



U.S. Citizenship  
and Immigration  
Services



D7

DATE: DEC 31 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 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 [REDACTED]. The petitioner seeks to employ the beneficiary as its chief financial officer (CFO) 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 within one year of commencing operations in the United States.

The petitioner filed a motion to reconsider. The director dismissed the motion to reconsider. The petitioner subsequently filed an appeal. On appeal, the petitioner asserts that the beneficiary meets all requirements for an intracompany transferee. The petitioner submits a brief and additional evidence to support its appeal.

#### I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (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 October 22, 2010. In a letter dated October 2, 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 its Chief Financial Officer (CFO) as the following:

**DUTIES:** In charge of all financial matters of the company. Budgeting, accounting, profit and loss statements, corporate taxes, payroll, general ledger, etc. Follow up on tax updates and changes. Create financial and statically [sic] tools and reports using spreadsheets. Manage, organize, and update relevant data using database applications. Analyze and interpret financial statistic [sic] and other data and produce relevant reports. Interpret instructions and issues arising, and then implement actions according to administrative policies and procedures. Arrange and participate in meetings, conferences, and project team activities. Report directly to the Board of Directors.

The petitioner also provided the following list of the beneficiary's job duties:

1. Controllership duties: responsible for presenting and reporting accurate and historical financial information of the company;
2. Treasury duties: responsible for the company's present financial condition, deciding how to invest the company's money, and supervising the capital structure of the company;
3. Economic strategy and forecasting: economic forecasting and modeling, trying to predict the best way to ensure the company's success in the future;
4. Provide the CEO with an operating budget;
5. Supervision of Accountant (with professional degree) and Administrative Assistant;
6. Meet with the CEO on a daily basis to supervise the work of the Marketing Manager, Advertising Manager and Technicians, work with the CEO on the strategic vision of the company;
7. Participate in developing new business, specifically, assist the CEO and President in identifying new funding opportunities, drafting of prospective budgets, and determining cost effectiveness of prospective services;

8. Represent the company externally to media, government, funding agencies, and the general public;
9. Recruit, supervise, and evaluate department staff;
10. Monitor banking activities; and
11. Will be supervised only by the Board of Directors.

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 ██████████ in the position of "Board of Directors/President" at the top, followed directly below by a secretary. The next tier depicted on the chart is ██████████ as CEO, and the beneficiary as CFO. The CEO is depicted as directly supervising a Marketing Manager and an Advertising Manager, who in turn will supervise a technician for LED displays. The beneficiary is depicted as directly supervising an Accountant and an Assistant.

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

In addition, the petitioner provided position descriptions for its listed employees, except for the President. In particular, the position description for the Accountant, ██████████, states the following:

**DUTIES:** Prepare profit and loss statements and monthly closing and cost accounting reports. Compile and analyze financial information to prepare entries to accounts, such as general ledger accounts, and document business transactions. 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. Prepare and review budget, revenue, expense, payroll entries, invoices, and other accounting documents. Analyze revenue and expenditure trends and recommend appropriate budget levels, and ensure expenditure control. Explain billing invoices and accounting policies to staff, vendors and clients. Resolve accounting discrepancies. Recommend, develop and maintain financial data bases, computer software systems and manual filing systems. Supervise the input and handling of financial data and reports for the company's automated financial systems. Interact with internal and external auditors in completing audits.

In pertinent part, the position description for the CEO, ██████████, lists her job duties as including: plan, develop, and establish policies and objectives of the business; directing and coordinating the financial programs to provide funding for new or continuing operations; reviewing financial statements; coordinate costs with product quality and sales; and review production costs and enhance profitable operations.

The position description for the Secretary, to be hired, 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, to be hired, lists duties 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 Advertising Manager, [REDACTED], simply states: "Report directly to the CEO."

The position description for the LED Technician, [REDACTED] indicates his duties include technical servicing and testing of the equipment.

The position description for the Accounting Assistant, to be hired, reflects duties such as: process and reconcile accounting documents; review and code financial information; prepare and process documents to disburse funds; make deposits and prepare reports; and compile and review information for accuracy.

The director issued a request for evidence ("RFE") on November 24, 2010, 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; (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; and (3) complete position descriptions for all the petitioner's proposed employees, including the beneficiary.

In response to the RFE, the petitioner provided an updated position description for its employees, adding a description for the President, adding the names of [REDACTED] as the Secretary and [REDACTED] as the Marketing Manager, and providing the percentage of time spent on each duty for each of the above employees. The breakdown of the beneficiary's time reflects that she will spend her time on the following:

1. Budgeting, accounting, profit and loss statements, corporate taxes, payroll, general ledger, etc. (30%);
2. Follow up on tax updates and changes (10%);
3. Create financial and statically [*sic*] tools and reports using spreadsheets (10%);
4. Manage, organize, and update relevant data using database applications (5%);
5. Analyze and interpret financial statistic [*sic*] and other data and produce relevant reports (10%);
6. Interpret instructions and issues arising, and then implement actions according to administrative policies and procedures (15%); and
7. Arrange and participate in meetings, conferences, and project team activities. Report directly to the Board of Directors (20%).

In a letter dated February 12, 2011, the petitioner provided another breakdown of the beneficiary's job duties, as follows:

1. Controllership duties: responsible for presenting and reporting accurate and historical financial information of the company (5%);
2. Treasury duties: responsible for the company's present financial condition, deciding how to invest the company's money, and supervising the capital structure of the company (10%);
3. Economic strategy and forecasting: economic forecasting and modeling, trying to predict the best way to ensure the company's success in the future (10%);
4. Provide the CEO with an operating budget, including interpreting legislative and programmatic rules and regulations, disseminating regulations to personnel, and monitoring compliance (15%);
5. Supervision of Accountant (with professional degree) and Administrative Assistant (10%);
6. Meet with Board of Directors on weekly basis (5%).
7. Meet with the CEO on a daily basis to supervise the work of the Marketing Manager, Advertising Manager and Technicians, work with the CEO on the strategic vision of the company (10%);
8. Participate in developing new business, specifically, assist the CEO and President in identifying new funding opportunities, drafting of prospective budgets, and determining cost effectiveness of prospective services (10%);
9. Represent the company externally to media, government, funding agencies, and the general public (10%);
10. Recruit, supervise, and evaluate department staff (5%); and
11. Monitor banking activities (10%).

Finally, the petitioner submitted copies of the diplomas of [REDACTED] and [REDACTED] [REDACTED] for associate degrees in Business Administration, the diploma of [REDACTED] for a bachelor's degree in computer science and his professional certificate in bookkeeping, the diploma of the beneficiary as an accountant, and the diploma of [REDACTED] as a lawyer.

The director denied the petition on July 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 beneficiary's job duties included routine bookkeeping functions such as "creating financially and statically [*sic*] tools and reports using spreadsheets and updating data using database applications." The director concluded that the beneficiary would likely perform the non-managerial, day-to-day functions of the U.S. operations.

On August 29, 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 August 25, 2011, emphasizing the beneficiary's duties in regards to financial matters. The petitioner asserted: "The beneficiary, as the CFO, will not deal with daily operations, she will only deal with functions related to the Finances of the Company (a major function)." On motion, the petitioner reiterated the beneficiary's duties as stated in the letter dated February 12, 2011.

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 November 15, 2011. In dismissing the motion, the director affirmed that the evidence in the record did not 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 beneficiary's job duties were generic. The director also observed that the beneficiary's purported subordinates did not all have college degrees, and therefore the petitioner failed to establish that the beneficiary would manage a staff of professionals.

On December 12, 2011, the petitioner filed an appeal. On appeal, the petitioner emphasizes that the beneficiary "will be in charge of all financial matters" and will only perform "all top and professional level" duties. The petitioner asserts that the beneficiary will be relieved from performing non-qualifying duties by the Accountant, who is a professional and who will report directly to her, and an Account Assistant. The petitioner provides the same list of job duties for the beneficiary that was previously provided, and resubmits copies of evidence previously submitted.

#### *Discussion*

Upon review of the record, 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).

The petitioner's claim that the beneficiary will perform "all top and professional level" duties and will be relieved from performing the daily tasks of the petitioner is not credible and is contrary to the evidence. As noted by the director, many of the beneficiary's duties are non-qualifying, routine bookkeeping duties, such as: "Create financial and statically [*sic*] tools and reports using spreadsheets," "Manage, organize, and update relevant data using database applications," "Analyze and interpret financial statistic [*sic*] and other data and

produce relevant reports.” These duties account for at least 55% of the beneficiary’s time, thus disqualifying her from being employed in a *primarily* managerial or executive capacity as required by 101(a)(44)(A) and (B) of the Act.

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).

Moreover, many of the beneficiary’s duties will significantly overlap with the Accountant’s duties. For example, both will be responsible for duties related to budgeting, creating financial reports, and analyzing financial data. In addition, despite the petitioner’s claim that the beneficiary will be “in charge of *all* financial matters of the company (emphasis added),” the position description for the CEO reflects that the CEO will also be performing substantial financial management duties. For example, the CEO will spend 15-25% of her time to “Direct and coordinate the formulation of financial programs to provide funding for new or continuing operations,” and another 10-20% of her time to “review financial statements to determine the progress and status of the company,” and review and coordinate production costs. Considering the CEO’s significantly overlapping duties with the Accountant and the CEO, the record is unclear what the beneficiary’s actual duties and role within the company will be.

In fact, the petitioner’s overall organizational structure is not credible. According to the petitioner’s amended 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: [REDACTED] as the President, Treasurer, and Director; [REDACTED] as the Vice President, Secretary, and Director; [REDACTED] as the CEO; and the beneficiary as the CFO. The petitioner’s original certificate of incorporation listed [REDACTED] as its President, Treasurer, and Director, and [REDACTED] as its Vice President, Secretary, and Director. However, in the petitioner’s organizational chart, the petitioner completely omitted the positions of Vice President, Secretary, and Director currently held by [REDACTED] and listed [REDACTED] as the only director. The petitioner provided no explanation for why it omitted the positions currently held by [REDACTED]

Moreover, the organizational chart depicted [REDACTED] as the Advertising Manager, a position that is directly subordinate to the CEO. The AAO finds this claim to be unpersuasive. As stated above, the petitioner’s certificate of incorporation reflects that [REDACTED] is actually the petitioner’s Vice President, Secretary, and one of its two directors. Hence, the petitioner’s claim that [REDACTED] will occupy the lower position of Advertising Manager and become directly subordinate to the CEO is not plausible or consistent with the fact that [REDACTED] is one of the petitioner’s two directors that will directly supervise the CEO. 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.

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).

Similarly, the petitioner's claim that it will employ 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 exclusive contract for 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.

The AAO acknowledges that section 101(a)(44)(C) of the Act requires that, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the United States Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

In the instant matter, the petitioner claims that the beneficiary will perform "all top and professional level ones." Moreover, at the time of filing, the petitioner proposed to employ a total of nine employees within its first year of operations, six or seven of which are in managerial or executive positions.<sup>1</sup> Many of the managerial or executive positions the petitioner described consisted of questionable and duplicative job duties, and two positions were not depicted or described at all. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by six or seven managers and executives, particularly given the size and stage of development of the petitioner's business. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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 (Tafe), 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

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<sup>1</sup> 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]

enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. at 604.

Finally, the petitioner failed to establish that the beneficiary will supervise a professional employee, specifically, the Accountant [REDACTED]. The record reflects that [REDACTED] has a professional certification in bookkeeping, but not a bachelor's degree in accounting or a closely related field. The fact that [REDACTED] possesses a bachelor's degree in computer science- a major completely unrelated to accounting establishes that a bachelor's degree is not a prerequisite for the accountant position. The petitioner thus failed to establish that [REDACTED] is employed in a professional capacity as that term is defined above.

If it is claimed that the beneficiary's duties involve supervising employees, then the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. As stated above, the fact that [REDACTED] does not possess a bachelor's degree in accounting or a closely related field establishes that a bachelor's degree is not a prerequisite for the Accountant position.

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. 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, considering the incomplete and unreliable job descriptions provided for the beneficiary and the petitioner's other employees, as well as 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 [REDACTED] (the "foreign employer"), located in Venezuela. As evidence of the foreign employer's ownership and control of the petitioner, the petitioner submitted a copy its stock certificate number 1 issued to the foreign employer on January 7, 2010 for five hundred (500) shares, and a copy of the petitioner's stock transfer ledger confirming the issuance of shares to the foreign employer in exchange for \$10,000. The petitioner submitted several of the foreign employer's bank statements showing that the foreign employer made several wire transfers in 2009 to 2010. The petitioner also submitted its bank statements showing that it received several wire transfers in 2009 and 2010.

However, the petitioner's stock certificate and stock ledger are not entirely credible. Contrary to the information found in the stock transfer ledger reflecting that the shares were issued to the foreign employer in exchange for \$10,000, the foreign employer stated in its letter dated October 2, 2010 that it "initially funded the subsidiary, [the petitioner], with a total of approximately \$202,000." Furthermore, the petitioner's business plan lists the "planned investment" from the foreign employer as \$300,000. The petitioner failed to provide an explanation for this discrepancy.

Although the petitioner submitted the foreign employer's bank statements showing that it made several wire transfers and its own bank statements showing that it received several wire transfers in 2009 through 2010, these bank statements did not identify the recipient(s) or remitter(s) of the wire transfers. The petitioner provided no independent, corroborating evidence to establish that it was the recipient of the foreign employer's wire transfers. Moreover, the dates of the wire transfers made and received by the foreign employer and the petitioner do not match. Regardless, the petitioner failed to explain how it could have been the recipient of the foreign employer's money transfers made in 2009, as the foreign employer did not decide to create the petitioner until 2010 and the petitioner was not formed and incorporated until January 7, 2010.<sup>2</sup>

Finally, the petitioner submitted a letter from [REDACTED] 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.

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

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<sup>2</sup> In its letters dated October 2, 2010 and January 21, 2011, the foreign employer stated: "During the year 2010 the decision was made to expand the company's operations to the United States."

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.