



U.S. Citizenship
and Immigration
Services

[REDACTED]

D7

DATE: OFFICE: CALIFORNIA SERVICE CENTER [REDACTED]

DEC 14 2012

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify 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 Colorado limited liability company established in July 2010, engages in automobile sales and rentals, and was established for the purpose of buying the assets of Affordable Auto LLC, a distressed company. It claims to be an affiliate of [REDACTED], located in Mexico. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that it had a qualifying relationship with the beneficiary's foreign employer, [REDACTED].

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, the petitioner submits a brief and additional evidence to supplement the record.

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.

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.

Finally, 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.

II. The Issues on Appeal

The sole issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer, [REDACTED]. 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 petitioner filed Form I-129, Petition for Nonimmigrant Worker, on September 15, 2010. In a letter dated August 9, 2010 submitted with the initial petition, the petitioner claimed to be an affiliate of [REDACTED], located in Mexico. Specifically, the petitioner claimed that [REDACTED] owns 80% of the petitioner, and that [REDACTED] owns 60% of the beneficiary's foreign employer, [REDACTED] Office for Renting Cars, located in Syria. Based upon [REDACTED] majority ownership of the U.S. and Syrian entities, the petitioner claims it has a qualifying affiliate relationship with the beneficiary's foreign employer.

In support of the initial petition, the petitioner submitted, *inter alia*:

1. Articles of Incorporation for [REDACTED] filed with the Mexican United States Department of Foreign Affairs on June 3, 2004, reflecting the following shareholders: (1) [REDACTED], \$1,200,000.00 shares (representing 60% of total shares); (2) [REDACTED], \$500,000.00 shares (representing 25% of total shares); and (3) [REDACTED], \$300,000.00 shares (representing 15% of total shares);
2. Articles of Organization of the petitioner, filed with the Colorado Secretary of State on July 8, 2010, reflecting the following members and shares: (1) [REDACTED], 40% membership percentage; (2) [REDACTED], 10% membership percentage; (3) [REDACTED], 10% membership percentage; (4) [REDACTED], 20% membership percentage; and (5) [REDACTED], 20% membership percentage;

3. Operating Agreement of the petitioner, dated July 22, 2010, listing the members and their capital contributions as follows: (1) [REDACTED] 60% ownership; (2) [REDACTED] 20% ownership; and (3) [REDACTED], 20% ownership. The Operating Agreement also states the following:

On July 8, 2010, the Articles of Organization of [the petitioner], a Colorado Limited Liability Company were duly filed in the office of the Secretary of State of the State of Colorado under and pursuant to the Colorado Act. Such Articles of Organization are hereby adopted and approved. In the event of any inconsistency between such Articles of Organization and the terms of this Operating Agreement *the terms of the Articles of Organization shall govern* (emphasis added).

4. The petitioner's Company Resolution for Purchase of Assets of Affordable Car Rental stating that the members of the petitioner authorized the purchase of the Assets of Affordable Car Rental from [REDACTED] in exchange for \$45,000.00 investment already made in Affordable Car Rental, and a good faith non-binding commitment of future investment of \$205,000.00 in Affordable Car Rental, within the next 12 months, depending on business climate and business needs. This resolution was signed by [REDACTED] on August 10, 2010, [REDACTED] on October 4, 2010, and [REDACTED] on August 10, 2010;
5. Contract of Sale of Stock between [REDACTED] ("seller") and [REDACTED] ("buyer"), dated March 17, 2010, for 1210 shares of stock in [REDACTED] Compania Sociedad Anonima de Capital Variable; and
6. Affidavit from [REDACTED], "the owner of Andulnafia's Office for Renting Cars," dated April 20, 2010, attesting to the beneficiary's employment as its general and commercial manager from 1993 to date. The affidavit was written in Damascus in the Arabic text and certified by the Chamber of Commerce of Damascus Suburb governorate (Chamber of Commerce of Damascus Countryside Province);

On October 19, 2010, the director issued a request for evidence ("RFE") instructing the petitioner to submit additional evidence establishing the qualifying relationship, including: (1) the foreign entity's annual report that lists all affiliates, subsidiaries, branch offices, and percentage of ownership; (2) proof that the foreign parent company paid for its stock in the petitioner, including bank-certified copies of the original wire transfers and "bank-certified copies of cancelled checks, deposit receipts, etc., detailing monetary amounts for the stock purchase"; and (3) a copy of the petitioner's banking information that explicitly identifies the parent company making a wire transfer representing the stock purchase into the petitioner's account. In the RFE, the petitioner was specifically advised:

The originator(s) of the monies deposited or wired must be clearly shown and verifiable by name with full address and phone/fax number. For all funds not originating with the foreign company, explain the source and reason for receiving such funds, and provide the names of all account holders depositing these funds, and their affiliation to the foreign or U.S. company.

In response to the RFE, the petitioner submitted, *inter alia*;

1. Letter dated November 29, 2010 from [REDACTED] asserting that “[t]he members of General Auto LLC are [REDACTED], our company, and [REDACTED], who was the previous owner of Affordable Automotive”;
2. Minutes of a meeting held on May 4, 2010 by members of [REDACTED] “to propose the acquisition of the General Company for Auto LLC dills amount of \$310.00 (Three hundred ten thousand U.S. dollars are U.S.) [sic].” In these minutes, the “active partners” of [REDACTED] were listed as “[REDACTED]”;
3. Minutes of a meeting held on May 17, 2010 by members of [REDACTED] discussing “the assembly’s interest offer for the acquisition of 60% of the company called ‘General Auto LLC in the amount of \$250,000.dills [sic].” In these minutes, the “active partners” of [REDACTED] were listed as “[REDACTED]”; and
4. Minutes of a meeting held on June 29, 2010 by members of [REDACTED] discussing “the acquisition of 60% of the company called ‘General Auto LLC based in the city of Denver, in the Colorado in the United States of America in the amount of \$250,000.dills [sic].” In these minutes, the “active partners” of [REDACTED] were listed as “[REDACTED], [REDACTED].”

On March 15, 2011, the director denied the petition, concluding that the petitioner failed to establish a qualifying relationship exists between it and the beneficiary’s foreign employer. In denying the petition, the director emphasized that the RFE specifically instructed the petitioner to submit evidence of wire transfers from the parent company to establish that it actually paid for its shares in the petitioning entity, but the petitioner’s response did not address the issue of wire transfers.

On April 13, 2011, the petitioner filed Form I-290B, Notice of Appeal or Motion. On appeal, the petitioner asserts that the parent company, Miconia LLC, “in fact paid for its ownership interest in the assets of Affordable Auto Rental” by “infus[ing] capital via bank transfers in to Affordable Auto Rental.” The petitioner clarifies that [REDACTED] “did not use wire transfers for this purpose,” but instead used bank transfers from “Account Number ending in -8476 [that] is owned by A-1 and OK Auto Sales with [REDACTED] as the signatory of the bank account” to “Account number ending in 2955 [that] is owned by Affordable Auto Rental, the predecessor to Petitioning Company.” On appeal, the petitioner submits the following new evidence:

1. Letter from Wells Fargo Bank, addressed to A-1 and OK Auto Sales, verifying that the customer, [REDACTED], has held account number ending in -8476 since 1994;
2. Account Profile from Wells Fargo Bank for account number ending in -8476 verifying the date the account was opened as March 16, 1994 and the statement delivery method as on-line; and

3. Account Summary from Wells Fargo Bank reflecting the following accounts held by an unnamed customer: two cash accounts, "A-1 and OK Auto Sales Accounts" ending in [REDACTED] and "Affordable Auto Rental Accounts" ending in [REDACTED]; one personal account, "osama" ending in [REDACTED]; and two personal credit accounts, ending in [REDACTED] and [REDACTED]

Upon review of the record, the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

First, the petitioner failed to establish that the foreign parent company, [REDACTED], paid for its shares of stock in the petitioner. Although the director explicitly requested the petitioner to submit evidence that the foreign parent company paid for its stock in the petitioner, including "bank-certified copies of cancelled checks, deposit receipts, etc., detailing monetary amounts for the stock purchase," the petitioner did not submit such evidence, nor an explanation for not submitting such evidence, in its response to the RFE. While the petitioner now submits bank statements purportedly between the foreign parent company and the petitioner for the first time on appeal, the AAO will not accept this evidence. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept such evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).¹

Second, the petitioner failed to establish that [REDACTED] owns 80% of the petitioner. According to Form I-129 and the initial documentation accompanying the petition, the petitioner claimed that it is 80% owned by [REDACTED], while [REDACTED] owns the remaining 20%. However, the petitioner's Articles of Organization, duly filed with the Colorado Secretary of State, reflects a different membership

¹ Even if the AAO were to accept the bank statements offered for the first time on appeal, the AAO that these bank statements, alone, are insufficient proof that [REDACTED] paid for its shares in the petitioner. Foremost, the petitioner failed to establish that bank account number ending in -8476 belongs to [REDACTED]. Rather, the documents from Wells Fargo Bank reflect that this bank account is held individually by [REDACTED] (referred to as "the customer"), not by [REDACTED]. The AAO notes that the -8476 account was established in 1994, ten years prior to the formation of [REDACTED] and that this account is nicknamed "A-1 and OK Auto Sales." Furthermore, the petitioner failed to establish that the bank account number ending in -2955 belongs to the petitioner. Again, the documents reflect that this bank account is held individually by [REDACTED], not by the petitioner. The fact that the account holder nicknamed the -2955 account as "Affordable Auto Rental Accounts" does not actually establish that this account belongs to the petitioner. Lastly, the fact [REDACTED] is a shareholder in the U.S. and foreign entities (discussed *infra*) alone, does not establish that he transferred and received these funds on behalf of the U.S. and foreign entities.

structure: (1) [REDACTED], 40% membership; (2) [REDACTED], 10% membership; (3) [REDACTED] (Mumina, LLC), 10% membership; (4) [REDACTED], 20% membership; and (5) [REDACTED], 20% membership. Although the names of [REDACTED], [REDACTED] and [REDACTED] are followed by “[REDACTED],” the membership interests appear to be held individually by the listed persons, not by [REDACTED] as a distinct legal entity, as the Articles of Organization lists each member by individual name, social security number, address, and membership interest percentage.² Furthermore, the petitioner’s Operating Agreement states that [REDACTED] owns 60% membership interest in the petitioner, [REDACTED] owns 20% membership interest, while [REDACTED] owns 20% membership interest. All of the above documents reflect differing ownership/membership structures and percentages of ownership than the 80/20 ownership structure held by [REDACTED] and [REDACTED], respectively, that the petitioner claimed on Form I-129. The petitioner failed to provide an explanation for these significant discrepancies.

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). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Third, the petitioner failed to establish that [REDACTED] owns 60% of the beneficiary’s foreign employer, [REDACTED] Office for Renting Cars. As evidence of [REDACTED] purported ownership interest in the foreign employer, the petitioner submitted the Contract of Sale of Stock dated March 17, 2010 reflecting that [REDACTED] purchased 1210 shares of stock in [REDACTED]. However, this document, alone, is insufficient evidence of the percentage of [REDACTED]’s ownership interest in the foreign employer. The petitioner failed to submit evidence establishing the total number of shares authorized to be issued by [REDACTED] Office for Renting Cars, in order to establish that [REDACTED] acquisition of 1210 shares actually represents 60% ownership.

As general evidence of a petitioner’s claimed qualifying relationship, a company’s stock certificates, stock certificate ledger, stock certificate registry, corporate bylaws, or other evidence establishing the total number of shares issued, the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control must be examined. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Finally, the credibility of the purchase contract is undermined by the affidavit dated April 20, 2010 from [REDACTED] who claimed to be “the owner of Andulnafia’s Office for Renting Cars.” The fact that

² The evidence in the record reflects that the three members of [REDACTED] are [REDACTED] [REDACTED] and [REDACTED]. Therefore, the petitioner cannot arguably assert that [REDACTED], [REDACTED], and [REDACTED] collectively constitute [REDACTED].”

██████████ signed an affidavit on April 20, 2010 attesting to be “the owner” of the beneficiary’s foreign employer conflicts with the petitioner’s claim that ██████████ is the majority owner of the foreign employer. Notably, the Contract of Sale of Stock dated March 17, 2010 reflects that ██████████ purchased its ownership interests in the foreign employer from ██████████

For the foregoing reasons, the petitioner failed to establish that ██████████ is the majority owner of both the petitioner and the beneficiary’s foreign employer. Therefore, the petitioner failed to establish that it has a qualifying relationship with the beneficiary’s foreign employer.

Beyond the decision of the director, the record reflects that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial capacity within one year.³

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary’s application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.

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 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. 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

³ The petitioner only asserts that the beneficiary will be employed in a managerial capacity. The petitioner does not claim that it will employ the beneficiary in an executive capacity. Therefore, the AAO will only analyze the beneficiary’s employment in a managerial capacity. The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions.

an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(I)(3)(v).

In a letter dated August 10, 2010, the petitioner described the beneficiary's job duties in the United States as including the following: creating staff schedules; procuring vehicles for rental; ensuring that all vehicles are properly maintained and repaired within budget; and sourcing appropriate vehicles which can be exported from the United States to Syria.

In a letter dated November 18, 2010, the petitioner provided the following breakdown of the beneficiary's hours and duties:

1. 35-40% of his time will be spent on "Oversight of Sales Department Manager" which include: reviewing reports prepared by Sales Department Manager; scheduling staff and evaluating staff performance; creating and modifying marketing plan and reporting; working with customers to resolve issues; and participating in sales efforts and providing final vehicle sales;
2. 20% of his time will be spent on "Oversight of Service Department Manager" which include: reviewing performance of service department; and
3. 40-45% of his time spent on Financial Operations, which include: reviewing financial performance; cost control analysis; and creating financial forecasts and revenue plans for presentation to company management.

The beneficiary's job duties, as described above, include qualifying and non-qualifying duties. In particular, the beneficiary's job duties of creating staff schedules, procuring vehicles for rental, sourcing vehicles for export, creating marketing plans, working with customers to resolve issues, participating in sales efforts, and providing final vehicle sales are non-qualifying duties, as they constitute the tasks necessary to provide the daily services of the U.S. petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

While performing *some* non-qualifying duties, alone, will not disqualify the beneficiary from the benefit sought, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to specifically document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner describes the beneficiary as performing both managerial and operational tasks, but fails to quantify the time the beneficiary spends on each particular duty. This failure of documentation is important because several of the beneficiary's daily tasks are non-managerial duties, as discussed above. For this reason, the petitioner failed to meet its burden of proof in establishing that that the beneficiary is primarily employed in a managerial capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In addition, the petitioner failed to establish that it would realistically support the beneficiary in a primarily managerial capacity within its first year of operations. The AAO finds that the petitioner's stated hiring plans, the position descriptions for its proposed U.S. employees, and the proposed organizational chart are inconsistent and not credible.

In a letter dated November 18, 2010, the petitioner described its anticipated staffing structure and provided position descriptions for its anticipated employees. In specific, the petitioner claimed that it plans to employ ten total positions underneath the beneficiary in the coming year: three auto sales persons to provide customer service and assist vehicle rental customers; one service manager to oversee the service department responsible for maintaining and repairing the vehicles in the petitioner's fleet; three mechanics; and one rental sales manager who will provide "customer service and assisting vehicle rental customers."

In contrast, the petitioner's organizational chart depicted its anticipated staffing as the following: three sales persons, all to be hired, within the Sales Department; one service manager and three mechanics, two to be hired, within the Service Department "DBA Beni G. Auto Shop"; and two sales persons, one to be hired, and one rental sales manager, within the Rental Sales Department. The petitioner's description of its anticipated staff differs from the organizational chart, in that the organizational chart lists two sales persons underneath the rental sales manager and three sales persons in the sales department – for a total of five sales persons - while the petitioner's description only states that it plans to hire three total sales persons.

Moreover, the petitioner currently has only three employees: a general director whose job is to "acquire cars at great rates, insurance, etc.;" a director of operations who assists the general manager; and an operations manager who "comes in contact with all customers and making the sale and rental cars." The petitioner's claim that it will more than triple its current staffing and add a completely new service department within its first year of operations is not entirely plausible, particularly given the foreign parent's assessment of the petitioner's existing business model as "a solid business model with substantial revenues" and that "the new entity [the petitioner] is essentially the assumption of assets from an existing entity that had strong revenue performance." The petitioner has not explained why it needs or desires to implement such significant increases to its current organizational and staffing structure when it claims the existing business model was effective.

Lastly, the petitioner failed to establish that the beneficiary would actually be supervising any supervisory, professional, or managerial employees, as required under section 101(a)(44)(A)(ii) of the Act. Although the petitioner claims the beneficiary will supervise a rental sales manager, the position description for the rental sales manager does not include any managerial duties, while the rental sales manager's listed job duty of "providing customer service and assisting vehicle rental customers" is exactly the same as the auto sales person's listed job duty. The AAO is not convinced that the "rental sales manager" will actually be a manager, other than in position title. Similarly, while the petitioner claims the beneficiary will be supervising a service manager and three mechanics, the organizational chart and the photographs of the petitioner's physical premises suggest that the petitioner's "service department" is actually a separate entity doing business as "Beni G. Auto Shop." Considering this, and the fact that the petitioner currently does not employ any mechanics or a service manager, the AAO is not persuaded that the beneficiary will actually be supervising a service manager, or any mechanics, as claimed.

Based on the above, it appears that the beneficiary will not be supervising any managers, whether a sales manager or a service manager, or any supervisory or professional employees. Rather, it appears that the

beneficiary will be no more than a first-line supervisor of non-professional employees providing direct sales and rental services. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary is primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

The AAO maintains plenary power to review each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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, the petitioner has not met its burden. Therefore, the appeal must be dismissed.

ORDER: The appeal is dismissed.