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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**



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DATE: **SEP 06 2011** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**  
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Connecticut limited liability company established in January 2009, states that it intends to engage in lubricants manufacturing, blending, packaging and distribution. It claims to be a subsidiary of [REDACTED] located in the United Arab Emirates. The petitioner seeks to employ the beneficiary as the president and managing director of its new office in the United States for a period of one year.

The director denied the petition based on two independent and alternative grounds. The director concluded that the petitioner failed to establish: (1) that the U.S. company had secured sufficient physical premises to house the new office; and (2) that the U.S. entity would support a managerial or executive position within one year of commencing operations in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the petitioner submitted evidence to satisfy all eligibility requirements for a new office L-1A classification petition.

## **I. The Law**

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

## **II. Discussion**

### ***A. Sufficient Physical Premises to House the New Office***

The first issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 17, 2009. The petitioner indicated on the Form I-129 that the company is located at [REDACTED]. The petitioner also indicated this location as the beneficiary's current address in the United States. In its letter submitted in support of the petition, the petitioner indicated that it leased premises "with an office space of approximately 1200 square feet." The petitioner indicated that the office would contain all "business essentials" such as a computer, telephone, fax machine and office furniture.

The petitioner also submitted a business plan in support of the petition. The business plan does not discuss the type of space secured for the business or the petitioner's space requirements. According to the initial business plan, the petitioner intends to employ an initial staff of three employees.

The director issued a request for additional evidence ("RFE") on February 25, 2009, in which the director instructed the petitioner to submit, *inter alia*, evidence that establishes that the U.S. company has secured sufficient physical premises to house the new office, including evidence of a signed lease.

In response to the RFE, the petitioner submitted a lease agreement signed on October 20, 2008. According to the terms of the lease, the beneficiary agreed to rent the residential property located at [REDACTED] and occupancy of the premises is limited to three persons. The "use" clause stipulates that "Tenant agrees to use the dwelling only as a single family residence and Personal Office for Tenant's immediate family." Counsel emphasized that the lease allows the use of the premises as a "personal office."

The director denied the petition on March 23, 2009, finding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. The director emphasized that the petitioner submitted a lease for a residential property that permits use of the premises solely by the beneficiary and his immediate family.

On appeal, counsel for the petitioner asserts that the petitioner submitted a lease that was signed prior to the filing of the petition, clearly stated that the size of the leased premises is 1,200 square feet, and provided evidence of rental payments. Counsel asserts that 1,200 square feet is a sufficient office space for the petitioning company. The petitioner re-submits a copy of the beneficiary's lease agreement, along with cash register receipts evidencing the beneficiary's purchases of a computer and office supplies.

Upon review, counsel's assertions are not persuasive. The petitioner has not submitted evidence that it has secured sufficient physical premises to house the new office.

The AAO acknowledges that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office, and observes that there may be cases in which a home office would satisfy the regulatory requirements. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a home office, if required, evidence that the landlord has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling will meet the company's needs. Finally, photographs and floor plans of the leased premises may assist in determining that the premises secured are sufficient to accommodate the petitioner's business operations.

Here, the petitioner has not offered any additional evidence on appeal to demonstrate that the specific premises secured are sufficient to accommodate the petitioner's intended business. As noted by the director, the lease agreement was entered into by the beneficiary in his personal capacity, for a dwelling to be occupied by him and his immediate family, and the lease expressly prohibits any other use of the premises. While the terms of the lease permit the beneficiary to use the premises as a "personal office," the AAO cannot conclude that this provision would allow the beneficiary to operate the petitioning company from his home. The lease was executed three months prior to the establishment of the petitioning company and the lease specifies that the premises may only be used by three occupants, the beneficiary and his immediate family. Absent additional evidence, it is reasonable to conclude that the premises are not authorized for use by the petitioner or its proposed employees.

Furthermore, although the petitioner indicates that its lease provides for 1,200 square feet of office space, the lease agreement does not specify the size of the property, and the petitioner has not submitted a floor plan, photographs or other evidence corroborating its statements regarding the size of the leased premises. In addition, the petitioner has not provided evidence that the landlord has granted the petitioner authorization to operate the business from the beneficiary's home or that the petitioner has obtained any applicable licenses required to operate a lubricant sales and distribution business from a private home. 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)).

Finally, even if the petitioner had established that it is authorized to conduct a business from the beneficiary's leased home, the maximum occupancy of the premises secured is three people. The space secured may be sufficient to accommodate the beneficiary, but it is clearly not sufficient to accommodate the proposed staff and scope of operations the petitioner anticipates for its first year in operation.

The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

***B. Beneficiary's Employment in a Managerial or Executive Capacity***

The second issue addressed by the director is whether the petitioner established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, pursuant to 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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

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

The petitioner stated on the Form I-129 that the beneficiary, as president and managing director of the U.S. entity, "will seek to expand his toll blending arrangements and seek to grow his client base in the United States in the sale and consultation for lubricants."

In a letter submitted in support of the petition, the petitioner explained that the petitioner's parent company is a manufacturer and marketer of automotive, industrial and marine lubricants and specialty lube oil additives. The petitioner stated that the parent company engages in blending, filling and distributing lubricants in the United Arab Emirates, parts of the Middle East and Africa, Australia and Fiji, where the company has distributors. The petitioner stated that the new subsidiary in the United States "will have a primary focus to look for toll blending arrangements as a first stage," and "in the second state, the subsidiary will then look for either a partnership or to acquire affiliated companies that are engaging in similar activity."

The petitioner stated that the beneficiary, as the managing director of both the petitioner and the foreign entity, has performed and will perform the following duties:

[H]e manages the technical and Marketing issues that are involved with such a complex organization, system integration, verification and validation, cost and risk, and supportability and effectiveness analyses for all blending formulations. [The beneficiary] is involved with the details of formulations and applications of oils, meeting with the Distributors, Customers, and Clients. He plans, organizes, directs and controls the organization's major functions such as Client orders, Suppliers Distribution and controls the organization's major functions such as the Blending, Filling and Distributing lubricants and works through other employees to achieve the organizational goals. In addition, he is responsible for coordinating subordinate subcontractor selection, performance assessment, and work assignments. He ensures analyses are performed at all levels of blending to include: concept, design, fabrication, test, operation and maintenance.

[The beneficiary] directs the logical and systematic blending and distribution of customer and/or product requirements into solidified blending solutions that acknowledge technical, mathematical, chemical and cost restraints. He also manages the functional analysis, requirements and allocation to translate customer requirements into hardware and chemical formula specifications.

He is responsible for the successful operation of the Company through his organizational skills. He also selects, manages and oversees the Company's employees.

The petitioner emphasized that the beneficiary "has a special capacity to work with the specific [company] clients and [company] products and provide key customers with chemical formulations customized for their needs."

In a separate statement, the petitioner indicated that the beneficiary's job duties in the United States will be the same as those he performs for the foreign entity and will include the following:

- Meeting with [the company's] key customers nationally and internationally to learn about their specific requirements and their budgets: deliver an overview presentation of [the company] and its products featuring relevant to customer environments.
- On the basis of information gleaned from customer meetings, develop proposals regarding the chemical blending for a particular [company] solution to be formulated according to the custom needs of the client: design requirements, lubricant use, requirements and specific features.
- Developing proof of concept integration through specific chemical requirements with [company] based requirements, standards, and industry requirements.
- Design of implementation projects, using the [company] products to address key client requirements.
- Responsible for delivering specific lubricant orders to client locations: Implementation of advanced chemical blending custom formulated according to [the beneficiary's] design proposals including design, applications and market testing.
- Resolution of Technical problems, trouble shooting with Clients with implementation of [company] products.
- Liaison with Senior Executive and Senior Chemists from [the company] and client complaints in order to provide an in-depth technical advice regarding the function, capabilities and applications of [the company].
- Responsible for the successful opening and Operation of [the company]. . . .
- Selects, Manages and oversees all Employees with [the company]
- Manages technical planning, product integration, verification and validation, cost and risk, and supportability and effectiveness analyses for all [company products].
- Ensure analyses are performed at all levels of [the company] to include: concept design production, blending, test and development.
- Directs the logical and systematic developments of customer or product requirements into a [company] product that acknowledges technical, schedule, and cost restraints.
- Manages the functional analyses, timeline analyses, requirements allocation and product chemical design to translate customer requirements into hardware and product specifications.
- Will lead activities which require broad knowledge in a variety of technical domains with complexity levels that require ability to operate various projects simultaneously.
- Will support client requirements to include occasional internal company briefings, as well as international customer negotiations and meetings at Contract and Closing levels.
- Promotion of automotive industrial and marine lubricants in countries of Middle East, Africa and the Indian Sub-Continent.
- Introduction of new package designs for product positioning at the point of sales.

The petitioner's initial evidence included a business plan for the U.S. entity. According to the business plan, "the company will penetrate the market in the distribution of superior quality lubricants and related products designed to accommodate the needs of small to mid-size manufacturing companies for the maintenance of their machinery." The business plan indicates that the company will initially employ the beneficiary as managing director, [REDACTED] Logistics and Purchasing. The AAO notes that [REDACTED] appear on the foreign company's organizational chart in these same positions. The petitioner indicates that [REDACTED] is responsible for the accounts and administration of

the company and has a background in accounting, corporate tax law, and banking. The petitioner indicated that [REDACTED] finds cost effective ways for transportation and sourcing of raw materials required for the business. The business plan does not address future hiring plans for the company

In the request for evidence (RFE) issued on February 25, 2009, the director instructed the petitioner to submit evidence to show how the company will grow to be of sufficient size to support a managerial or executive position. The director noted that such evidence should demonstrate that the beneficiary will be relieved from performing the non-managerial, day-to-day operations of the company within one year. The director further requested complete position descriptions for the petitioner's proposed employees, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

In addition, the director requested that the petitioner specify the specific number of employees to be hired during the first year of operations. Finally, the director noted that, according to the petitioner's business plan, the company anticipates paying only \$26,508 in salaries and wages during each of its first three years in operation. The director questioned how this amount would support the proposed managerial, sales and administrative positions, and requested additional evidence of the company's anticipated staffing requirements.

In response, counsel for the petitioner indicated that the company expects to achieve substantial growth during the first year in operations because of its foreign entity's strong ties and connections throughout the international market. Counsel further stated that the beneficiary has been investigating the possibility of merging with or taking over an existing private company in the United States to create "a more solid and existent clientele base."

In response to the director's request for a complete description for each proposed employee, the petitioner reiterated the job description provided for the beneficiary at the time of filing. The petitioner described the other proposed positions as follows:

Managing Director in Training – This position will primarily be the shadowing position of the Managing Director. This position will be an in training position for the Managing Director during the first year operation to relieve the Managing Director. The Assistant will be trained and will learn the day to day operations involved in the production of the specific products and the services that are provided through [the company]. This will be a full time position which will be a 40 hour work week.

Accounts Manager and Logistics – Acts as primary point-of-contact for Client. Leads day-to-day management and optimization of client campaigns. Assists in strategy development. Search Engine Marketing, Online Media, Email, Marketing, Web Analytics, Website Effectiveness and Research/Planning. Proactively finds new ways to build the client's business and grow accounts. Masters and maintains vast knowledge of client's business, competition, and latest industry news and trends . . . . Owns the contract and contract renewals for new work for an existing client. Approves Change Orders and invoices, and is responsible for payment collections. Works closely with the project team in order to maintain continuous knowledge of project status in order to identify potential issues and/or opportunities within or related to the project. . . . At a later stage, he will engage in finding a

storage to store products for distribution in USA, negotiate with transportation companies for local distribution. Negotiate with packaging suppliers, additive suppliers, and lube base oil suppliers for the possibilities of local blending of [company] products in USA for distribution in the USA. The Accounts Manager/Logistics person will be One Full Time Position with a Forty hour work week.

Administrative Staff – 2-3 individuals. Performs administrative and office support activities for multiple supervisors. Duties may include fielding telephone calls, receiving and directing visitors, word processing, filing, and faxing. Extensive software skills are required, as well as internet research abilities and strong communications skills. Staff in this category also may have the title of department assistant, coordinator or associate. This will be a part time position with a 15-20 hour work week.

Counsel clarified that the petitioning company anticipates employing the beneficiary and three other employees during the first year of operations. Counsel stated that the business plan "was incorrect in the information provided as for the salaries to be paid and the wages to be paid." Counsel stated that "the amounts shown were in Pounds and not in American dollars as the other numbers in the Graph were and that the number was incorrectly averaged rather than the total amount to be paid, which was an oversight." Specifically, counsel indicated that the beneficiary will be paid \$74,774, the assistant managing director will be paid \$38,500, the accounts and logistics manager will be paid \$45,000 and the administrative staff will earn approximately \$15,000 each.

The director denied the petition, concluding that the record does not establish that the new company will grow to be of sufficient size to support a managerial or executive position. The director noted that the initial business plan was very vague regarding the number of staff to be hired or the duties they would perform. The director acknowledged the petitioner's response to the RFE, but noted that the petitioner "did not provide any information on when these positions would be filled."

On appeal, counsel asserts that the petitioner "clearly documented that the beneficiary will be performing exclusively managerial and executive functions for the petitioner for only the first year." Counsel contends that the beneficiary's subordinate employees are professional, managerial or supervisory employees who will handle the day-to-day management of their departments and "make direct contact with the bottom tier employees." Counsel states that the beneficiary "will be responsible for the overall management and administration of the company and coordinate the various needs and activities of the component departments."

Counsel submits that the petitioner has satisfied all requirements pursuant to the regulation at 8 C.F.R. 214.2(l)(3)(v)(C) and has established that the petitioning company will support a primarily managerial or executive position within one year.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year.

As a preliminary matter, we note that the director's brief explanation for the denial of the petition reflected a cursory review of the evidence in the record. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). As the AAO's review is conducted on a *de novo* basis, the AAO will herein address the petitioner's evidence and eligibility. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)

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. As noted above, 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 petitioner has provided a detailed and consistent description of the beneficiary's proposed duties as managing director of the U.S. company; the AAO does not, however, concur with counsel's assessment that all of the beneficiary's duties fall under the definitions of managerial or executive capacity. The petitioner places great emphasis on the beneficiary's scientific and technical expertise and lists a number of duties requiring this expertise. For example, the petitioner indicates that the beneficiary is responsible for meeting with clients to learn about their requirements, delivering presentations regarding company products, developing proposals for lubricant formulations based on a client's needs, developing proof of concept integration, resolving and troubleshooting technical problems, and providing in-depth technical advice regarding company products. Although the petitioner indicates that the beneficiary "manages the functional analysis, requirements and allocation to translate customer requirements into hardware and chemical formula specifications," the petitioner had not identified subordinate employees within the foreign or U.S. companies who actually perform or would perform any technical duties the beneficiary is claimed to manage. Such duties are directly linked to the petitioner's provision of products and services to its clients and cannot be considered managerial or executive in nature.

The petitioner has also submitted evidence of the beneficiary's correspondence with company customers which illustrates that he is directly involved with sales activities even in his capacity as managing director of the foreign entity. The e-mail correspondence indicates that the beneficiary receives and responds to inquiries regarding the petitioner's products, potential orders and prices. 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 will be "primarily" performing managerial or executive duties within one year. 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).

In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. The director specifically requested that the petitioner provide a breakdown of the number of hours the beneficiary will devote to specific tasks on a weekly basis, but the petitioner failed to provide the requested information in response. This failure of documentation is important because several of the beneficiary's proposed tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. 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, nor can it deduce whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). 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). 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 definitions of executive and managerial capacity 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 prove 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). Several of the beneficiary's proposed duties would generally fall under the definitions of managerial or executive capacity, and the AAO does not doubt that the beneficiary possesses managerial authority over the new company. However, the proposed position description alone is insufficient to establish that the beneficiary's actual duties would be primarily in a managerial or executive capacity. As discussed above, 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 regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) requires the petitioner to submit evidence that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position supported by information regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals.

In reviewing the totality of the evidence in the record, the AAO concurs with the director that the petitioner has not clearly described the proposed organizational structure of the new company, and has therefore failed to establish how the beneficiary would be relieved from performing non-managerial duties within one year.

The petitioner's business plan submitted at the time of filing indicated that the company intends to operate with a staff of three employees including the beneficiary, an accounts manager whose duties are limited to accounting and financial matters, and a logistics and purchasing employee who is responsible for transportation and sourcing of raw materials. The business plan acknowledges that such management personnel may be required to "wear more than one hat" initially. The business plan indicates that the company's financial assumptions are based on an assumption that total salaries and wages will amount to approximately \$26,000 for each of the first three years in operation. As noted above, the petitioner identified

the U.S. company's proposed employees by name. The evidence of record shows that these two individuals are actually employees of the foreign entity.

In response to the RFE, the petitioner made no reference to the two named employees in the initial business plan [REDACTED]. The petitioner instead indicated that it will initially employ a trainee or assistant managing director who would be trained to perform the beneficiary's duties, an accounts manager and logistics employee who would perform all sales, marketing, customer service, project management, and transportation and logistics functions, and a part-time administrative person. Counsel dismissed the salary figures quoted in the business plan as both an oversight and mathematical error, and instead indicated that the actual salaries to be paid would be in excess of \$160,000 annually.

Counsel does not acknowledge or attempt to explain the variation from the organizational structure described in the business plan, nor are his assertions supported by documentary evidence, such as a revised or corrected business plan amending the claimed oversight in reporting the company's anticipated salary and wage expenses. 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 Obaigbena*, 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, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The 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). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner has simply not provided an adequate explanation of its business plan.

The petitioner initially indicated that the U.S. company would be staffed by the beneficiary and two employees of the foreign entity. The petitioner did not indicate that it would employ sales, marketing, or customer service staff. The evidence of record suggests that the foreign entity is similarly structured. It employs a blending supervisor to oversee the production of the products, a drum filler, an employee responsible for additives mixing, and a cargo receiver and stocker, in addition to the beneficiary, the accounts manager and the logistics and purchasing employee. Furthermore, as discussed above, the e-mail correspondence in the record demonstrates that the beneficiary himself is responsible for client interactions, orders, pricing and sales for the company's products. Therefore, based on the initial business plan, it appeared that the beneficiary would personally perform most of the client-related functions of the company, while relying on support from the foreign entity's staff, who actually mix and package the products, and handle company finances, purchasing of raw materials, and logistics. The fact that the beneficiary leased residential premises with use of a "personal office" would further support a finding that the petitioner anticipates that the beneficiary would be the only full-time U.S.-based employee.

Overall, the petitioner's business plan does not support the petitioner's claims regarding the nature and scope of its intended business and its proposed organizational structure. Based on the foregoing discussion of discrepancies between counsel's claims made in response to the RFE and the statements made in the company's business plan, the AAO cannot discern the petitioner's actual hiring plans for the first year of operations.

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. The petitioner in this matter has failed to do so. 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*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Overall, the inclusion of a number of non-managerial duties in the beneficiary's job description, considered in light of the inconsistencies in the record regarding the nature of the petitioner's personnel plan 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. Accordingly, the appeal will be dismissed.

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.