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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

[Redacted]

D7

DATE: **AUG 13 2012**

Office: CALIFORNIA SERVICE CENTER

[Redacted]

IN RE:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner filed this petition to classify 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 Chinese company, is engaged in the development and sale of horticultural products. It established a subsidiary, [REDACTED], in Indiana in 2010. The petitioner seeks to employ the beneficiary as the director of marketing and sales for its new office in the United States for a period of six years.<sup>1</sup>

The director denied the petition concluding that the petitioner failed to establish: (1) that it has secured sufficient physical premises to house the new office; and (2) that the intended U.S. operation will support an executive or managerial position within one year of the approval of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel contests the director's findings with respect to both stated grounds for denial and asserts that the petitioner has met all eligibility requirements for the requested classification. Counsel submits a brief and additional evidence in support of the appeal.

#### I. THE LAW

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

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

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

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<sup>1</sup> Pursuant to the regulation at 8 C.F.R. § 214.2(l)(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.

- (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.

The director denied the petition based on two alternative grounds, concluding that the petitioner failed to establish: (1) that it has secured sufficient physical premises to house the new office; and (2) that the intended U.S. operation will support an executive or managerial position within one year of the approval of the petition.

## II. SUFFICIENT PHYSICAL PREMISES TO HOUSE THE NEW OFFICE

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

### A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 8, 2010. On the Form I-129, the petitioner indicated that the beneficiary's work site would be located at [REDACTED] in [REDACTED]. The petitioner provided this same address as the beneficiary's current address in the United States.

The petitioner provided a lease agreement for "the dwelling" located at this address. The lease does not provide information regarding the type or amount of space leased or any intended or authorized use of the premises other than as a "dwelling." The lease had a commencement date of August 1, 2009, pre-dating the establishment of the U.S. company by approximately five months.

On August 10, 2010, the director issued a request for additional evidence (RFE) in which she instructed the petitioner to submit, *inter alia*, the following: (1) color photographs of the inside and outside of all premises secured for the U.S. entity; (2) a floor plan for the leased premises; (3) its business telephone number and operating hours; (4) its business insurance policy; and (5) an occupancy permit.

The petitioner responded to the RFE on September 18, 2010, but failed to acknowledge the director's requests for additional evidence to establish that the U.S. company had secured adequate physical premises to house the new office.

The petitioner's response included a business plan for the U.S. company. The business plan provides the following information at page 14:

#### 5.1 Corporate Offices

[The U.S. company] currently has its temporary office [REDACTED]. The office address is used for business mailing. The company will seek a suitable office for its corporate headquarters at Phase 2 period to accommodate daily operation.

According to the petitioner's growth plan at page 4 of the business plan, "Phase 2" is anticipated to occur between the second quarter of 2012 and the last quarter of 2013.

The director denied the petition on October 21, 2010, concluding that the petitioner failed to establish that the U.S. company had acquired sufficient physical premises to house the new office. In denying the petition, the director observed that the petitioner failed to provide the evidence requested in the RFE pertaining to the company's physical premises. Further, the director emphasized that while the petitioner submitted a lease agreement for the premises located [REDACTED], the petitioner's business plan indicates that this address is "used for business mailing" and is not intended to "accommodate daily operation." The director highlighted the petitioner's statement in its business plan that it intends to "seek a suitable office" during "Phase 2" of operations, or some time in or after the second quarter of 2012.

On appeal, counsel indicates that the U.S. company has moved to Houston, Texas subsequent to the filing of the petition in order to "be near to the Horticultural industries." Counsel provides the following information regarding the company's relocation:

At the inception of the company while in Indiana, the [company] management did not feel that a big office was essential for the nature of the company and decided it was not prudent to devote too much resources to the physical aspects of the office. [The beneficiary] and [REDACTED] both have to travel around the country frequently to visit client, suppliers, manufacturers and attending business conventions to promote the business. They realistically did not need an office in its traditional sense. They rented a small space in West Lafayette, Indian[a] with all the basic essential office and communication equipment and facilities.

They fulfilled all functions of an office from top to bottom by themselves to conserve the personnel expenditures so they can devote all their resources to the tangible market and business development.

Counsel indicates that the company has rented a "modest space" in Houston and provides the company's new street address.

#### B. Analysis

Upon review, the petitioner has not established that it secured sufficient physical premises to house the new office.

Evidence of the physical premises secured for the new office is required initial evidence for a petition filed pursuant to 8 C.F.R. § 214.2(l)(3)(v). Therefore, the critical facts to be examined are those that were in existence at the time of filing the petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r. 1998).

While the petitioner submitted a lease agreement that was valid at the time of filing, the lease was for a "dwelling" and was signed several months prior to the establishment of the U.S. company. Based on the evidence available, it appears that the lease may be for the beneficiary's own apartment, as the petitioner provided the same address as his residential address on the Form I-129. The lease agreement does not specify that the rented space is to be used as an office or for any commercial purpose.

Accordingly, the director appropriately issued a request for additional evidence regarding the physical premises leased by the U.S. company. The petitioner, as noted by the director, failed to submit any of the requested evidence pertaining to the U.S. company's physical premises. 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). Therefore, the petition was properly denied.

On appeal, counsel attempts to cure the deficiency by stating that the company "did not need an office in its traditional sense," and that the company had a space with "all the basic essential office and communication equipment." Counsel's statements do not assist USCIS in determining whether the petitioner had secured sufficient physical premises to house the new office as of the date of filing. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, while the AAO acknowledges that the petitioner has apparently moved to a new location, the petitioner must still establish that it had satisfied the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(v)(A) as of the date of filing the petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

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.

The submitted lease agreement alone, which appears to be for a residential dwelling, and is described as something other than "an office in its traditional sense," is insufficient to meet that requirement. The petitioner has not offered any evidence in support of the petition to demonstrate that the specific premises secured as of the date of filing the petition were sufficient to accommodate the petitioner's intended business. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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

## II. EMPLOYMENT CAPACITY IN THE UNITED STATES

The second issue to be addressed is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the petition. See 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.*

#### A. Facts and Procedural History

The petitioner stated on the Form I-129 that the beneficiary, as director of marketing and sales, will be "in charge of the new market development, sales of the parent company's horticultural products and formation of partnership with American companies to export their products to China."

In a letter dated July 1, 2010, counsel further described the beneficiary's proposed duties in the United States as the following:

[The beneficiary's] duties here include the new client's development and existing client's service and contacts as well as trying to establish partnership with American companies to introduce their products into the Chinese market. During his tenure in America, he would also attempt to nurture new management talent locally to take over the day to day operation so he can explore the feasibility of opening up more offices elsewhere in the United States.

Counsel stated that "[f]ive more employees are planned to be added to the new company under [the beneficiary's] direct supervision."

In addition, the petitioner submitted a copy of the beneficiary's letter of appointment issued by the Chinese parent company on January 19, 2010. According to the letter, the beneficiary was appointed to the position of sales director for the Northern district of the North American market, with responsibility for strategic management of the U.S. subsidiary and the following duties:

1. The budgeting, profit and loss of the North American subsidiary company;
2. To cooperate with [REDACTED] the director for the southern district of the North American market. To serve the needs of the North American customers and oversee the growth of the North American orders;
3. To recruit more employees as the company grows.

In the RFE issued on August 10, 2010, the director requested: (1) a detailed description of the beneficiary's proposed duties in the United States including the percentage of time the beneficiary would allocate to each specific duty; (2) a proposed organizational chart for the U.S. company; and (3) a list of job duties, educational requirements, salaries and wages and source of remuneration for any current or proposed employee who will report to the beneficiary. The director also requested an original letter from the foreign entity which outlines the proposed number of employees to be hired for the U.S. company and the types of positions they will hold, the amount of the U.S. investment, and the financial ability of the foreign entity to commence doing business in the United States. Finally, the director requested a copy of the business plan for the U.S. company. The director emphasized that the evidence should establish how the new office will support a managerial or executive position within one year.

In a letter dated September 2, 2010, the foreign entity stated that the U.S. company will initially employ the beneficiary as "overseas market sales chief supervisor" and [REDACTED] as the "overseas market sales representative." The foreign entity stated that the U.S. company "plans to employ five more employees from the year of 2012 to 2013 to support the company business." The foreign entity stated that it has sufficient funds to pay the beneficiary's salary and benefits and to support the U.S. company's marketing budget.

According to the petitioner's business plan, the U.S. company was established as a sales representative for its Chinese parent company. It intends to sell the parent company's plants to customers in North America and will also represent U.S.-based plant companies who wish to develop business in the Chinese floriculture market. The business plan at page 14 indicates that the company plans to hire "1 supervisor and 4 skilled labors" to operate a greenhouse that it expects to begin operating no earlier than the fourth quarter of 2013. In addition, the business plan indicates that the U.S. company has retained the services of a technical advisor and a marketing consultant.

The director denied the petition concluding that the petitioner failed to establish that the U.S. company will support a managerial or executive position within one year of the approval of the petition. In denying the

petition, the director observed that the petitioner failed to provide a detailed description of the proposed duties and failed to establish that it would employ any subordinate workers to relieve the beneficiary from performing the non-qualifying duties of the U.S. entity. Rather, the director noted that the petitioner's statement and business plan for the U.S. office indicate that the company has no plans to hire any additional employees during the first year of operations.

On appeal, counsel states:

[The beneficiary's] duties here include the new client's development and existing client's service and contacts as well as trying to establish partnership with American companies to introduce their products into the Chinese market. During his tenure in America, he would also attempt to nurture new management talent locally to take over the day to day operation so that he can explore the feasibility of opening up more offices elsewhere in the United States.

It would be difficult and impractical to quantify or itemize [the beneficiary's] proposed managerial duties. We can qualify [the beneficiary's] managerial duties within the [U.S. company] as a manager and executive to include new products development and existing products modification, business management and supervision. He would contribute to business and marketing development through his existing contacts and old clients in America. He would also make good use of his Purdue University MBA training to nurture new management talent locally to take over the day to day operation so he can explore the feasibility of opening up more offices elsewhere in the United States[.]

Counsel further stated that "the business is better than they originally planned and they are confident that new employees would be added within the first year." Counsel emphasizes that the parent company has ample resources to hire new employees whenever needed and that it "is working on the guidelines for the prospective new American employees and will have wanted ad out very soon." Specifically, counsel indicates that the company will add two employees within one year and that both employees would work under the beneficiary's supervision. Counsel notes that the company already employs [REDACTED] in addition to the beneficiary, and resubmits a copy of her letter of appointment issued by the foreign entity.

In support of the appeal, the petitioner submits a copy of its Texas Form C-3, Employer's Quarterly Report, for the third quarter of 2010, evidencing payment of the beneficiary's and [REDACTED] salaries.

#### B. Analysis

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.

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 described the beneficiary's proposed duties in broad terms and described a position that appears to include a combination of qualifying and non-qualifying duties. For example, the evidence of record, including the petitioner's description of the beneficiary's duties and the foreign entity's letter of appointment, indicates that the beneficiary will be responsible for "new client's development and existing client's service and contacts," "trying to establish partnership with American companies," serving "the needs of the North American customers," and overseeing "the growth of the North American orders." All of these duties, without further explanation, suggest that the beneficiary may be directly involved in the sales and marketing of the foreign entity's products in the United States, including non-qualifying duties associated with these functions.

The petitioner did state that the beneficiary will be "in charge of the strategic management" of the U.S. company, responsible for its budgeting, profit and loss, and responsible for recruiting employees. Such statements reflect that the beneficiary will be a senior employee within the new company, but they offer little insight into what the beneficiary will actually do on a day-to-day basis during the first year of operations and beyond. Further, the submitted letters of appointment from the foreign entity suggest that the beneficiary and his colleague, [REDACTED], have been granted joint authority over the U.S. company and will be dividing sales and marketing responsibilities on a geographic basis, as their duties are described in nearly identical terms. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his proposed daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On appeal, counsel reiterates the same nonspecific duties provided in the petitioner's letter and adds that "it would be difficult and impractical to quantify or itemize [the beneficiary's] proposed managerial duties." Counsel does not indicate why it is particularly difficult to describe the beneficiary's position. The AAO notes that the beneficiary, as of the date of filing, held employment authorization pursuant to approved F-1 post-completion optional practical training, and appears to have already assumed the proffered position with the U.S. company. Nevertheless, counsel adds that the beneficiary's duties will include "new products development and existing products modification," and "business management and supervision." Counsel does not attempt to further elaborate as to the beneficiary's role in product modification and development efforts or the duties encompassed by "business management." 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.).

Overall, while some of the duties described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity and the inclusion of potentially non-qualifying sales and marketing duties raise questions as to the beneficiary's actual proposed duties. 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties would constitute the majority of the beneficiary's duties, or whether the beneficiary would primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties would be managerial in nature, and what proportion would be non-managerial by the end of the first year of operations. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Therefore, 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 noted 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 regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(1) 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.

Therefore, in reviewing the totality of the evidence in the record, the AAO must consider the nature of the petitioner's new office, its proposed staffing levels, its preparation for rapid development, and its need for an employee who will perform primarily managerial or executive duties.

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).

At the time of filing, and in response to the RFE, the petitioner indicated that it intends to employ the beneficiary and [REDACTED]. While the petitioner has subsequently stated that the beneficiary's position is senior to [REDACTED] the information provided in their respective letters of appointment indicates that both individuals have the same job title, the same salary and that they have been assigned to perform essentially

the same functions, albeit for different geographic regions in North America. The petitioner has not established that the beneficiary would be supervising [REDACTED]. While the petitioner indicated its intent to hire five employees, it never stated that such employees would be hired prior to the end of the first year of operations. The only labor requirement documented in the petitioner's business plan indicates a need for a supervisor and four skilled laborers who would work in the company's greenhouse scheduled to be opened in 2013, three years after the filing of the petition. Therefore, the AAO must conclude that the petitioner intended to employ only two employees for the duration of its first year in operation and beyond.

The petitioner has submitted evidence that the company works with a marketing consultant and a technical advisor, but has not established that the beneficiary actually supervises these employees or established how these consultants would relieve the beneficiary from primarily performing sales and marketing functions associated with his assigned geographic region. 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)).

On appeal, counsel asserts that the U.S. company's business is "better than they originally planned," and that the petitioner is now "confident that new employees would be added within the first year." Counsel indicates that the petitioner is preparing position descriptions for prospective employees and preparing to advertise the job openings. The fact remains that the information provided by the petitioner as of late September 2010 indicated no intent to hire additional staff prior to 2013. While counsel now indicates that the company anticipates hiring two employees prior to the end of the first year of operation, the petitioner offers no additional evidence in support of counsel's statements, such as an explanation for a revised business plan or information regarding the types of employees to be hired and the company's immediate need for such employees. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Further, 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'r 1998). The fact remains that, as of September 18, 2010 when the petitioner responded to the RFE, the company neither claimed nor documented any intention to hire employees within the first year of operations. Counsel, as of November 18, 2010, indicates an immediate need to fill two unidentified positions without identifying with any specificity how this need arose or what the positions are. The petitioner has not provided sufficient evidence to support counsel's claim that the company is in the process of recruiting additional staff.

As the petitioner has not consistently claimed its intent to hire additional staff within the first year of operations or identified the nature of any positions that may be filled within the timeframe, it has not established that the beneficiary would be primarily engaged in the supervision of professional, supervisory, or managerial employees within one year. Pursuant to section I01(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as a "personnel manager" under the statutory definition.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the

essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity.

While it appears that the beneficiary is responsible for "new market development" as the "sales director for the Northern district of the North American market," the petitioner has not identified any specific managerial duties the beneficiary would perform in relation to the sales and marketing function. Further, given that the petitioner has not documented its intent to employ any subordinate personnel within the U.S. company during its first year in operation, it is unclear how much of the beneficiary's time could be spent performing managerial, as opposed to operational, duties associated with this function. The AAO cannot conclude that the beneficiary will be acting primarily as a function manager solely because he is the only employee assigned to the sales and marketing function in the assigned geographic area.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While the beneficiary has been assigned a managerial job title and appears to be assigned to the co-management of the U.S. company along with [REDACTED], the petitioner has not established that he would be relieved from focusing on the day-to-day operations of the petitioner's business within one year. As discussed, the petitioner has not established that it would have subordinate staff in place to relieve the beneficiary from many day-to-day non-managerial tasks associated with operating the business. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

Based on the petitioner's failure to provide a detailed description of the beneficiary's duties, and in light of the petitioner's stated hiring plans for the first year of operations, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity within one year or that the company will grow to the point where it can support a qualifying managerial or executive position. For this additional reason, the appeal will be dismissed.

#### IV. CONCLUSION

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.