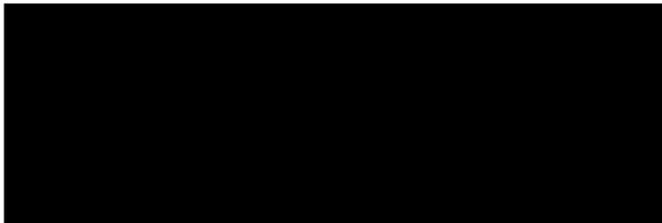




U.S. Citizenship
and Immigration
Services



D7

DATE: **DEC 19 2012**

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:

SELF REPRESENTED

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, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner filed a motion to reconsider, which the director dismissed for being improperly filed. The petitioner subsequently filed a motion to reopen, which the director dismissed for being improperly filed. 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 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 Florida corporation established in January 2010, engages in the business of advertising and marketing technology. It claims to be a 100% owned subsidiary of Distribuidora Full Kosas C.A., located in Venezuela. The petitioner seeks to employ the beneficiary as its chief executive officer (CEO) 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 the beneficiary would be employed in a primarily managerial or executive capacity, or that the U.S. entity would support a managerial or executive position within one year of commencing operations in the United States.

The petitioner filed a motion to reconsider. The director dismissed the motion to reconsider for being untimely filed. The petitioner filed a motion to reopen with evidence that its prior motion to reconsider was timely filed. The director dismissed the motion to reopen, concluding that it did not meet the requirements for a motion to reopen.

The petitioner subsequently filed the instant appeal. On appeal, the petitioner asserts that its motions to reconsider and reopen were properly filed, and that the beneficiary meets all requirements for an intracompany transferee.

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.

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 primary 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.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 12, 2010. In a letter dated July 21, 2010, the petitioner described the nature of its business as an "advertising and marketing technology company that has pioneered in [sic] multiple innovating & eye catching tools." The petitioner described the beneficiary's job duties as "creating culture, building the senior management team, financing," and the following:

1. Setting strategy and vision: decides and sets budgets, forms partnerships, and hires a team to steer the company accordingly;
2. Team-building: hire, fire, and lead the senior management team
3. Capital allocation: sets budgets within the firm, fund projects that support the strategy, ramp down projects which lose money or do not support the strategy, consider the company's major expenditures and manage the firm's capital;
4. Developing a strategic plan: advance the company's mission and objectives;
5. Oversee company's operations;
6. Approve company operational procedures, policies, and standards;
7. Oversee foreign operations: evaluate operating and financial performance;
8. Present company report to the Board of Directors;
9. Represent the company: represent the company before governmental authorities, third parties, and banks, sign contracts on behalf of the company, authorized to withdraw money from company's bank account, and sign and endorse checks;
10. Review activity reports: review financial statements and revise objectives and plans; and
11. Evaluate the performance of subordinate managers.

The petitioner provided the following breakdown of the beneficiary's time:

1. Plan, develop, and establish policies and objectives (50%);
2. Direct and coordinate the formulation of financial programs to provide funding for new or continuing operations (15%);
3. Negotiate all contracts with agents, suppliers, and clients (10-20%);
4. Review financial statements, coordinate production costs and product quality, modify inventory control programs, confer with management personnel to establish production and quality control standards, specifications, and delivery dates of products ordered and services, and recruit and recommend staff (10-20%).

The petitioner indicated on Form I-129 that it has a projected staffing level of seven employees for its first year of operations. The petitioner provided a proposed organizational chart listing nine total employees for 2010-2011, listing Jose Santana at the top in the position of "Board of Directors/President," followed below by a secretary. The next tier depicted on the chart is the beneficiary as CEO, and Vanessa Crespo as Chief Financial Officer (CFO). The beneficiary is depicted as directly supervising a marketing manager and an advertising manager, who in turn will supervise a technician for LED displays. The CFO is depicted as directly supervising an accountant and an assistant.

With the initial petition, the petitioner submitted a print-out from the Florida Department of State Division of Corporations' website reflecting that the petitioner amended its officer/director structure on July 19, 2010 to the following: [REDACTED] as "PTD" (President, Treasurer, Director); [REDACTED] "VPSD" (Vice President, Secretary, Director); the beneficiary as CEO; and [REDACTED] as CFO. According to the petitioner's initial Certificate of Incorporation filed on January 7, 2010, the petitioner's initial directors were [REDACTED] as President and Treasurer, and [REDACTED] as Vice President and Secretary.¹

The director issued a request for evidence ("RFE") on April 28, 2011, in which he instructed the petitioner to submit, *inter alia*, the following: (1) evidence that the petitioner will grow to be of sufficient size to support a managerial or executive position; and (2) a detailed description of the staff of the new office to include the number of employees, the job titles and duties with the percentage of time dedicated to each duty to be performed by each employee, and a description of the management and personnel structure of the U.S. office.

In response to the RFE, the petitioner submitted a letter dated June 6, 2011 attesting that it hired two employees in the end of 2010, and one additional employee in the first quarter of 2011. The petitioner attested that it plans to hire four additional employees in the third quarter of 2011, with overall plans to have eight full-time employees by the end of 2011. The petitioner further attested: "At the current time [REDACTED] carries the position of President and CEO, once [the beneficiary] is approved on this petition, she will be appointed the new CEO for [the petitioner]."

The petitioner submitted an updated organizational chart providing the following names of its employees: [REDACTED] as Board of Directors/President; [REDACTED] as Secretary; the beneficiary as CEO; [REDACTED]

¹ See Florida Department of State Division of Corporations' website at: <http://www.sunbiz.org/pdf/00001992.pdf> (accessed December 13, 2012).

██████████ as Marketing Manager; ██████████ as Advertising Manager; and ██████████ as Accountant. All other positions were unnamed. Other than adding names for its employee, no changes were made to the structure of the organizational chart.

In addition, the petitioner provided position descriptions for all its employees except for the CFO. In pertinent part, the position description for the President, ██████████ lists his job duties as including: represent the company before governmental authorities; sign all major contracts; head the board of directors; supervise the CEO and CFO; and travel to local prospect customers.

The position description for the Secretary, ██████████ lists her job duties as including: file data, perform routine clerical tasks, and order and maintain relevant office supplies.

The position description for the Marketing Manager, ██████████ lists her duties as including: contact person with providers to purchase; promotion of the company; plan and coordinate visitation of clients; purchasing policy and planning; make or buy policy analysis and decision; report directly to CEO; plan and prioritize personal sales activities and customer/prospect contact, especially managing personal time and productivity; manage product/service mix, pricing and margins; maintain and develop existing and new customers.

The position description for the Accountant, ██████████ clarifies that he is a contractor and lists his duties as including: establish, maintain, and coordinate the implementation of accounting and accounting control procedures; analyze and review budgets and expenditures for local, state, federal, and private funding, contracts, and grants; monitor and review accounting and related system reports for accuracy and completeness; and prepare and review budget, revenue, expense, payroll entries, invoices and other accounting documents.

The position description for the LED Technician, ██████████ clarifies that he is also a contracted employee.

The position description for the Advertising Manager, ██████████ simply states: "Report directly to the CEO."

The petitioner submitted a letter from Paradigm Strategic Marketing, LLC ("PSM") dated May 31, 2011, stating in pertinent part:

This letter serves as an affirmative business reference for [the petitioner]. As of February 15, 2011 Paradigm Strategic Marketing (PSM) entered into an agreement with [the petitioner] for consulting and direct sales in the continental U.S. and outlying territories . . . In June, 2010 I met with [the petitioner's] proprietors, ██████████ and ██████████ at Infocomm. . . We are pleased to be attending again one year later as a partner representing [the petitioner's] unique products and services. . . .

Finally, the petitioner submitted, *inter alia*, the following: (1) 2010 IRS Forms W-2 issued to ██████████ and ██████████ (2) 2011 Form UCT-6, Florida Department of Revenue Employer's Quarterly Report, for the quarter ending on March 31, 2011 showing three employees: ██████████ ██████████ and ██████████

(3) 2011 IRS Form 941, Employer's Quarterly Federal Tax Return, for quarter one ending on March 2011, confirming three employees, signed by "Oscar Flores, VP"; (4) 2010 Form UCT-6 for the quarter ending on December 31, 2010 showing two employees, [REDACTED] and [REDACTED]; (5) 2010 IRS Form 941, for quarter four ending on December 2010, confirming two employees; (6) diplomas of [REDACTED] and [REDACTED] for associate degrees in Business Administration; (7) diploma of [REDACTED] for a Bachelor of Science degree; and (7) diploma of [REDACTED] for a bachelor's degree in computer science and his professional certificate in bookkeeping.

The director denied the petition on June 27, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. The director observed that the petitioner's organizational structure consisting of five managerial/executive positions (President, CEO, CFO, Marketing Manager, and Advertising Manager) appears unjustifiably "top heavy," given its stage of development and the amount of business conducted. The director further observed that it was not clear who was providing the goods and services of the operations, as the petitioner did not claim to employ any salespersons. The director concluded that it was likely the services offered by the organization will be performed by the managers or executives.

On August 1, 2011, the petitioner filed Form I-129, Notice of Appeal or Motion, requesting a motion to reconsider. In support of the motion, the petitioner submitted a brief, dated July 21, 2011, asserting that the beneficiary will be relieved from the day to day operations of the business, which will be performed by the Marketing Manager, Advertising Manager, Technician(s), Secretary, and Assistant. In this letter, the petitioner also asserted that it does not need a sales person because of the nature of its business, an advertising and marketing company that has pioneered innovative tools, and because it has entered into a sales and marketing consulting agreement with PSM. The petitioner asserted that the beneficiary qualifies as a manager because she will be supervising two managers, including the Advertising Manager, [REDACTED]. Finally, the petitioner asserted that its potential sales for 2011 are over \$9 million.

On motion, the petitioner submitted a copy of the "Sales & Marketing Consulting Agreement" between the petitioner ("Distributor") and PSM ("Consultant"). The agreement, which governs the sale of the distributor's service offerings, states in pertinent part: "Distributor appoints and consultant agrees to become an exclusive distributor's sales representative of distributor's offerings." The agreement also states: "consultant agrees to use its best efforts to promote the sale of the Products and goodwill of distributor" and that "consultant will pursue sales policies and practices to realize the maximum sales potential for the service offerings in the client base."

The director dismissed the petitioner's motion to reconsider on October 4, 2011 for being untimely filed. On October 3, 2011, the petitioner filed a motion to reopen, providing evidence that its previous motion to reconsider was timely filed. On January 9, 2012, the director dismissed the petitioner's motion to reopen on the basis that it did not meet the requirements for a motion to reopen pursuant to 8 C.F.R. § 103.5, which requires the petitioner to submit new evidence.

On February 3, 2012, the petitioner filed this instant appeal. On appeal, the petitioner asserts that its motion to reconsider was timely filed, and that its motion to reopen was properly filed and supported with new facts. On appeal, the petitioner refers back to its motion to reconsider and motion to reopen, and resubmits copies of various documents already in the record.

Discussion

Upon review of the record, the AAO agrees with the petitioner that its previous motions to reconsider and reopen were properly filed. Therefore, the AAO will withdraw the director's decisions to dismiss the motion to reconsider and the motion to reopen for being improperly filed.

Nevertheless, the AAO affirms the director's decision to deny the petition based upon the conclusion that the petitioner failed to establish 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. 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).

In the instant matter, the petitioner described many of the beneficiary's duties in vague or overly broad terms. For example, the petitioner listed job duties for the beneficiary such as "Oversee company's operations," "Developing a strategic plan: advance the company's mission and objectives," "Approve company operational procedures, policies, and standards," and "Oversee foreign operations." These types of vague and conclusory assertions that merely repeat the language of the statute or regulations are insufficient to 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.).

Although the petitioner provided a breakdown of how the beneficiary's time would be allocated among her various responsibilities, this breakdown was equally vague, indicating that the beneficiary would devote 50% of her time to "Plan, develop, and establish policies and objectives," and 15% of her time to "Direct and coordinate the formulation of financial programs." The AAO cannot accept such ambiguous or broad position descriptions and speculate as to the actual related managerial or executive duties to be performed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*, at 1108.

Upon review of the entire record, the petitioner's claim that the beneficiary will be employed as its CEO and will manage two subordinate managers is not credible. The evidence in the record consistently reflects that [REDACTED] is currently the CEO of the petitioner. In a letter dated June 6, 2011, the petitioner explained: "At the current time [REDACTED] carries the position of President and CEO, once [the beneficiary] is

approved on this position, she will be appointed the new CEO for [the petitioner]. However, the petitioner's explanation of why [redacted] continues to represent himself as the CEO is undermined by the fact that the petitioner already amended its articles of incorporation on July 19, 2010 to reflect that the beneficiary is the CEO. The petitioner failed to provide any explanation for this discrepancy.

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).

In addition, the petitioner's claim that the beneficiary will directly supervise the Advertising Manager, [redacted] is not credible. The record reflects that [redacted] is actually the petitioner's Vice President, Secretary, and one of its two Directors.² Hence, the petitioner's claim that [redacted] will occupy the lower position of Advertising Manager and will report directly to the beneficiary, whom purportedly will have the authority to "hire, fire, and lead" him, is not plausible nor consistent with the petitioner's other claim that the beneficiary will directly report to the board of directors, which includes [redacted]. In addition, the petitioner failed to provide any job duties for the Advertising Manager other than "Report directly to CEO." In light of the fact that the claimed Advertising Manager is actually the petitioner's Vice President, Secretary, and Director, and the lack of any specific job duties for the Advertising Manager, the record is unclear what duties will actually be performed by the Advertising Manager, or whether such a position actually exists.

In fact, the petitioner's overall organizational structure is not credible. According to the petitioner's certificate of incorporation, which notably was amended just one month prior to the filing of the instant petition, the officer/director structure is as follows: Jose Santana as the President, Treasurer and Director; [redacted] as the Vice President, Secretary, and Director; the beneficiary as CEO; and [redacted] as CFO. However, in its organizational chart, the petitioner completely omitted the positions of Vice President/Secretary, and listed [redacted] as the only director. The petitioner provided no explanation for why it omitted the position currently held by [redacted] and depicted him in a lower position subordinate to the beneficiary.

Furthermore, the petitioner failed to provide a position description for the CFO. The petitioner's failure to provide a position description for the CFO is significant, as many of the beneficiary's job duties, such as "decide and set budgets," "[c]apital allocation: set budgets within the firm, fund projects that support the strategy . . . consider the company's major expenditures and manage the firm's capital," appear more appropriate for the CFO or someone whose primary duty is financial management.

Overall, the petitioner's failure to provide job descriptions for the Vice President, Secretary, CFO, and Advertising Manager, is critical. Without any job descriptions for these positions, the AAO is unable to assess the credibility of the beneficiary's claimed job duties as CEO in the context of the petitioner's entire operations.

² Notably, [redacted] filed the instant Form I-129 on behalf of the petitioner, signing as the petitioner's Vice President.

Similarly, the petitioner's claim that the beneficiary will supervise a Marketing Manager is unpersuasive. The position description for the Marketing Manager contains job duties that are non-managerial and unrelated to marketing, such as "plan and coordinate visitation of clients," "customer service," "purchase policy and planning," "make or buy policy analysis and decision," and "maintain and develop existing and new customers through appropriate propositions and ethical sales." The position description even lists frivolous duties such as "plan and prioritize personal sales activities" and "managing personal time and productivity." Furthermore, the petitioner provided evidence that it entered into a sales and marketing contract with PSM, in which the petitioner agreed that PSM would be its exclusive sales and marketing representative in the United States. However, the petitioner's job description for the Marketing Manager makes no reference to the petitioner's contract for exclusive marketing services with PSM. In light of the lack of substantial, marketing-related job duties for the Marketing Manager as well as the petitioner's contract for exclusive marketing services with PSM, the record is unclear what duties will actually be performed by the Marketing Manager, or whether such a position actually exists.

As the director concluded in his denial, the petitioner's proposed organizational structure appears "top heavy." Specifically, the petitioner proposes to employ a total of nine employees within its first year of operations, six or seven of which are in managerial or executive positions.³ The petitioner's stated need for six or seven managers and executives is not entirely plausible, given the size and stage of development of the petitioner's business. In short, the petitioner has not credibly established that it will realistically employ the beneficiary in a *primarily* managerial or executive capacity within its first year of operations.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of 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). 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. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The AAO acknowledges that pursuant to section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner claimed that the beneficiary will devote all of her time to qualifying duties, and will perform no non-qualifying duties. Furthermore, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify its proposed employment of six or seven managers and executives, in an overall firm of nine persons. 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).

³ The organizational chart depicted six managerial or executive positions, but the chart did not include the additional executive position of Vice President/Secretary currently held by [REDACTED]

The AAO does not doubt that the petitioner is a bona fide business. However, the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity, or as its CEO. The petitioner's evidence fails to substantiate that the duties of the beneficiary and her proposed subordinates correspond to their placement in the organization's structural hierarchy. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. Overall, the vague, incomplete and unreliable job descriptions provided for the beneficiary and the petitioner's other employees, considered in light of the petitioner's misrepresentation of its organizational structure, prohibits the determination that the petitioner could realistically employ the beneficiary in a managerial or executive position within its first year of operations. Accordingly, the appeal will be dismissed.

Qualifying Relationship

Beyond the decision of the director, the record does not establish that the petitioner has a qualifying relationship with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims to be a wholly-owned subsidiary of Distribuidora Full Kosas C.A. (the "foreign employer"), located in Venezuela. As initial evidence of the foreign employer's ownership and control of the petitioner, the petitioner submitted a copy of its stock certificate number 1, issued to the foreign employer on January 7, 2010 for one thousand (1000) shares. This certificate is *prima facie* invalid, as the certificate clearly states that the petitioner is authorized to issue five hundred (500) shares of common stock. The petitioner's Certificate of Incorporation confirms that the maximum number of shares of stock that the corporation is authorized to issue at one time is 500 shares. The petitioner failed to explain why or how it could have legitimately issued 1000 shares to the foreign employer on January 7, 2010, as depicted by this stock certificate. The petitioner submitted no evidence to establish that it amended its capital structure. Moreover, the stock certificate bears only the signature of the President; it does not bear the signature of the Secretary, [REDACTED], whom the petitioner notably omitted from its organizational chart.

In addition, in response to the director's RFE requesting additional evidence of the qualifying relationship, the petitioner submitted another version of its stock certificate number 1. This version of stock certificate number 1 reflects that the petitioner issued 500 shares to the foreign employer on January 7, 2010. The petitioner failed to explain why it has two different versions of stock certificate number 1. Based on the above, none of the stock certificates the petitioner submitted are credible.

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. at 591-92. 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.*

The petitioner submitted a letter from [REDACTED], Vice President, Channel Sales of PSM, stating that he met with "Bros" proprietors, [REDACTED] and [REDACTED]" in June 2010. This letter further undermines the petitioner's claims that it is 100% owned by the foreign employer.

In response to the director's RFE requesting evidence that the foreign employer was in continuous contact with the petitioner throughout its incorporation process, the petitioner submitted numerous emails between [REDACTED] and [REDACTED], depicted in the foreign employer's organizational chart at the top of its organizational hierarchy as its President, discussing the petitioner's incorporation and formation. However, these emails were dated between December 7, 2010 and January 10, 2011— almost one year *after* the petitioner was incorporated in the State of Florida on January 7, 2010. As such, these emails bear no probative value with respect to establishing a qualifying relationship between the foreign employer and the petitioner.

The petitioner submitted a letter dated May 26, 2010, in which [REDACTED] formally notified the beneficiary of her transfer to work for the U.S. petitioner. However, the petitioner failed to establish that [REDACTED] had actual authority to transfer the beneficiary on behalf of the foreign employer. The foreign employer's by-laws reflect that the foreign employer has only two shareholders and directors: the beneficiary, who owns 1600 shares, and [REDACTED] who owns 6400 shares. [REDACTED] is not listed as a shareholder or director of the foreign employer.

Finally, the petitioner's unsigned, undated, and uncertified 2010 IRS Form 1120, U.S. Corporation Income Tax Return, alone, is insufficient to prove the petitioner's qualifying relationship with the foreign employer. The petitioner failed to submit any evidence, such as an IRS tax transcript, confirming that this form was actually submitted to the IRS.

Based on the foregoing, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.