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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

PUBLIC COPY

[Redacted]

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DATE: **MAY 13 2011** Office: VERMONT 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,

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation established in September 2007, states that it operates a grocery and butcher shop. It claims to be an affiliate of [REDACTED] located in Hyderabad, India. The petitioner seeks to employ the beneficiary as its president and general manager for a period of three years.¹

The director denied the petition on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that there is a qualifying relationship between the U.S. company and the beneficiary's prior foreign employer; and (2) that the beneficiary will be employed in the United States 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. On appeal, counsel asserts that the petitioner submitted adequate evidence of ownership of the U.S. company, and contends that the director had no basis for requiring additional documentation related to the beneficiary's acquisition of the U.S. company. Counsel further asserts that the director erred by not adjudicating the matter as a "new office" petition. Counsel submits a brief, but no additional evidence, in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(I)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

¹ The petitioner initially indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary is not coming to the United States to open a new office, but indicated in response to the director's request for evidence that it is in fact a "new office" as defined in the regulations at 8 C.F.R. 214.2(I)(1)(ii)(F). The director ultimately adjudicated the matter as a "new office" petition pursuant to 8 C.F.R. § 214.2(I)(3)(v). Pursuant to 8 C.F.R. § 214.2(I)(7)(i)(A)(3), 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.

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) 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 (I)(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.

As a preliminary matter, we note that the petitioning company was incorporated in the State of New York in June 2007, and the petitioner claims to have acquired ownership of the company in February 2008. The petitioner filed the instant petition on March 10, 2008. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F), a "new

office" means an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year. The director appropriately adjudicated the petition as a "new office" petition pursuant to the regulations at 8 C.F.R. § 214.2(l)(3)(v).

II. The Issues on Appeal

A. Qualifying Relationship

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

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

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

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

* * *

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

(L) *Affiliate* means

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

The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it is an affiliate of Jamia Arabia Darussalam Educational Society, located in India, based upon the beneficiary's 100 percent ownership of both companies.

As evidence of the beneficiary's ownership of the foreign entity, the petitioner submitted a "Certificate of Registration" indicating that the organization was established on February 9, 1988 in Hyderabad, India under the [REDACTED]. The petitioner submitted a document dated February 1, 2008 on the foreign entity's letterhead, which lists the organization's officers of the corporation. The beneficiary is listed as "Founder & Director."

With respect to the U.S. company, the petitioner submitted a copy of its certificate of incorporation filed June 20, 2007, which indicates that it is authorized to issue 200 shares of stock with no par value. The petitioner provided the Minutes of the Meeting of the Shareholders of the petitioning company dated January 21, 2008, which indicates that the petitioner's shareholder, [REDACTED], resolved to transfer 100% of the shares of the corporation to the beneficiary on January 21, 2008.

The petitioner also submitted an agreement titled "Transfer of Shares" signed by [REDACTED] and the beneficiary on January 15, 2008, in which the beneficiary agreed to pay \$110,000 on February 1, 2008 and execute a promissory note in the amount of \$77,734.08, in exchange for the shares. The petitioner also submitted a Bill of Sale dated February 1, 2008 under which [REDACTED] granted the beneficiary "the premises located at [REDACTED]" in exchange for \$110,000. Finally, the petitioner submitted a copy of a Promissory Note in which the beneficiary agreed to pay [REDACTED] a total of \$77,734.08 in monthly installments of \$1,619.46, from April 1, 2008 until March 1, 2012.

The director issued a request for additional evidence on March 14, 2008, in which he requested, in pertinent part, additional evidence to establish that the U.S. and foreign entities have a qualifying relationship. Specifically, the director requested that the petitioner submit: (1) the foreign entity's articles and certificate of incorporation and bylaws; (2) documentary evidence establishing the ownership and control of the foreign entity; (3) documentary evidence establishing the ownership and control of the U.S. entity, including the number of shares of stock that have been issued, the names of all shareholders, and copies of all stock certifications issued; (4) evidence that the promissory note has been properly filed with the appropriate authorities; and (5) evidence that indicates the beneficiary's name on any license, certificate or other documentation in the name of the petitioning entity. The director also requested additional evidence to establish that the foreign entity is presently engaged in the regular, systematic and continuous provision of goods and services, including evidence of the organization's business activities for the past year.

In a response dated June 9, 2008, counsel for the petitioner stated that the petitioner cannot provide articles or incorporation or stock certificates for the foreign entity. Counsel explained:

In India, there are no official documents from which the government keeps record of all the companies. The only document available for [the beneficiary's] company is the Certificate of Registration assigned by [REDACTED]. Also, being that all companies in India are required to pay a lumpsum of taxes at the end of the year, all companies are registered to pay their taxes. [The beneficiary] has provided our office with a Tax Receipt document issued by [REDACTED]. Most companies in India are only registered with the state authorities rather than the Government of India.

Counsel further noted that the foreign entity is considered an educational institution and is therefore not treated like a regular business that generates income. Counsel indicated that "there are no records of fully stated taxes with the income and expenses of the foreign entity." Instead, the petitioner submitted a letter on the foreign entity's letterhead, listing the job titles of the staff and their monthly salaries. According to this information there are approximately 25 teachers and other staff, whose salaries are paid based on donations and charitable contributions.

The petitioner submitted a receipt from the Tax Section of [REDACTED] dated May 3, 2005. The receipt appears to be for property taxes in the amount of Rs. 1664 for the period April 1, 2005 through March 31, 2006, and is accompanied by a "Special Notice of House Tax/New Assessment/Amendment" for property located at [REDACTED]. The petitioner submitted photographs of the foreign entity, an Islamic school for boys, which reflect that this is the school's street address.

With respect to the U.S. company, the petitioner submitted a copy of the U.S. company's Stock Certificate number two indicating that the company issued 100 shares to the beneficiary on February 1, 2008.

The director denied the petition on June 19, 2008, concluding that the evidence submitted is insufficient to establish the claimed qualifying relationship between the U.S. and foreign entities. The director observed that the petitioner failed to submit copies of all the U.S. company's stock certificates or a list of all stock certificates issued to date. The director further noted that the petitioner did not provide evidence that "the promissory note was filed" or that the claimed transfers of funds have occurred. As such, the director determined that the petitioner did not adequately corroborate its claim that the beneficiary purchased the shares of the U.S. company.

On appeal, counsel for the petitioner asserts that the director erred by insisting that documents surrounding the sale of shares in the U.S. company to the beneficiary, such as the lease, promissory note, bill of sale, and transfer of shares, were required to be filed with any authority in the State of New York. Counsel asserts that the petitioner will document the change in ownership when it files its Biennial Statement with the New York State Board of Corporations, and has no other filing requirements. Finally, counsel contends that the documents submitted "would be considered viable and substantial contracts or evidence of corporate ownership in any court in the United States."

Upon review, the AAO concurs with the director's conclusion that the evidence of record does not establish the qualifying relationship between the U.S. and foreign entities.

The AAO agrees, in part, with counsel's assertion that the petitioner was not required to file certain corporate documents with any authority in New York State, such as an assignment of lease, bill of sale, or promissory note. However, counsel fails to acknowledge the other reasons given for the denial, which were valid.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

As noted by the director, the petitioner failed to submit copies of all of its stock certificates, nor did it submit a copy of its stock certificate ledger. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner has not submitted evidence that its stock certificate number one was actually canceled and thus a copy of a single stock certificate is insufficient to support the petitioner's claim that the beneficiary wholly owns the U.S. company.

The director also noted in the decision that the record contains no evidence of any monetary transfers from the beneficiary to the U.S. company or its claimed prior stockholder, although the evidence the petitioner submitted indicates that the beneficiary was required to pay \$110,000 plus monthly payments on a promissory note in order to acquire his ownership interest. The petitioner opted not to submit any additional evidence to address this deficiency on appeal, and instead relies upon the stock certificate #2, bill of sale, promissory note, and assignment of lease documentation. Therefore, the record does not contain any evidence that the beneficiary actually paid for his ownership interest in the company.

The petitioner submitted evidence that the beneficiary had over \$41,000 in a Chase Bank savings account as of November 2007. The petitioner also submitted two HSBC Deposit Receipts in the amounts of \$35,000 and \$50,000, and dated January 10, 2008 and January 18, 2008, respectively. The evidence submitted does not identify the name of the account holder, the name of the person making the deposits or the source of the funds. The AAO concurs with the director that, absent copies of all corporate documentation related to the issuance of company stock, and evidence that the beneficiary actually paid for his ownership in the U.S. company according to the terms of the "transfer of shares" agreement, the petitioner has not established the claimed affiliate relationship between the U.S. and foreign entities. 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)). Accordingly, the appeal will be dismissed.

B. Employment in a Managerial or Executive Capacity

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(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.



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 plan and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner must also establish that the beneficiary will have managerial or executive authority over the new operation. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

The petitioner indicated on the Form I-129 that the U.S. company was established in 2004 and currently has two employees. As noted above, the petitioner did not indicate on the Form I-129 that the beneficiary will be employed in a new office. In a letter dated March 7, 2008, counsel for the petitioner described the U.S. company as a new office and stated that the beneficiary's proposed duties as general manager and president of the U.S. company, as follows:

This position entails unilateral decision making authority. The decisions made by [the beneficiary] will greatly impact the manner in which [the petitioner] conducts business. [The beneficiary] will have final say in deciding what goods will be purchased for sale as well as seeing that the items purchased are distributed efficiently and profitably to the customers of [the company].

Among [the beneficiary's] goals will be to develop new business relationships in the United States. He will also negotiate the sale of various meats and grocery items and will be responsible for marketing these products to potential and existing buyers. He will also evaluate meat and grocery distributors to decide who [the petitioning company] will purchase their inventory from. His goal is to sell every product at a rate which will generate the most profit for [the petitioner].

In addition [the beneficiary] will plan business objectives, to develop organizational policies to coordinate functions and operations, and to establish procedures for attaining objectives; review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions; direct and coordinate formulation of funding for new or continuing operations to maximize productivity.

[The beneficiary] will also be responsible for the hiring and training of new employees. He will also develop [the petitioner's] recruitment efforts and policies. In addition to these duties, [the beneficiary] will plan and develop human resources designed to supervise and evaluate performance of any employees hired by [the petitioner] for compliance with established policies and objectives of the organization and contributions in attaining objectives.

[The beneficiary's] position is a key managerial one because he has the executive experience of having opened other branches of [company] offices in foreign countries. He is highly experienced in business development and organization through the institution he has founded in India. . . .

Even though [the beneficiary] is more than qualified to perform the tasks involved in the sale of goods, he will not involved be involved [sic] in the performance of these procedures on a day-to-day basis. [The beneficiary] will hire additional employees once he receives authorization to work in the United States to perform these tasks. [The beneficiary] will directly supervise all future employees. He will direct his efforts towards the further expansion of the company in the U.S., training, and hiring future employees. It is possible that he may assist in the completion of certain projects when needed.

In the request for evidence issued on March 14, 2008, the director instructed the petitioner to submit: (1) a comprehensive description of the beneficiary's proposed duties; (2) a complete list of the U.S. employees which includes their names, position titles, position description, and breakdown of the number of hours to be devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary; (3) additional evidence of the management and personnel structure of the U.S. entity; (4) evidence of the financial status of the U.S. entity; (5) a copy of the latest U.S. corporate income tax return filed by the company; (6) copies of the U.S. company's IRS Forms 941, U.S. Quarterly Federal Income Tax Return, for the last four quarters; (7) evidence to show how the beneficiary will be relieved from performing non-managerial duties; and (8) photographs of the interior and exterior of all premises secured for the U.S. entity.

In response, counsel clarified that the petitioner intended to file a "new office" petition, and that it is therefore unreasonable for the director to request evidence that employees have been hired or evidence that the business

is thriving financially. The petitioner acknowledged that "although there have been previous owners of the corporation, these owners and their business practices/records have naught to do with the petitioner and his plans for the operation of this business." The petitioner submitted a copy of the company's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which indicates that the company achieved gross receipts or sales of \$126,594 in 2007 and paid no salaries, wages, labor costs or compensation to officers.

The petitioner submitted a letter dated June 9, 2008 in which it further described the beneficiary's proposed duties and the proposed staffing of the U.S. entity. The petitioner indicated that the beneficiary "wishes to hire a purchasing manager, marketing manager and store manager in the near future to assist him with his managerial responsibilities." The petitioner stated that the purchasing manager will be responsible for training butchers and ensuring that they adhere to New York State Department of Health Regulations, checking the quality and freshness of meat, and purchasing quality meat at the best price from third-party agents.

The petitioner indicated that the marketing manager will be researching competition in the community and reporting to the beneficiary; finding Islamic religious institutions to which the company will donate some of the business's profit; and exploring neighboring communities for good locations to expand the grocery and meat business. Finally, the petitioner indicated that the store manager will manage the day-to-day operations, oversee the work of employees, create weekly work schedules, report to the beneficiary on a weekly basis, and maintain "responsive and cooperative relationships with supervisors, co-workers, vendors, customers, and other personnel."

The petitioner indicated that the beneficiary will be responsible for: "all management decision making"; "management and development of budgeting, financial analysis and the hiring of employees; "developing long-term plans to grow sales and control costs; and "finance for working capital and specific assets." The petitioner further stated that, the beneficiary "will be responsible for developing and implementing store operational goals and objectives; initiate annual business planning and the goal setting process."

The petitioner submitted an organizational chart indicating that the beneficiary will supervise the three proposed managers, and the store manager will supervise one cashier and two butchers.

The director denied the petition, concluding that the petitioner failed to establish that the U.S. business will support a managerial or executive position within one year of the approval of the petition. In denying the petition, the director noted that the petitioner did not submit evidence to establish when the proposed managers will be hired, or that they would be in place within one year. The director further noted that, a review of the record reveals that the petitioner acquired an active business which presumably must have some staff in place. The director observed that, based on 2007 IRS Form 1120S, the business does not appear to operate at a level that would support the proposed staff within one year. Finally, the director noted that the petitioner failed to provide photographs depicting the operation of the entity.

On appeal, counsel asserts that it is "hard to believe that the Service has not recognized that this application is a new office petition." Counsel makes no further reference to the director's conclusions with respect to the beneficiary's proposed employment capacity in the United States.

Upon review, we affirm the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year. This finding is based primarily on the petitioner's failure to provide a description of the beneficiary's proposed duties that establishes that such duties will be primarily managerial or executive in nature, and the failure to establish the scope of the organization and the proposed staffing levels of the U.S. entity within one year. Contrary to counsel's assertions on appeal, the director did in fact ultimately adjudicate this matter as a new office petition. Given that the petitioner initially indicated on the Form I-129 that the company was established in 2004, has two employees, and is not a new office, it was not unreasonable for the director to request additional evidence pertaining to existing employees and the financial status of the company. If the petitioner has additional evidence to submit in support of its new office petition, the AAO would have reviewed it on appeal, as the request for evidence was not written specifically to the requirements at 8 C.F.R. § 214.2(l)(3)(v). The petitioner has not supplemented the record on appeal and counsel appears to be unaware that the director appropriately adjudicated the petition as a new office 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.* 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 proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 petitioner's 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

The position description submitted at the time of filing the petition suggested that, while the beneficiary would hold discretionary decision-making authority over the operations of the petitioning company, he would also be performing a number of non-managerial duties associated with the day-to-day activities of operating a grocery store. For example, the petitioner stated that the beneficiary will "negotiate the sale of various meats and grocery items," "will be responsible for marketing these products to potential and existing buyers," and will "evaluate various meat and grocery distributors to decide who [the petitioner] will purchase their inventory from." Based on these duties, it is evident that the beneficiary would be directly involved in the company's purchasing, sales and marketing activities, duties that have not been shown to be managerial or executive within the context of a retail business.

The petitioner described the remainder of the beneficiary's duties in overly broad terms that failed to identify what specific managerial or executive tasks the beneficiary would perform as the president and general manager of the petitioning company. The petitioner noted that the position entails "unilateral decision making authority," and that the beneficiary will "plan business objectives," "develop organizational policies to coordinate functions and operations," "establish procedures for attaining objectives," and "review objectives and plans." Many of these duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not

sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed.

Thus, while several of the duties described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. Furthermore, the petitioner indicated that the beneficiary would perform non-qualifying duties associated with the company's purchasing, sales and marketing functions. Based on the initial evidence, the director was unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties did not establish what proportion of the beneficiary's duties would be managerial in nature, and what proportion would be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The director reasonably requested that the petitioner submit a comprehensive description of the beneficiary's proposed tasks, along with a breakdown of the number of hours he will devote to each of his duties on a weekly basis. The petitioner failed to provide the requested breakdown of the position description in response to the RFE. In addition, when responding to the RFE, the petitioner eliminated the purchasing, sales and marketing tasks included in the initial position description, and indicated that the beneficiary's main responsibility will be "management and development of budgeting, financial analysis and the hiring of employees," along with "developing long-term plans," and "developing and implementing store operational goals and objectives." In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. As discussed above, the petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

The petitioning company, prior to the beneficiary's claimed purchase of the company, had been operating a grocery store and meat shop doing business as "Indus Spice" since approximately June 2007, for less than one year. At the time of filing, it appeared that the petitioner sought to rely on the ongoing business operations

rather than submitting evidence of the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals, or evidence of the size of the investment in the U.S. entity. See 8 C.F.R. §§ 214.2(l)(3)(v)(C)(1) and (2). The petitioner indicated on Form I-129 that the company already has two employees and stated in its support letter that the beneficiary would hire additional employees to handle the sale of goods upon approval of the petition. However, the petitioner failed to document the existence of any employees already hired nor has it described in detail what duties they perform. 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)). In response to the RFE, the petitioner indicated that the beneficiary will hire three managers, two butchers and a cashier in the "near future."

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).

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

Furthermore, the petitioner's evidence must substantiate that the duties of the beneficiary and his subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization will be sufficiently complex to support an executive or managerial position within one year.

The petitioner has submitted a proposed organizational chart depicting two tiers of proposed managerial employees supervising a staff of two butchers and one cashier. The duties attributed to the proposed positions of purchasing manager, store manager and marketing manager are those the petitioner included in the beneficiary's own job description at the time of filing, at which time nothing was stated with respect to hiring additional management staff. The petitioner's stated need for four managers, two butchers and one cashier is

not entirely plausible given the nature of the petitioner's retail business, particularly given that the company claims to currently operate with only two employees. While it has assigned many of its proposed positions managerial job titles, it is reasonable to believe that the petitioner has a reasonable need for more lower-level employees, such as cashiers and stockers, than it does managers. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Furthermore, the petitioner failed to provide the requested photographs of the interior and exterior of the premises secured for the store, which would assist USCIS in determining the exact size, scope and nature of the operation.

The AAO's analysis of this issue is severely restricted by the petitioner's failure to submit an adequate business plan. A review of the totality of the evidence submitted provides no documentation corroborating the petitioner's claims regarding the number of employees to be hired, no timeline for hiring employees, no evidence regarding the current financial position of the U.S. company, and no evidence regarding the petitioner's anticipated start-up costs and financial objectives for the first year of operations. The AAO notes that the petitioner's submission of a vague job description for the beneficiary and a proposed organizational chart falls significantly short of establishing that the company will be able to support a primarily managerial or executive position within a twelve-month period. The regulations require the petitioner to present a credible picture of where the company will stand in exactly one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. 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. at 165 (citing *Matter of Treasure Craft of California*, 14I&N Dec. 190 (Reg. Comm'r. 1972)).

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president and general manager. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Overall, the vague job description provided for the beneficiary, considered in light of the petitioner's failure to document its business or hiring plans and financial objectives for the first year of operations, prohibits a determination as to whether the petitioner could realistically support a managerial or executive position within one year. For this additional reason, the appeal will be dismissed.

C. One Year of Continuous Employment Abroad

Beyond the decision of the director, the remaining issue in this matter is whether the petitioner submitted evidence that the beneficiary 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, pursuant to 8 C.F.R. § 214.2(l)(3)(iii).

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).

The petitioner indicated on the Form I-129 that the beneficiary has been employed by the foreign entity from July 1982 to the present, with no interruptions in employment. The petitioner also indicated that the beneficiary was last admitted to the United States as a B-2 visitor on November 22, 1999, and has been in the United States since that time, for over eight years at the time the petition was filed. The petitioner submitted a copy of the beneficiary's latest approval notice granting him an extension of R-1 status for employment with [REDACTED] from May 1, 2005 through April 30, 2008.

Counsel asserted that, in light of the above-cited definition of intracompany transferee, "the USCIS should take into consideration the three (3) years of [the beneficiary's] employment preceding his entry into the United States."

Counsel's interpretation of the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) is not persuasive. The cited regulatory provision must be read together with the regulation at 8 C.F.R. § 214.2(l)(3)(iii), which requires evidence that the beneficiary 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*. If the beneficiary is already in the United States in a lawful status for a branch of the same employer, or a parent, affiliate or subsidiary thereof, this period of employment will not be considered interruptive of the beneficiary's continuous employment abroad, and USCIS will look beyond the three-year period immediately preceding the filing of the petition to determine whether the beneficiary meets the requirement set forth at 8 C.F.R. § 214.2(l)(3)(iii). A beneficiary's one year of continuous employment abroad, once established, remains continuous, despite the beneficiary's subsequent stay in the United States for a branch, affiliate, subsidiary, or parent of the foreign entity in an authorized nonimmigrant status. Logically, it follows that working for an *unrelated* employer for more than three years will in fact interrupt a beneficiary's one year of continuous employment abroad.

In this matter, the beneficiary has spent the three or more years immediately preceding the filing of this L-1A petition employed in the United States in R-1 status by an organization that has not been shown to be a parent, affiliate or subsidiary of the claimed qualifying foreign employer abroad. As such, this period of employment in R-1 status must be considered interruptive of the beneficiary's continuous employment abroad. 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); *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.