as General Manager of [the petitioner], I confer with fruit buyers and arrange for the sale of the harvested crop, I evaluate financial statements and make financial planning, I determine the types and quantities of fertilizer required for maximum production, I control the budget regarding the purchase of equipment and goods needed for the daily operation of the farm, I analyze market conditions to determine the types of plants to be planted, and I inspect the fields to determine the ultimate picking dates, to evaluate proper irrigation, and to evaluate crop damage from weather.

The beneficiary indicates that the field boss has seven years of farming experience, including three years of experience in berry farming. He describes the field boss' role as follows:

As Field Boss [redacted] supervised the work of all of the lower farm workers, up to 25 at one time. I instructed him in English as to the tasks to be accomplished on the farm. He then instructed and directed the workers, who almost all speak only Spanish fluently, on the various tasks to be performed on the farm such as pruning the berry plans, tying the plants to wire and pole systems which supports them, harvesting, and other farm workers tasks on [the petitioner's farm]. At my direction, the Field Boss hires the workers, makes their schedules, and reports their work hours to me, as well as directing and overseeing all of their work. Because neither owner of [the petitioner] speaks Spanish, we cannot and do not direct the numerous lower farm workers personally.

The position of Field Boss is not limited to instructing the workers. The Field Boss also coordinates with and takes direction from me on plans and programs for the farm, and makes recommendations for improvements, land preparation, fertilizing, planting crops, cultivation, and harvesting. He inspects the berry fields and confers with and advises me regarding problems. At my direction, he requisitions equipment and materials, and communicates work schedules. Also at my direction, the Field Boss supervises the repair and maintenance of farm buildings and equipment.

The beneficiary indicates that the Field Boss is trained in proper methods for berry pruning and tying, operating and inspecting berry harvesting machines, inspecting harvested fruit, spreading fertilizers, installing irrigation systems, planting methods and operating heavy farm machinery and equipment. The beneficiary states that the Field Boss trains and supervises the farm workers in these methods, often under the beneficiary's supervision.

The beneficiary states that the Field Boss spends the majority of his time supervising lower farm workers "with a smaller amount of his time" used to perform the other duties noted. The beneficiary states that he spends the majority of his time in the United States directing the activities of the field boss.

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

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 exercises discretion over the petitioning entity and had the appropriate level of authority as general manager and co-owner of the organization, the petitioner has failed to show that his actual day-to-day duties will be primarily managerial or executive in nature.

The petitioner's initial description of the beneficiary's duties was general and non-specific, borrowing liberally from the statutory definitions of managerial and executive capacity. For example, the petitioner stated that the beneficiary will "establish goals and policies and direct the general management" of the business; "enjoy full discretionary authority to operate all aspects of the business", and control the companies [sic] personnel functions, with power to hire and fire employees." While such responsibilities suggest that the beneficiary is responsible for oversight of the company, it provides little insight into how he would actually allocate his tasks on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The remainder of the beneficiary's duties, as described at the time of filing, included ensuring compliance with government agencies, including taxing authorities, employment authorities and farmland regulatory agencies. The petitioner did not describe the specific tasks the beneficiary would perform or otherwise describe what this area of responsibility entails or who would perform administrative tasks associated with these compliance functions. The petitioner stated that the beneficiary will "control the budget regarding

purchase of equipment and goods" but did not indicate who would actually be responsible for the day-to-day financial or purchasing functions of the company. Finally, the petitioner indicated that the beneficiary's primary duty is "directing the farm through the Field Boss." The only function attributed to the Field Boss based on the initial evidence was to "direct the mostly Spanish-speaking farm workers," and it was not evident what, if any, other functions would be handled by this individual.

The petitioner submits an expanded description of the beneficiary's duties on appeal. In addition to duties listed at the time of filing, the petitioner adds that the beneficiary is engaged in: "training of farm workers"; making "day-to-day operational decisions"; directing all on-site activities (field preparation, pruning of plants, fertilizing, irrigation, harvesting, and arranging transport) through the Field Boss; conferring with fruit buyers and arranging for the sale of the harvested crop; evaluating financial statements and financial planning; determining the farm's fertilizer needs; analyzing market conditions; and inspecting the fields. Many of these duties do not fall under the statutory definitions of managerial or executive capacity, and such duties do not appear to be incidental to any qualifying managerial or executive duties the beneficiary does perform.

The beneficiary indicates that he is "engaged in training of farm workers," a task that would not typically be performed by an individual with managerial or executive authority over the entire operation of the company. While he later goes on to state that the Field Boss carries out training functions under his direction, the beneficiary's exact role in delivery of training to the farm's personnel has not been clearly defined. In some respects, it appears that the Field Boss simply acts as a translator responsible for relaying the beneficiary's instructions to the workers.

The beneficiary also indicates that he is responsible for finding buyers for the harvested crops, selling the crops, evaluating financial documents, determining what type and how much fertilizer to buy, analyzing market conditions and inspecting the fields to determine when to harvest crops, how to irrigate the fields and to evaluate any crop damage caused by weather. While such tasks are removed from the day-to-day activities of planting, maintaining and harvesting crops, the petitioner has not explained how the beneficiary's performance of the company's sales, marketing, financial, and administrative functions rises to the level of managerial or executive capacity. All of these activities are part of the routine, day-to-day operations of the company. While the petitioner appears to employ ample farm workers, it does not employ any workers charged with the business aspects of operating a farm.

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial sales, administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. 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; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9<sup>th</sup> Cir. 2008).

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

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Therefore, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The petitioner indicates that the beneficiary's immediate subordinate is the field boss. Counsel correctly observes that the director erroneously applied an absolute requirement that the beneficiary must supervise professional employees. The petitioner need only establish that the beneficiary supervises managerial, supervisory, or professional employees if it seeks to establish that his supervisory duties qualify under the statutory definition of managerial capacity. The petitioner does not claim that the field boss works in a professional or managerial capacity, but it has consistently claimed that he serves as the supervisor to all other seasonal farm workers working for the petitioner.

An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. See generally *Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)). The petitioner indicates that the field boss "directs the mostly Spanish-speaking farm workers." On appeal, the petitioner indicates that the field boss also hires and schedules the farm workers, as well as overseeing all of their work. Therefore, the AAO is satisfied that the beneficiary's duties include overseeing one subordinate supervisor.

However, the petitioner has not sufficiently corroborated its claim that supervising the field boss is in fact the beneficiary's primarily responsibility, requiring the majority of his time in the United States. Pursuant to section 101(a)(44)(C) of the Act, an individual shall not be considered to be acting in a managerial or executive capacity merely on the basis of the number of employees that the individual supervises or directs. As discussed above, the beneficiary is responsible for sales, marketing, administrative and operational functions associated with the operation of a farm, with no subordinates to assist him with any of these functions, many of which require the performance of non-managerial tasks. Collectively, this brings into

question how much of the beneficiary's time can actually be devoted to managerial or executive duties. At best, the AAO can conclude that the beneficiary performs some qualifying supervisory duties as a personnel manager pursuant to section 101(a)(44)(A)(i) and (ii) of the Act.

On appeal, counsel further contends that "USCIS also erred in finding that the record does not show that [the beneficiary] will primarily manage an essential function of the farming enterprise." Counsel does not further develop his argument that the beneficiary qualifies for the benefit sought as a "function manager," and the petitioner did not advance such a claim prior to the adjudication of the petition. 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 detailed position description that clearly describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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, or other non-qualifying duties, 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. 1988).

In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner has not clearly articulated a claim that the beneficiary manages an essential function of the petitioning organization or identified the essential function and the duties the beneficiary performs related to such function. The claim consists solely of counsel's unsupported assertion that the beneficiary qualifies as a function manager. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, as discussed above, absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, and thus cannot deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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.* While the petitioner has established that the beneficiary maintains authority over the U.S. company, the record does not support a finding that the beneficiary's role is focused primarily on the broad goals and policies of the organization. Rather, the petitioner indicates that the beneficiary is involved in the sales, marketing, financial and administrative aspects of the business, rather than delegating such functions to subordinate or external personnel.

Upon review of the totality of the evidence, the petitioner has not supported its claim that the beneficiary's duties are primarily managerial or executive, given that all of the employees are engaged solely in farm work or supervising the farm work, rather than any business aspects of operating a farm. There is no mention in the record of any administrative, sales or other non-farm employees working for the petitioning enterprise, and the petitioner indicates that the beneficiary himself performs many of the operational aspects of the business side of the operation. Again, 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. Furthermore, 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). The petitioner has not met this burden.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

**B. Qualifying Relationship**

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

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
  - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
  - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the

duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The U.S. petitioner claims to have an affiliate relationship with the foreign entity based on common ownership and control by the beneficiary and his brother, who are claimed to 50-50 shareholders of both companies. The director acknowledged that the evidence submitted shows that the ownership of the petitioning organization and that of the foreign entity is as follows:

|                         |                            |
|-------------------------|----------------------------|
| <u>Foreign Company</u>  | <u>Shares of Stock</u>     |
| [REDACTED]              | 100                        |
| [REDACTED]              | 100                        |
| <br><u>U.S. Company</u> | <br><u>Shares of Stock</u> |
| [REDACTED]              | 1000                       |
| [REDACTED]              | 1000                       |

The director concluded that the petitioner failed to establish that there is an affiliate relationship between the two companies. The director's reasoning was as follows:

Although some common ownership exists between the two companies, they do not meet the definition of affiliate, as they are not owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. To establish eligibility it must be shown that the foreign entity and the petitioning entity share common

ownership and control. Control may be de jure by reason of ownership of 51 percent by reason or control of voting shares through partial ownership and possession of proxy votes. Matter of Hughes, 18 I&N Dec. 289 (Comm'r 1982).

The director acknowledged counsel's argument that the two companies are in fact owned in exactly the same percentage by the same persons. However, the director concluded that "the investors are independent individuals, and they are not bound together as a single unit by any agreement to vote in concert." The director determined that "in the absence of voting agreements establishing control of both companies by a single individual shareholder or a combination of shareholders, the petitioner has not demonstrated that an affiliate or subsidiary relationship exists between the U.S. and foreign entities."

On appeal, counsel asserts that the U.S. and foreign entities are affiliates pursuant to the regulatory definition at 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Counsel asserts that the petitioner and the foreign entity precisely meet this definition because the same two individuals own and control exactly the same percentage (50% each) in both corporations.

Counsel further asserts:

The USCIS' decision in this case cites Matter of Hughes, 18 I&N Dec. 289 (Comm'r 1982) and Matter of Siemens Medical Systems, 19 I&N Dec. 362 (Comm'r), apparently for the misplaced suggestion that one 50% shareholder where there are affiliates must have at least 51% control. This language is not only contrary to the express language of 8 CFR 214.2(l)(1)(ii)(L)(2) . . . but is also plained [sic] contrary to the holdings of Matter of Hughes and Matter of Siemens Medical Systems, cited above. In Matter of Siemens Medical Systems, the Commissioner expressly held that 50-50 control creates per se control in each 50% owner. The Commissioner considered Matter of Hughes and held as follows:

There is no majority control, but where each parent through ownership and control of 50 percent of the voting shares of the joint venture has the power to prevent action by that company through exercise of veto power, it "negatively" controls the company.

Such is clearly the case for each 50% shareholder in this case.

Counsel further asserts that the director erred in determining that there must be voting agreements in place bind the two 50% shareholders to "vote in concert," noting that the exact opposite decision was made in Matter of Siemens Medical Systems, "where the Commissioner actually held 50-50 ownership will establish per se control in each 50% owner unless there are agreements negating that inherent control." It is noted that the facts present in the precedent decision cited by counsel may be distinguished from those of this case because Matter of Siemens Medical Systems pertained to two corporations that each owned 50 percent of a 50-50 joint venture and were therefore subsidiaries of the joint venture.

In the beneficiary's affidavit submitted on appeal, he asserts that he and his brother, the other 50 percent owner of both the U.S. and foreign entities, have no agreements restricting the control of either shareholder.

Upon review, the director's determination with respect to this issue will be withdrawn. The evidence submitted supports a finding that the U.S. and foreign entities are affiliates based on common ownership and control by the same two individuals, pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). The fact that neither company has one majority shareholder with more than 50% ownership or control does not negate the qualifying affiliate relationship. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Both companies are owned in the exact same proportions by the same two individuals, therefore, they have exactly the same ownership, with both shareholders equally controlling both companies.

**C. Qualifying Employment Abroad**

Beyond the decision of the director, a remaining issue in this matter is whether the petitioner has submitted 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. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The petitioner indicates that the U.S. farm was founded in Washington State as a partnership in 1997 and incorporated on June 26, 2003. The petitioner's Canadian affiliate was incorporated in British Columbia on December 30, 2002.

The petitioner states that the beneficiary has been employed by the United States petitioner on a part-time seasonal basis in E-2 status since March 2000, and on a full-time basis as the general manager of the Canadian entity since 2003. The petitioner indicates that the beneficiary would continue to reside in Canada and divide his work time between the United States and foreign companies.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. *Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.*

(Emphasis added).

A determination as to whether the beneficiary was employed by the foreign entity on a full-time continuous basis for at least one year in the three years preceding the filing of this petition rests upon whether the statutory and regulatory definitions of "intracompany transferee" permit a beneficiary to acquire his one year of continuous employment abroad while concurrently employed by a related entity in the United States in a lawful status.

The beneficiary has been employed in the United States on at least a part-time basis during his entire period of employment with the petitioner's foreign affiliate. While the petitioner describes the beneficiary's foreign employment as "full-time," it has not specified exactly how much time the beneficiary devotes to his duties for the foreign entity during the berry farming season while he is in the United States pursuant to his E-2 visa. The petitioner indicated on the Form I-129 that the beneficiary's proposed employment for the U.S. company is in fact full-time. A beneficiary's full-time services may be divided among affiliate companies, but the full-time employment must occur abroad. *See* 8 C.F.R. § 214.2(l)(3)(iii); *see also*, 9 FAM § 41.54 n.11.1a (noting that several years of part-time employment equaling one year in aggregate cannot be viewed as meeting the one year of full-time employment abroad requirement). The requirement that the full-time employment be gained abroad precludes the beneficiary from gaining his qualifying experience while employed concurrently by the U.S. entity and the foreign entity.

The beneficiary's periods of employment in the United States in E-2 status will not interrupt his continuous period of full-time employment abroad, once that period is established. However, the petitioner has not shown that the beneficiary had one year of full-time continuous employment with a qualifying employer abroad prior to beginning his intermittent employment in the United States in 2000. Based on the facts as described in the record, the petitioner has not submitted evidence to satisfy the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(iii).

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

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.