



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

D7

DATE: **DEC 24 2012** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

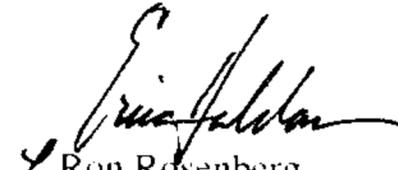
ON BEHALF OF PETITIONER:  
[REDACTED]

INSTRUCTIONS:

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

If you believe the 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 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 extend the employment of its managing director 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 is a limited liability company organized in the State of South Carolina on May 16, 2008 and it is engaged in the water treatment business. The petitioner claims a qualifying relationship as a branch of [REDACTED] located in the Bahamas. The beneficiary was previously granted a two-year extension of an initial new office petition and now the petitioner seeks to extend his stay for an additional two years.

On September 30, 2011, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying manager or executive capacity as required under section 101(a)(15)(L) of the Act.

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 for the petitioner notes that there are several factual inaccuracies contained in the director's decision and he expresses concern as to whether the director considered evidence from this case or from another case in reaching his decision. In addition, counsel asserts that the director erred in his assessment of the beneficiary's duties. Counsel indicated that he would submit a brief and/or additional evidence to the AAO within 30 days but the record reflects that nothing further has been received. The file is considered complete.

#### 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 (1)(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.

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.

## II. Employment in a Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed primarily in a managerial or executive capacity under the extended petition.

### A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 10, 2011. The petitioner indicated on the Form I-129 that it is a branch of a water treatment business established in 2000, has nine current employees and an estimated gross annual income of \$1.2M. According to the record however, the U.S. entity was organized as a limited liability company in the State of South Carolina in 2008 and has very limited income of its own and no paid employees other than the beneficiary. In support of the petition, the petitioner described the beneficiary's duties as follows:

Responsible for all aspects of start-up branch office of the parent company, including establishing corporate entity, location, hiring and training new employees, marketing water treatment/purification product lines in conformity with vendor agreements and overall responsibility for business operations.

An "offer of employment" letter dated May 17, 2011 added that the beneficiary would be "responsible for all aspects of our operations to include sales and marketing, annual budget, pricing, contracts, management of operations, and expenditures." The petitioner did not submit any additional information describing the duties the beneficiary performs on a day-to-day basis.

The director issued a request for additional evidence ("RFE") on June 22, 2011, instructing the petitioner to submit, *inter alia*, the following: (1) a letter describing the managerial decisions to

be made on behalf of the U.S. entity; (2) a description of the typical managerial responsibilities to be performed by the beneficiary; (3) a breakdown of the time spent on executive and managerial duties and non-managerial and executive duties in the U.S. entity; (4) a description of the degree of discretionary authority the beneficiary will have in day-to-day operations in the U.S. entity; (5) the number of employees, their salaries, job title, and duty description in the U.S. entity; (6) a description of the management and personnel structures of the U.S. office, including an organizational chart; (7) a complete position description for all employees in the company, including one for the beneficiary's position; and (8) a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis and whether or not they require a college education.

In response to the RFE, dated September 15, 2011, counsel provided a statement that included the following regarding the beneficiary's duties:

[H]e directs the company and is responsible for business decisions including which projects the company will bid and/or accept, hiring and firing of employees, management of the company's assets, and directing project managers assigned to particular projects. As chief executive the beneficiary has many duties, the majority of which are either executive or managerial in nature.

Furthermore, counsel noted that the beneficiary's position with the U.S. entity required executive, managerial and technical skills including:

[E]xtensive knowledge of the company products and services, ability to train personnel, ability to market the company, ability to budget company resources such as capital, contract labor for each job, maintain relations with vendors and licensors (Aquathin), among others. The beneficiary is the chief executive of the company as well as its owner and has complete discretionary authority for company business both in day to day operations and future planning. Nearly all of the beneficiary's time will be allotted to managerial duties, whether management of sales, marketing, finance, and overall responsibility for water projects.

Counsel asserted that the beneficiary currently had only one subordinate supervisor in the foreign corporation and one subordinate with the U.S. entity. Counsel stated that the U.S. subordinate's duties include "administration of company business such as payroll, accounts receivable, accounts payable, and assisting the beneficiary in communicating with existing and future customers regarding water services projects." In addition, counsel stated:

At this time the personnel required in the U.S. office has been minimal. The petitioner's activity in the U.S. has consisted mostly in the organization of the

company and establishing a presence. The Branch office has processed purchases of supplies on behalf of the parent company in the Bahamas which is reflected in the petitioner's bank statements which is an activity that was accomplished by the [U.S. subordinate] under the beneficiary's direction and supervision. The management and personnel structure in the U.S. will mirror the parent company in that the beneficiary will hire personnel for projects in the U.S. as jobs are acquired. The project manager will report to the beneficiary. The company will not use company resources to maintain a large staff until such time as demand requires the company [to] do so.

Counsel further explained:

[a]t this time there is no need for office/clerical staff or managers for sales, marketing, finance, or other functions to be hired. [The U.S. subordinate] is assisting the beneficiary in operating the office so that the beneficiary may work to develop the business. The beneficiary will hire personnel in the future, such as project managers, based upon demand.

\* \* \*

The beneficiary is the highest level manager for the U.S. entity and he has no supervisor. The U.S. entity is a relatively new organization and the beneficiary is its chief executive officer. At this time there are no managers working under the beneficiary at the U.S. entity. The beneficiary directs the U.S. entity and he manages the functions required for development of the U.S. business entity.

Notably, while counsel asserted that the beneficiary has one subordinate in the U.S. entity, he also explained that U.S. entity had not filed any tax forms because it had hired no employees and had generated very little income.

Despite the director's specific request for a complete position description for the beneficiary, the petitioner did not submit any additional information describing the beneficiary's duties on a day-to-day basis.

The director denied the petition on September 30, 2011, concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, noting that the beneficiary is the only claimed employee with the U.S. entity, the director found that the petitioner had not established that the beneficiary would be supervising other supervisory, professional, or managerial employees who would relieve him from performing the services of the entity. The director also stated that the record did not establish how the business would be operating at a level that warranted and could support

someone in a managerial or executive capacity as defined in Section 101(a)(44) of the Immigration and Nationality Act. The director also determined that, based on the job description, the beneficiary would be engaged in the non-managerial, day-to-day operations of the entity.

On appeal, counsel states "[t]he decision to deny contains numerous factual inconsistencies so that [it] is difficult to ascertain whether the officer considered the evidence submitted in this case or if the information the officer was considering came from another file." Counsel notes that the director misidentified the name of the foreign company and the parent company's country. Furthermore, counsel asserts that the branch office was organized as an L-1A start-up in 2008 and it was not created in 2000 and it did not begin operations in 2002 as stated in the director's decision. Counsel further states on appeal:

The denial letter is also in error with its assessment of the duties of the beneficiary, [beneficiary]. [Beneficiary] is the senior most figure in the company and he makes all of the major policy and business decisions for both the parent company and branch office. The denial letter incorrectly states that his duty is to primarily engage in retail sales to the public. The denial letter also states the company has only rented office space and not retail space. The denial letter accuses [beneficiary] of engaging in retail sales when the next paragraph states no retail space has been rented. The company has not rented retail sales space because [beneficiary] is not engaged in retail sales of water purification equipment but directs a company that provides water purification system sales, service and installation in a construction setting for hotels and other commercial and residential applications. Ample evidence of corporate structure as well as the business activities of the parent company as well as the branch office was submitted.

#### B. Discussion

Upon review, counsel's assertions are not persuasive. The petitioner did not establish that the beneficiary had been or will be employed primarily in a managerial or executive capacity.

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.*

In this matter, the petitioner identified the beneficiary as a managing director but provided a job description that failed to establish that the beneficiary acts "primarily" in a managerial or executive capacity. The petitioner provided a vague and broad description which failed to adequately describe what the beneficiary does on a day-to-day basis. For example, the

beneficiary's responsibilities were described, in part, as training new employees and being responsible for all aspects of the operations including sales, marketing, budget, pricing, contracts and management. As the petitioner's initial evidence did not identify any subordinate employees to perform the day-to-day, non-managerial duties associated with these operational activities, it was not clear whether the beneficiary's responsibilities would require him to perform qualifying managerial duties, or whether he would be directly responsible for such tasks as sales, marketing and securing contracts.

The director provided the petitioner an opportunity to develop the job description and provide specific duties with a percentage breakdown of time allocated to each of the duties but the petitioner failed to adequately respond. As such, the record contains no specific daily tasks and no breakdown of time to account for the beneficiary's day. 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).

Rather, counsel provided another very general explanation stating that the beneficiary would be responsible for a variety of business decisions and hiring requirements. 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 activities in the course of his daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd v. Sava*, 724 F. Supp 1103 (E.D.N.Y 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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).

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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the

function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(i)(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. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir. 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner did not demonstrate that the beneficiary was or will be managing the U.S. entity, or managing a department, subdivision, function, or component of the company, at a senior level of the organizational hierarchy, consistent with the statutory definition of "managerial capacity." When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

On the Form I-129, the petitioner stated that the beneficiary would be responsible for business operations and marketing, as well as for all aspects of the branch start-up such as establishing the entity, finding a location and hiring new employees. Additionally, the petitioner stated that the beneficiary would be directing the company and responsible for sales, marketing, finance and operations. Further, counsel asserted that the beneficiary "directs a company that provides water purification system sales, service and installation in a construction setting for hotels and other commercial and residential applications."

Despite all of these claimed responsibilities and functions, counsel acknowledged that, at the time, the business had no employees other than the beneficiary. Counsel explained that the entity was a "relatively new organization" and not sufficiently developed. Counsel further stated that since there are no employees, the petitioner has not yet filed an IRS Form 941, Employer's Quarterly Federal Tax Return. Counsel described some future employee positions and the anticipated development of the business but no organizational chart was provided. He explained that the management and personnel structure would eventually mirror the parent company once the business grew sufficiently to require it. An organizational chart depicting the management and personnel structure for the parent company was not submitted. Counsel noted that the beneficiary's wife was assisting the beneficiary so that he could work to develop the business. Counsel also asserted that the beneficiary directed the entity and managed the functions for development of the business. However, the beneficiary appears to have no staff to perform the functions he is claimed to manage. The director recognized this deficiency, stating that without subordinate employees "the actual process of installing the water purification and related

appliances must be performed by the beneficiary himself." Though counsel asserted that if a project were obtained the beneficiary would hire sufficient personnel to complete it, the beneficiary does not currently have any employees to perform the sales and marketing functions to obtain those jobs. Rather, the beneficiary is performing those functions himself. Further, the petitioner submitted photographs of a "water softener installed by [the beneficiary]" in November 2010 as evidence of the company's business activities.

The AAO notes that the petitioner was organized in 2008 and is no longer a "new office" for purposes of meeting the regulatory requirements for this classification. Rather, the record reflects that USCIS previously granted a two-year extension of the new office petition filed in 2008. Nevertheless, based on the evidence submitted with this petition, the beneficiary is still engaging in start-up activities as the petitioner's sole employee. It is evident that without staff, the beneficiary is required to perform the duties that would normally be delegated to subordinate employees, whether those tasks are marketing and selling the petitioner services, providing the water treatment installation activities, or performing other operational and administrative tasks. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). Although the petitioner maintains that the beneficiary is acting in a managerial or executive capacity, the petitioner provides no independent evidence to corroborate these claims. 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 AAO notes inconsistencies in the record relating to [REDACTED] the beneficiary's spouse. In support of this petition counsel asserted that the beneficiary had one subordinate supervisor with the U.S. entity who was responsible for "administration of company business such as payroll, accounts receivable, accounts payable, and assisting the beneficiary in communicating with existing and future customers regarding water services projects." That subordinate is the beneficiary's spouse. Counsel elaborated that the subordinate was under the beneficiary's direction and supervision and assisted with operation of the office so that the beneficiary could work to develop the business. Further, the beneficiary's spouse signed the "offer of employment" letter to the beneficiary on behalf of the U.S. entity. Nevertheless, counsel also stated that the U.S. entity had no managers working under the beneficiary and no other employees. Only the beneficiary is claimed as an employee on the Certificate of Zoning Compliance document dated July 2011 and since there are no employees, the entity submitted no IRS Forms 941. It is unclear how the petitioner can simultaneously claim the beneficiary's spouse as a subordinate supervisor yet claim that it has no employees other than the beneficiary. 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). Based on these inconsistencies, the petitioner has not established that the beneficiary supervises any subordinates in the United States.

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.*

The record did not demonstrate that the U.S. entity has the organizational complexity to support a qualifying executive position. Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. Based on this record of proceedings, the beneficiary's job duties appear to require him to perform significant marketing and sales development without the benefit of subordinate employees, as well as to actually provide the petitioner's services, thus precluding him from functioning in a primarily managerial or executive role. Again, 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 Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 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"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioning entity and has the

appropriate level of authority as the owner and managing director of the organization, the petitioner has failed to show that his actual day-to-day duties will be primarily managerial or executive in nature. Accordingly, the appeal will be dismissed.

### III. Foreign Employment in a Managerial or Executive Capacity

Beyond the decision of the record, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial or executive capacity prior to his transfer to the United States. *See* 8 C.F.R. § 214.2(l)(3)(iv). The petition indicated that the beneficiary was a director, chief executive officer, founder and principal owner of the foreign company who was responsible for major business decisions and the overall direction of operations. Counsel further asserted that the beneficiary had one subordinate supervisor in the foreign company who was a project manager.

The petitioner provided an undated letter which described the beneficiary's work with the foreign corporation as follows:

[The beneficiary] wears many hats in this company. He has the knowledge and capabilities of supplying and installing the exact system for each customer according to their particular needs. He is the go to man for water pumps, their repair, maintenance and service as well. He trains the staff in these areas and works with contractors while roughing in houses with waterlines and solar power. He also prices these jobs himself and contractors rely on him for this info...His work hours a week range in excess of 45 on site and 20 on paperwork. If he includes travel to the jobs on the family islands this changes drastically to 65 hours a week on site.

Despite the director's specific request for evidence related to the beneficiary's foreign employment in the RFE, the petitioner provided no organizational chart or other evidence to establish the personnel structure or management of the organization. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The record contains a single self-prepared undated document entitled "Employee Salaries per week and Job Description" which is printed on the foreign entity's letterhead. The document listed 11 personnel, including the beneficiary. A weekly salary amount and a job title were listed next to each name, but no duty description was provided. The petitioner identified the beneficiary as the owner/director and described his duties abroad as "[r]esponsible for major business decisions, and overall direction of operations" with no further detail offered. The petitioner failed to provide a detailed description of the beneficiary's duties to establish that he was performing in a managerial or executive capacity. To the contrary, the letter describing the beneficiary's duties and activities with the foreign company suggests the beneficiary was primarily engaged in providing services and performing first-line supervisory

duties. The inconsistencies between counsel's assertions and the submitted evidence raise serious doubts regarding the claim that the foreign company employed the beneficiary in a qualifying capacity. *See* 8 C.F.R. § 214.2(l)(3)(iv). 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). For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

#### IV. Qualifying Relationship

Beyond the decision of the director, the record contains insufficient information to establish a "qualifying relationship" under the Act and the regulations. The petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
  - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
  - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
  - (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
  - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
  - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. . .

The petitioner's assertion that the U.S. entity is a branch of the foreign company is not supported by the evidence. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). USCIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm'r 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm'r 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm'r 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm'r 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office).

The record indicates that the petitioning enterprise does not maintain a qualifying "branch" relationship with the overseas company. Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's

Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

In this matter, the evidence supports that the petitioner, a South Carolina limited liability company, is a separate legal entity from the foreign company. The petitioner submitted a state business license, a certificate of existence, Articles of Organization, code compliance documents and an Internal Revenue Service Form SS-4 Application for Employer Identification Number indicating that the beneficiary is the sole member of the petitioning company. None of the documents submitted by the petitioner established the foreign company as owner of the U.S. entity. The evidence submitted does not demonstrate that the petitioning organization is an operating division or office of the foreign company, consistent with the regulatory definition of "branch." *See* 8 C.F.R. § 214.2(l)(1)(ii)(J).

In this matter, the claimed branch is an limited liability company organized in the United States, therefore the AAO will examine the ownership and control of that entity to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. On the Form I-129, the petitioner stated the beneficiary owns both the foreign company and the U.S. entity. However, the record establishes no single individual or parent entity with ownership and control of both companies that would qualify the two as affiliates. 8 C.F.R. § 214.2(l)(1)(ii)(L). There is no direct evidence in the record to support the petitioner's claim that the foreign entity and the petitioner have the same owners. According to the evidence provided by the petitioner, the beneficiary holds only one of two issued shares in the foreign company. Beneficiary is the director but no other documents regarding control of the company were provided. To establish eligibility, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

The petitioner is allegedly owned solely by the beneficiary, the petitioner failed to provide adequate documentation to support this claim. As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members.

Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Other than petitioner's assertion, only an Internal Revenue Service (IRS) Form SS-4 Application for Employer Identification Number indicating that the beneficiary is the sole member of the petitioning U.S. LLC is provided as proof of ownership. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In this matter, there is insufficient evidence in the record to support the petitioner's claim that the foreign entity and the petitioner have the same owners. Consequently, it must be concluded that the petitioner has failed to demonstrate a qualifying relationship with a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G).

Finally, while not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States.

For these additional reasons, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

## V. Conclusion

The AAO acknowledges the director's typographical errors pointed out by counsel on appeal. The director misidentified the foreign company's name as [REDACTED] rather than [REDACTED] in the Bahamas. Additionally, the director referred to an RFE issued on May 31, 2011 rather than June 22, 2011 and a RFE response received on August 26, 2011 rather than September 17, 2011. Finally, counsel asserted that the director erred in his assessment of the beneficiary's duties by noting the beneficiary is to primarily engage in retail

sales to the public. Nevertheless, the director found: (1) that the petitioner failed to establish that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional or managerial employees who would relieve him from performing the services of the corporation; (2) the record did not establish how the business would operate at a level warranting an individual in a managerial or executive capacity; (3) it appeared the beneficiary would be involved in the non-managerial day-to-day operations; and (4) that the petitioner failed to establish that the beneficiary's position would meet the standard of this petition.

A review of the director's decision and the record establishes that substantively, the director did in fact considering the petitioner's evidence. The director's numerous references to the unique facts and circumstances of the matter together with relevant quotes and observations indicate that while inaccuracies are found in the decision, the errors were typographical in nature and did not affect the outcome of this matter or the director's analysis of the beneficiary's employment capacity. Ultimately, the director denied the petition because the petitioner failed to submit evidence establishing that the beneficiary would be employed in a primarily managerial or executive capacity. This finding, and the director's discussion of the relevant evidence leading to such finding, was clear and free of any such errors. On appeal, counsel has not presented additional evidence sufficient to overcome the grounds for denial.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.