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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE: **JAN 11 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:



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, 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 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, a Texas corporation, states that it operates a restaurant. It claims to be an affiliate of [REDACTED] located [REDACTED]. The petitioner has employed the beneficiary since November 2002 and now seeks to extend his status so that he may continue to serve in the position of president for one additional year.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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 states that the director "failed to apply the correct language and interpretation of the law and the regulations." 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 Issue on Appeal

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

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 10, 2008. The petitioner indicated on the Form I-129 that it is operating a restaurant without indicating the number of employees or its gross annual income. The petitioner stated that the beneficiary performs the following duties:

The Beneficiary will continue to be employed as the President of the Petitioner, and will be responsible for performing the following duties; setting and establishing the company's goals and objectives; reviewing locations for the establishment of additional retail outlets; reviewing and analyzing market conditions; reviewing and approving marketing strategy; establishing sales and marketing goals and overseeing implementation of such goals; supervising and controlling work of subordinate managers

and supervisors; hiring and firing managers and supervisors; and reviewing financial records prepared by professional staff.

In the performance of his duties, the beneficiary will receive little supervision [from] the Board of Directors. Beneficiary will exercise wide discretion and latitude in the performance of his duties.

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 March 26, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) a list of the U.S. employees supervised by the beneficiary, including a brief description of job duties and educational level for all employees; (2) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees he supervises; (3) a comprehensive description of the beneficiary's duties indicating exactly whom the beneficiary directs and the percentage of time the beneficiary spends performing each of the listed duties; and (4) evidence of wages paid to employees and contractors in 2008.

In response to the RFE, the petitioner submitted an organizational chart for the U.S. company, a letter indicating the beneficiary's and subordinates' job duties, and tax returns and Forms W-2 for the U.S. company.

The petitioner submitted an organizational chart for the U.S. company listing the beneficiary as Manager, two Cooks and two Waiters/Cashiers.

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

- Setting and establishing the company's goals and objectives – 20%
- [R]eviewing locations for the establishment of additional locations – 10%
- [R]eviewing and analyzing market conditions – 15%
- [R]eviewing and approving inventory budgets – 5%
- [D]irecting and managing the staff including reviewing sales reports created by the subordinate staff – 15%
- [R]eviewing and approving marketing strategy in place and implementing changes – 10%
- [E]stablishing sales and marketing goals and overseeing implementation of such goals
- Hiring and firing of the staff – 5%
- [R]eviewing financial records prepared by professionals and conferring with financial institutions for loans for expansion and lines of credit – 15%

President exercises great latitude and discretion with little or no supervision from the board of directors.

One of the duties above does not specify a percentage of time; however, in adding up all of the others provided, it is assumed that the beneficiary spends 5% of his time on "establishing sales and marketing goals and overseeing implementation of such goals."

The petitioner's 2007 IRS Form 1120, U.S. Corporation Income Tax Return, indicates that the petitioner had gross sales of \$233,432 and a net income of \$96,291. However, the petitioner failed to indicate any

"compensation of officers," "salaries and wages," and "cost of labor." The petitioner submitted several Forms 1099 for 2007 indicating "nonemployee compensation" for the beneficiary in the amount of \$32,000 and for five other individuals (not currently mentioned in this petition) in the total amount of \$35,361.50. The petitioner's 2008 Form 1120 indicates that the petitioner had gross sales of \$193,168 and a net income of \$75,940. The petitioner failed to indicate any "compensation of officers" or "cost of labor" but did indicate a total \$27,198 in "salaries and wages," which correlates to the 2008 Forms W-2 for each of the beneficiary's subordinates in the total amount of \$27,198. However, the petitioner's state quarterly wage report for the fourth quarter of 2008 lists the four employees (identified on the organizational chart) and the total wages, tips, and other compensation to employees as \$27,198. The petitioner failed to submit state quarterly wage reports for quarters one through three for 2008 and any remuneration to the beneficiary for 2008.

The director denied the petition on August 14, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition.

In support of the appeal, counsel submits a brief that lists the same duties as above and provides more details for each duty as follows:

The Director believes that the description of the beneficiary's duties contained a number of generalities which merely paraphrased the statute. Therefore, in response, a more detailed description is provided:

Establish Sales and Marketing Goals:

[R]esponsible for establishing sales and marketing goals by conducting market research and analyzing competitor prices in comparison to the organization. In conducting market research, he will compare the geographic location of our business in relation to the demographic characteristics of our customers. He will then effectively compare customer's needs and wants to competitor's weaknesses. By doing this, he will be able to increase and strengthen our customer base. Based on this analysis, he will set marketing goals for achieving sales of a certain dollar amount.

Set Employment and Organizational Policies:

Additionally, he will be responsible for setting company policies relating to employment and product pricing. Furthermore in his capacity, he will be responsible for aiding in formulating and administering the policies of the organization, such as the number of employees required at each business location, their salary, and minimum requirements for the job. He will also be responsible for reviewing new business locations by studying geographic locations and analyzing market needs. He will be the final authority of all business activities with limited supervision.

Supervise Managers:

[The beneficiary] will be responsible for managing and supervising four employees. . . . The employees will be responsible for the day-to-day operations of the restaurant[;] however[,] [the beneficiary] will oversee these operations and make changes or recommendations as necessary. He will be the final authority of all business activities. He will exercise wide latitude and discretion over all matters.

The description above indicates that the beneficiary supervises two cooks and two waiters/cashiers. It also provides the same job duties for the cooks and waiters/cashiers as previously provided by the petitioner. Counsel also submits a letter from the petitioner stating the same as above for the beneficiary's job duties and a copy of a "Food Service Manager's Training" certificate for the beneficiary dated March 12, 2009.

Discussion

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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 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 AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. However, 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 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").

In the instant matter, counsel and the petitioner describe the beneficiary's proposed position in very broad terms, noting he will "set and establish the company's goals and objectives," "supervise and control work of subordinate managers and supervisors," and "hire and fire managers and supervisors." These duties merely paraphrase the statutory definition of managerial and executive capacity. *See* section 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary would be engaged in primarily managerial or executive duties under the extended petition. At the time of filing, the petitioner characterized the beneficiary's role as president. The petitioner indicated that the beneficiary's duties include "setting and establishing the company's goals and objectives – 20%," "reviewing and analyzing market conditions – 15%," "reviewing and approving inventory budgets – 5%," "hiring and firing of the staff – 5%," and "reviewing financial records prepared by professionals and conferring with financial institutions for loans for expansion and lines of credit – 15%." The AAO notes that counsel and the petitioner provided additional descriptions for three of the above duties; however, the descriptions are not sufficient to establish that the beneficiary is an executive or 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 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.

Furthermore, the petitioner's evidence must substantiate that the duties of the beneficiary and his 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. Here, the petitioner has submitted an organizational chart depicting himself as the single tier of managerial employees supervising a staff of two cooks and two waiters/cashiers. Counsel for the petitioner argues on appeal that the beneficiary's subordinates may not be professionals but they are managers. Counsel further states that all of the subordinates "serve an essential function of the organization." While the subordinates perform some of the non-qualifying duties required for day-to-day operation of a restaurant, the petitioner has not provided a comprehensive breakdown of the beneficiary's duties on a daily basis. 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 of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as that of a personnel manager under the statutory definitions.

The petitioner stated that the restaurant was established in 1998 and the beneficiary has been employed by the petitioner since 2002 in L-1A status. The petitioner also states that it employs the beneficiary, two cooks, and two waiters/cashiers. As described in detail above, the petitioner's IRS Form 1120 for 2008 only indicates the total salaries and wages paid as \$27,198, which is the same amount as the 2008 Forms W-2 for each of the beneficiary's subordinates (not including the beneficiary) and the petitioner's state quarterly wage report for the fourth quarter of 2008 (also not including the beneficiary). Given that the total for the year 2008 is the same as the total for the fourth quarter of 2008, the AAO questions why the petitioner failed to have any employees for the first three quarters of 2008. The petitioner failed to provide any clarification on this issue and failed to submit state quarterly wage reports for quarters one through three of 2008. 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).

On appeal, counsel contends that the beneficiary is a "function manager."

Counsel states:

The beneficiary does not simply have the title of Manager; he carries with it the responsibilities and credence of actually performing the activities that a Manager performs. The Director has failed to take into account that the Beneficiary will be responsible for reviewing and seeking additional business locations and that this important duty will not be delegated to any subordinate manager; therefore, the Beneficiary will engage in the essential function of the Petitioner's expansion of business in the United States.

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 (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner claims that the beneficiary will manage the essential function of expanding business in the United States; however, the breakdown of the beneficiary's job duties provided by the petitioner does not support such a claim. The petitioner failed to articulate the beneficiary's duties as a function manager and failed to provide a breakdown indicating the amount of time the beneficiary spends on duties that would clearly demonstrate that he manages the essential function of expanding business in the United States. In fact, the breakdown provided by the petitioner in response to the RFE does not list any duties specifically related to the company's expansion in the United States; some of the duties vaguely imply that the U.S. company will attempt to expand its business in the United States but does not list specific duties that would indicate that the beneficiary spends at least 51% of his time managing the essential function of expanding business 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 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 under the extended petition. 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 fact, the majority of the beneficiary's duties listed above are non-executive in nature and it does not appear that the beneficiary has sufficient subordinate employees to relieve him 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 submitted a copy of the menu for its restaurant, [REDACTED]. The menu lists the restaurant hours as Monday through Friday, 6:00 am to 10:00 pm and additional Chester Fried Chicken hours as Monday through Friday, 24 hours, and Saturday and Sunday, 6:00 am to 10:00 pm. The restaurant alone is open 80 hours per week and Chester Fried Chicken is open 152 hours per week. According to the petitioner, it only employs the beneficiary, two cooks, and two waiters/cashiers. The petitioner has not explained how two cooks and two waiters/cashiers could fully staff this restaurant for the duration of time it is open for business. The petitioner has not indicated that it employs a dishwasher, busboys, etc. or any other staff to perform administrative/clerical duties.

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. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. 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 and U.S. entity and a 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 articles of incorporation, stock certificates, and stock ledger have not been submitted by the petitioner. Additionally, the petitioner's 2007 and 2008 U.S. Corporation Income Tax Returns are checked "no" for the question asking "at the end of the tax year, did any individual, partnership, corporation, estate, or trust own, directly or indirectly, 50% or more of the corporation's voting stock?" at Schedule K. In the instant matter, the petitioner claims that the beneficiary majority owns and controls both the petitioner and the foreign entity. However, such evidence has not been provided.

Additionally, the record contains a financial document dated March 31, 2008 for the foreign entity that lists the beneficiary as a partner owning 60% of the shares and a second partner owning 40% of the shares. However, the record also contains a document from [REDACTED] dated November 19, 2008 that lists three partners/owners (shares not listed) of the foreign entity.

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 back up the petitioner's claims of ownership and affiliation to the foreign entity raises serious doubts regarding the claim that the petitioner is an affiliate 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 an affiliate 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 denied 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.