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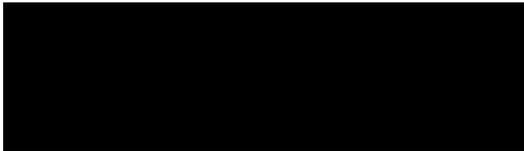
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DATE: **JAN 04 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, an Arizona limited liability company, states that it operates an exotic Thai restaurant. It claims to be a subsidiary of [REDACTED] located in Bangkok, Thailand. The beneficiary was initially granted L-1A status in 2008 and the petitioner now seeks to extend her status so that she may continue to serve in the position of general manager.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary's duties are executive or managerial in nature or that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties.

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 asserts that the director erred as a matter of fact in concluding that the employees under the beneficiary's supervision are not professional or managerial employees. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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

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

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

The issues addressed by the director are whether the petitioner established that the beneficiary's duties are executive or managerial in nature and specifically, whether the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. As both issues relate to the beneficiary's role in a managerial or executive capacity, they will be discussed together.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 17, 2009. The petitioner indicated on the Form I-129 that it is operating an exotic Thai restaurant with eight employees and failed to indicate its gross annual income. The petitioner submitted a letter in support of the petition where it stated that the beneficiary performs the following duties:

During [the beneficiary's] employment in the United States she has used essentially the executive and managerial skills and knowledge to supervise the professional staff (approximately 3 professionals) in business operation. She oversees the business of newly acquired Thai restaurants as well as completing the process for our Thai Culture Center. She reviews the general agreements or contracts in our business dealings with landlords or government agencies. She supervises a chef, a marketing manager and a contracted accountant to successfully move forward [*sic*] with our new restaurant and our culture center in all aspects of the business operation. She controls quality and quantity of our products and services as well as the financial records of the operation. She manages and directs the business negotiations and interactions with suppliers, other business entities and shipping company to complete the import and export process. She examines and develops US market for our products and draft [*sic*] business proposals for the parent company's review and approval. She also exercises the responsibility of training and hiring of other employees in the restaurant and culture center.

In the extension period she will use the same skills and experience to continue her job responsibilities as mentioned above. Her presence at our company will be critical for the next two years. The company's operation and successful expansion for the past year show that she has played a key role in our business operation, and her continuing presence is essential to bring the expansion effort to a successful conclusion.

The petitioner did not submit any additional information describing the duties of the beneficiary on a day-to-day basis.

The director issued a request for additional evidence ("RFE") on August 19, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties indicating exactly whom the beneficiary directs including job title and position description and the percentage of time the beneficiary spends performing each of the listed duties; (2) a copy of the U.S. company's organizational chart, for each restaurant and the cultural center, clearly identifying the beneficiary's position and the employees she supervises by name and job title, including a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision; and (3) a list of all the U.S. company's employees, for each restaurant and the cultural center, from the date of establishment to the present, including names, job titles, dates of employment, and wages.

In response to the RFE, the petitioner submitted two separate lists of employees for the U.S. company where one list included job duties for three of the employees and an organizational chart for the U.S. company.

The petitioner submitted an organizational chart listing [REDACTED] as the president of the petitioner and [REDACTED] as the CEO, the beneficiary as the general manager

of the petitioner, [REDACTED] as the marketing manager, [REDACTED] as the marketing manager's assistant, [REDACTED] as the independent contractor/accountant, [REDACTED] as the chef executive, [REDACTED] as a server, and [REDACTED] as a server/bartender [sic]. The same organizational chart also lists [REDACTED] as the general manager of [REDACTED] (at the same tier as the beneficiary), [REDACTED] as the chef executive, [REDACTED] as a part-time chef assistant, [REDACTED] as food preparation, and [REDACTED] and [REDACTED] as servers.

The petitioner described the beneficiary's job duties as follows:

1. Supervise the professional staff such as chef, marketing manager and contracted accountant to successfully move forward [sic] with our new restaurant and our culture center in all aspects of the business operation and the detailed job duties include: (50%)
 - a. direct the marketing manager to negotiate business lease with landlord, preparation of all relevant business documents such as business proposal, purchase/sale agreement, business plan, and marketing plan
 - b. meeting, discussion and directing chef for quality of our foods preparation and cooking to ensure that our service and cuisine are truly Thai authentic.
 - c. direct contracted accountant [REDACTED] CPA for compiling and analyzing of financial information such as general ledger accounts, documenting business transactions; information of assets, liabilities, and capital, as well as balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position
2. Control quality and quantity of our products and services as well as the financial records of the operation. Cooperate with our contracted accountant and prepare monthly financial report for the president's review. Make strategic planning and decision about the quality and quantity of our products and service. (20%)
3. Supervise the import and export of our products. Direct our marketing manager to contact our partners, suppliers, other business entities and shipping company in Thailand to order the imported products such as silk scarf, bencharong porcelain, Thai literatures, curry paste and Thai food ingredients and tools for education and promoting of Thai culture and history in our culture center. (20%)
4. Training and hiring of other employees in the restaurant and culture center including review and response to all questions about our business operation as contained in our employer and employee manual. (10%)

The petitioner submitted a list of current employees, specifically identified as working for the petitioner, listing [REDACTED] and the beneficiary. The petitioner did not submit any of the additional information requested for each employee, such as educational level, position descriptions, immigration status, or annual salaries. The petitioner also submitted a separate list of employees only including [REDACTED] the marketing manager, [REDACTED] the chef, and [REDACTED] the accountant. The second list included job duties for the three positions only.

The petitioner submitted quarterly federal tax returns for the fourth quarter of 2008 for [REDACTED] d/b/a [REDACTED] which lists three employees: [REDACTED]. The first and second quarters of 2009 for [REDACTED] d/b/a [REDACTED] each list the same eight employees: [REDACTED]. The petitioner also submitted quarterly federal tax returns for the fourth quarter of 2008 for [REDACTED] d/b/a [REDACTED] which lists five employees: [REDACTED]. The first quarter of 2009 for [REDACTED] lists [REDACTED], and [REDACTED] and the second quarter of 2009 lists only [REDACTED] and [REDACTED] as employees. The petitioner did not submit any tax information in its own name.

The director denied the petition on December 7, 2009, concluding that the petitioner failed to establish that the beneficiary's duties are executive or managerial in nature. In denying the petition, the director found that the description of the beneficiary's duties were too vague and general to determine what the beneficiary will do on a day-to-day basis. The director observed that the petitioner did not provide quantifiable definitions for the listed tasks and that it did not demonstrate that the beneficiary would be managing a function or component of the U.S. entity. The director further observed that the petitioner failed to submit the educational information requested and therefore failed to establish that the beneficiary supervises professional, managerial, or supervisory employees.

In support of the appeal, counsel submits a brief in which he asserts that the beneficiary's duties are not vague or general. Counsel further asserts that the employees under the beneficiary's supervision are professional employees and that "[the beneficiary] continues to perform her managerial job duties under the approved L-1 petition and her job duties have never been interrupted." Counsel lists the same job duties previously provided by the petitioner in his brief and does not submit new evidence in support of the beneficiary's duties on appeal. In support of the beneficiary's professional subordinates, counsel submits a letter from [REDACTED] confirming her business relationship with the petitioner, the same list of job duties previously submitted for the marketing manager, chef, and contracted accountant, copies of each of their degree certificates indicating a Baccalaureate degree or above, and summary reports from O*Net OnLine about accountants, chefs and head cooks, and marketing managers.

Discussion

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary's duties are executive or managerial in nature or that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties.

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(1)(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 in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary

from performing operational duties, 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 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 his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or 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").

The petitioner initially described the beneficiary's proposed position in very broad terms, noting she will "oversee the business of newly acquired Thai restaurants," "complet[e] the process for our Thai Culture Center," "review the general agreements or contracts in our business dealings with landlords or government agencies," "supervise a chef, a marketing manager and a contracted accountant," "control quality and quantity of our products and services," and "manage and direct the business negotiations and interactions with suppliers, other business entities and shipping company to complete the import and export process."

When requested to clarify the nature of the beneficiary's duties, the specific tasks she performs, and the amount of time she devotes to specific tasks, the petitioner's response was nearly as generalized as the description previously submitted. The petitioner indicated that the beneficiary's duties include supervising a chef, marketing manager, and contracted accountant (50%), controlling the quality and quantity of products and services as well as financial records (20%), supervising the import and export of products (20%), and training and hiring other employees in the restaurant and culture center (10%). The AAO notes that counsel's brief, submitted on appeal, states, "[t]he above job descriptions can not [*sic*] be considered as too vague [or too general] by common sense or through reasonable interpretation and understanding of the plain English word "vague" [or "general"]. " USCIS will not accept a vague job description and speculate as to what the beneficiary actually does on a day-to-day basis as the petitioner's general manager. While these tasks are undoubtedly necessary in order to establish the U.S. operations, the petitioner has not indicated how such duties qualify as either managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide sufficient detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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).

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. 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 a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. Here, the petitioner states that the beneficiary is supervising three professional employees. According to the O*Net OnLine information provided by counsel on appeal, the accountant position usually requires a four-year bachelor's degree, the chef or head cook position usually requires only training in vocational schools, related on-the-job experience, or an associate's degree, and the marketing manager position usually requires a four-year bachelor's degree. It appears as though the marketing manager and the contracted accountant are professional employees; however, the petitioner has not established that such employees will relieve the beneficiary from performing non-qualifying tasks.

Furthermore, if the petitioner claims that the beneficiary will be employed as a personnel manager, the petitioner's evidence must 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. While the petitioner has submitted a proposed organizational chart depicting the beneficiary as the only managerial employee supervising a staff of one marketing manager (who supervises an assistant), one chef, one contracted accountant, one server, and one server/bartendee [*sic*], the petitioner has not shown how a restaurant would support this staffing structure. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor.

The petitioner's business plan, dated July 2008, states that it has acquired one restaurant called [REDACTED] and is in the process of purchasing three others: [REDACTED] d/b/a [REDACTED] and [REDACTED]. According to the Arizona Corporation Commission Public Access System,¹ [REDACTED] is owned by [REDACTED] is owned by [REDACTED] and [REDACTED], and [REDACTED] is owned by [REDACTED]. The database also shows that the trade name [REDACTED] is owned by [REDACTED] and [REDACTED] is owned by [REDACTED]. On the Form I-129, the petitioner indicated that it had eight employees; the organizational chart submitted by the petitioner indicated that it employed the beneficiary as general manager, one marketing manager and an assistant, one independent contractor/accountant, one chef executive, one server, and one

¹ Arizona Corporation Commission Public Access System. Web. 20 Dec. 2011 <<http://starpas.azcc.gov/scripts/cgiip.exe/WService=wsbroker1/main.p>>. (A copy of the information found has been incorporated into the record of proceeding.)

server/bartendee [sic]. The same organizational chart lists some of the same individuals in other positions for [REDACTED]. The quarterly federal tax returns for [REDACTED] and [REDACTED] list all or some of the individuals that are supposed to be employed by the petitioner according to the organizational chart. It is unclear whether the petitioner acquired the business of [REDACTED] or [REDACTED] (or if they are otherwise affiliated) as documentation has not been provided by the petitioner. In this case, the petitioner has not established that the beneficiary has sufficient subordinate staff to relieve her from performing non-qualifying duties. 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).

The petitioner has neither claimed nor established, in the alternative, that the beneficiary is employed primarily as a "function manager." 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner did not indicate that the beneficiary performs as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary spends on duties that would clearly demonstrate she manages an essential function of the U.S. company.

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 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 beneficiary in this matter has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than day-to-day operations. In addition, the petitioner has not established that the beneficiary has sufficient subordinate employees to relieve her from performing non-qualifying duties.

The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B)

of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. 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).

The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner indicated in its business plan that the restaurants will be open for lunch and dinner seven days a week. The specific hours of operation are: [REDACTED] are open 53 hours per week each, [REDACTED] is open 57 hours per week, and [REDACTED] is also open 57 hours per week. According to the evidence submitted by the petitioner, it appears that the beneficiary manages the [REDACTED] that is open 57 hours per week and only employs the beneficiary, a marketing manager and assistant, one chef executive, one server, and one server/bartender [sic]. Additionally, most of the same employees are also employed by [REDACTED] at the [REDACTED] according to the organizational chart and the quarterly federal tax returns. The petitioner has not explained how what can only be a part-time staff of one chef and two servers, could fully staff either restaurant for the duration of time they are open for business. The petitioner has not documented that it employs a dishwasher, busboys, etc. or any other staff to perform administrative/clerical duties. The petitioner has not established that the beneficiary's subordinate staff could relieve her from performing non-qualifying duties associated with operating a restaurant seven days per week.

The petitioner also makes reference to a Thai Culture Center and states that the beneficiary will also "complet[e] the process for [the] Thai Culture Center" in addition to her duties with the restaurants. However, the petitioner failed to submit any information about the culture center other than photos and invoices for products pictured. The petitioner did not list any duties for the beneficiary that are specific to the culture center nor did the petitioner articulate how the beneficiary will perform as a manager or executive at the culture center.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner

still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Here, that burden has not been met.

While the petitioner claims that the beneficiary manages two professional employees, the petitioner has not established that such employees will relieve the beneficiary from performing non-qualifying duties. As such, the AAO will uphold the director's determination that the petitioner has not established that the beneficiary's duties are executive or managerial in nature or that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. Accordingly, the appeal will be dismissed.

III. Qualifying Relationship

Beyond the decision of the director, the minimal documentation of the foreign company's and the petitioner's business operations raises the issue of whether there is a qualifying relationship between the U.S. entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). When considering the totality of the evidence presented, the petitioner has not sufficiently demonstrated that it is an affiliate of the foreign company.

The record as presently constituted does not contain any evidence of ownership of the petitioner. The stock certificates, stock ledger, or other evidence of ownership have not been submitted by the petitioner. The petitioner also failed to submit U.S. corporate income tax returns that would establish ownership of the U.S. company. The petitioner did submit a document titled Unit Purchase Agreement, which states that [REDACTED] who owned 100% of the petitioner, sold 60% of the U.S. company shares to [REDACTED] for \$30,000. However, evidence of the actual purchase of the shares, or other investment in the petitioner by the foreign entity, has not been submitted by the petitioner to demonstrate that a qualifying relationship exists.

In this case, the record contains insufficient evidence to establish the current ownership of the petitioner and that the foreign entity is in any way affiliated to the petitioner. The lack of evidence presented to support the petitioner's claims of ownership and affiliation to the foreign entity raises serious doubts regarding the claim that the petitioner is a subsidiary of the foreign entity. 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).

Due to the deficiencies and inconsistencies detailed above, the petitioner has not met its burden to establish that the petitioner is a subsidiary of the foreign company. For this additional reason, the petition cannot be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. Conclusion

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. 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 v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.