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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAK 07 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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ 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 California corporation, states that it is a jewelry retailer and wholesaler. It claims to be an affiliate of the beneficiary's foreign employer, Pvt. Ltd., located in India. The petitioner seeks to employ the beneficiary in the position of project manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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. On appeal, counsel for the petitioner asserts that the director's decision reflects an oversight or poor understanding of the evidence submitted and fails to provide an adequate basis for the determination that the beneficiary will not be employed in a qualifying managerial capacity. Counsel asserts that the evidence of record establishes that the beneficiary will be employed as a manager of an essential function of the U.S. company. Counsel submits a brief 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a managerial capacity. The petitioner does not claim that the beneficiary will be employed in an executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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.

II. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 29, 2009. The petitioner stated on the Form I-129 that it operates as a jewelry retailer and wholesaler with six employees and gross annual income of approximately \$600,000.

In a letter dated May 26, 2009, the petitioner stated that the beneficiary has been offered the position of project manager, and that he would be "fully and solely responsible for managing the entire operation of Petitioner with regard to the marketing of 'Engagement' and wedding jewelry." Specifically, the petitioner indicated that it intends to launch an online and retail "Build Your Own Ring" collection that will allow customers to design their own custom-made engagement rings using 3D CAD technology. The petitioner described the beneficiary's proposed role as follows:

Beneficiary will exercise broad discretion over day-to-day operations in Petitioner, principally relating to the Project. His duties will include the hiring and firing of personnel, preparing and executing sales and marketing plans, budgeting and financial management, supervision of managerial and other staff, liaising between the US and India organizations for selection of jewelry [*sic*] designs, manufacturing, import issues, etc., dealing with outside legal and accounting professionals, etc. Even though Beneficiary is not expected to hire and supervise subordinate staff in the initial phase of Project implementation, if the marketing of the Project follows the anticipated growth curve, such resourcing of qualified personnel will become a necessity. More specifically, Beneficiary's duties and responsibilities will include the following:

- Interface between the US and India entities related to CAD designs of jewelry [*sic*]
- Coordinate/report to Petitioner's President relating to discharge of responsibilities
- Manage operations regarding the activities and promotions of our import/distribution of jewelry and determine feasibility of particular marketing strategies and decisions
- Organize and establish office systems and procedures including management of human resources, employee training, planning and implementing staff incentives, etc.
- Develop organizational policies to coordinate functions and design and marketing operations between departments and establish responsibilities and procedures for obtaining departmental objectives
- Research US and international markets in order to develop marketing, sales and branding strategies on a short and long term basis, including for web-based sales/promotions
- Outsource and oversee marketing material development
- Develop and implement strategic plans for overseeing company operation; conduct application management outsourcing in the market.
- Communicate with the President with regard to current status of market, supply and demand issues, and financial status of US goals for expansion efforts
- Exercise a high level of discretionary authority, including the authority to hire and fire personnel as needed.
- Interface with marketing staff regarding sales and merchandise related issues
- Liaise with outside professionals such as legal and accounting
- Arrange and participate in jewelry trade shows
- Set and control budgets and related fiscal matters
- Negotiate contracts and deal with other operational issues
- Inventory procurement, management and control

The petitioner emphasized that the beneficiary is being transferred to the United States specifically to implement the company's "Engagement Ring Business Plan." The petitioner noted that the beneficiary "will be in charge of a critical function in Petitioner's business," will have autonomy and wide discretion over the day-to-day decisions he makes, and will report to the company's president. The petitioner further noted that "it is anticipated that by the end of this year, Petitioner will hire additional employees to meet Petitioner's expected current and growing needs in the near term." The petitioner acknowledged that USCIS denied a prior L-1A classification it filed on the beneficiary's behalf, and suggested that the director erred in not determining that the beneficiary will be employed as a "function manager."

The petitioner submitted an organizational chart for [REDACTED] Inc. & Subsidiary" which depicts the beneficiary in the position of "General Manager – Design and Marketing" reporting to the company's director, and overseeing four employees, including a head of accounting [REDACTED] and three sales employees [REDACTED]

The director issued a request for additional evidence ("RFE") on June 4, 2009 in which she instructed the petitioner to submit, *inter alia*, additional information and documentation to establish that the beneficiary will be performing managerial or executive duties for the U.S. entity. Specifically, the director requested: (1) a more detailed description of the beneficiary's proposed duties which indicates the percentage of time spent in each specific duty and indicates exactly which employees the beneficiary will supervise; (2) a detailed organizational chart for the U.S. entity which clearly identifies the beneficiary's position and lists all employees under his supervision by name and job title; (3) information regarding the total number of employees at the U.S. location where the beneficiary will be employed; (4) for each employee, a brief description of job duties, educational level, annual salaries/wages, immigration status and source of remuneration; and (5) copies of the petitioner's California Forms DE-6, Quarterly Wage Reports for the last four quarters.

In a response dated June 30, 2009, the petitioner reiterated that the beneficiary is being transferred to the United States "to primarily drive the launch and marketing campaign" of the company's engagement ring project. The petitioner further stated that "[b]roadly, Beneficiary will spend his time in developing and implementing a marketing plan including market development, working with the Indian Affiliate to design and develop at least some engagement ring customization for the US market as would inevitably be required, identify and work with strategic partners, etc."

The petitioner provided a consolidated version of the original position description noting that it could not be more specific without making the job duties seem "frivolous."

- Interface between the US and India entities related to CAD designs/customization of jewelery [sic]; inventory procurement, management and control – 10%
- Coordinate/report to Petitioner's President relating to discharge of responsibilities. Communicate with the President with regard to current status of market, supply and demand issues, and financial status of US goals for expansion efforts – 3%
- Manage operations regarding the activities and promotions of our import/distribution of jewelry and determine feasibility of particular marketing strategies and decisions – 15%
- Establish, organize, and upgrade as necessary, office systems and procedures, and when needed, manage human resources (including hiring/firing), employee training, planning and implementing staff incentives, etc. – 8%
- Develop organizational policies to coordinate functions and design and marketing operations between departments and establish responsibilities and procedures for obtaining departmental objectives. Conduct application outsourcing – 15%
- Research US and international markets in order to develop marketing, sales and branding strategies on a short and long term basis, including for web-based sales/promotions, identify and develop relationships with strategic business partners. Oversee marketing material development. Interface with marketing staff regarding sales and merchandise related issues – 22%

- Exercise a high level of discretionary authority, including the authority to develop and implement strategic plans for overseeing company operation, set and control budgets and related fiscal matters, liaise with outside professionals – 15%
- Arrange and participate in jewelry trade shows – 7%
- Negotiate contracts and deal with other operational issues – 5%

The petitioner stated that the duties demonstrate that the beneficiary will operate at a senior level within the petitioning organization, and will be "managing the critical and essential function of marketing of the project along with all of its attendant duties, as well as take care of other responsibilities."

The petitioner noted that the beneficiary "will initially manage Petitioner[']s current employees, but only as a small side function." The petitioner stated that it expects the beneficiary to manage human resources as the project takes off, including responsibility for hiring and firing staff, but noted that personnel management "is still not expected to be his primary or even secondary responsibility." The petitioner stated that the beneficiary will be supervising independent consultants engaged in the deployment of the project.

The petitioner's response to the RFE included a revised organizational chart for the U.S. company. The chart depicts the beneficiary as "general manager – marketing." Subordinate to the beneficiary is a junior manager, who in turn supervises a store manager. The chart depicts five employees subordinate to the store manager, including three salespeople, a "Head of Diamonds, Exhibition and Advertising," and a "Head of Gold and Public Relations." The AAO notes that the individual in the position of store manager was identified as "head of accounting" on the previously submitted organizational chart, while the "head of gold and public relations" was previously given the job title "sales."

The most recent California Form DE-6 in the record is for the first quarter of 2009. It indicates that the petitioner had five employees as of March 31, 2009. The employees named on the Form DE-6 include the three individuals identified as salespeople, the junior manager, and the "head of diamonds, exhibition and advertising." Nevertheless, the petitioner provided position descriptions for each position identified on the organizational chart. The petitioner noted that the store manager, head of gold and public relations and two persons identified as shareholders/owners are on an approved leave of absence.

The director denied the petition on July 29, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director concluded that the beneficiary's proposed duties were described in broad terms that fail to convey any understanding of what he will be doing on a day-to-day basis as a project manager, and also generally paraphrased the statutory definitions of managerial and executive capacity.

In addition, the director acknowledged the petitioner's claim that the beneficiary would be "managing the entire operation of the petitioner with regard to the marketing of engagement and wedding jewelry," but determined that the record failed to establish that the beneficiary would be performing primarily qualifying duties related to this function, or that the petitioner's existing employees would be performing non-managerial duties related to the function. The director further determined that, despite the petitioner's statement that several of the petitioner's employees have at least a bachelor's degree, the record does not establish that the beneficiary would be engaged in the supervision of professionals.

On appeal, counsel for the petitioner objects to the director's finding that the petitioner provided an overly broad description of the beneficiary's duties, noting that "it is impossible to be more specific without trivializing the responsibilities." Counsel contends that "managerial duties are broad-based and it is not quite possible to identify each and every little duty that Beneficiary would engage in." Counsel further suggests that USCIS "deliberately refuses to understand commonly used terms and meanings," and goes on to define terms such as "retail jewelry" and "wholesale jewelry."

In response to the director's finding that the beneficiary does not qualify for the benefit sought as a manager of subordinate managerial, professional or supervisory staff, counsel states:

Some members of the subordinate staff are managers and some are not. However, Petitioner has clearly stated or otherwise made clear through the job description, that the primary responsibilities of Beneficiary (at least about 75% of the time) is to manage the function of marketing by overseeing other managers or outside professional consultants, and discussing other high level issues with higher management, namely, Petitioner's President. Nor has petitioner ever claimed that the staff Beneficiary will manage is professional. Hence the Service's arguments describing the threshold criteria for professionals and the arguments as to why the criteria are not met, is quite immaterial.

Counsel emphasizes that the beneficiary will be managing an essential function in the United States, "namely, that of marketing a particularly important type of jewelry which is expected to give a very substantial boost to Petitioner's earnings as supported by the market research that has been done." Counsel states that "it is equally clear that Beneficiary alone will be unable to manage the entire Engagement Ring project and will be hiring other qualified marketing and technical personnel to assist him and to do the legwork." Counsel indicates that such employees will be "managers or professionals such as engineers and/or marketing/sales personnel."

In this regard, counsel asserts that the beneficiary "has indeed been supervising technical professionals who have developed and are implementing the 3D CAD technology that has gone into the Engagement Ring business." Counsel states that the beneficiary would continue to supervise them through other managers in the company's India office, and would also supervise the work of outside professionals such as accountants.

With respect to the beneficiary's position within the U.S. company's organizational hierarchy, counsel notes that the petitioner has repeatedly stated that the beneficiary will occupy a senior position that reports to the president and will manage an essential function of the company. In addition, counsel states that the beneficiary will supervise subordinate managers, including the junior manager and store manager. Counsel further asserts that the director overlooked the growth and expansion of the petitioner's business that is anticipated to occur upon implementation of the engagement ring project, and undervalued the importance of the marketing function to the growth of the petitioner's business.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial capacity.

As a preliminary matter, although the petitioner indicates that the beneficiary will be charged with implementing a new line of business in the United States that is expected to lead to the petitioner's expansion in terms of employees and number of business locations, the petitioner must establish eligibility at the time of

filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Therefore, the petitioner must establish that the beneficiary would be engaged in primarily managerial duties upon commencement of employment with the U.S. company, and not at some future date once the project is underway.

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.* While the petitioner has provided a lengthy business plan related to its customized engagement ring project, and has consistently indicated that the beneficiary will be responsible for overseeing the entire project, the AAO concurs with the director's determination that the petitioner's description of the beneficiary's duties fails to establish that he will perform primarily managerial duties related to the project, at least in its initial phases.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description that clearly describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulate the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner indicates that the responsibility that will require the largest portion of the beneficiary's time (22%) is researching domestic and international markets in order to develop marketing and branding strategies, overseeing marketing material development, and interfacing with marketing staff. The petitioner has not identified who would be developing marketing materials, provided evidence of any marketing staff assigned to the project, or explained how performing market research duties would rise to the level of managerial or executive capacity. The petitioner's staff, according to the organizational chart submitted at the time of filing, included the company president, three salespeople, and a head of accounting, but no employees who would be charged with assisting the beneficiary with marketing duties. In fact, the petitioner specifically stated that the beneficiary "is not expected to hire and supervise subordinate staff in the initial phase of project implementation." Therefore, the AAO is unable to conclude that the beneficiary would be fully performing the stated duties immediately upon approval of the petition.

The petitioner stated that the beneficiary will devote an additional 15% of his time to "exercise a high level of discretionary authority" related to "overseeing company operations," setting and controlling budgets" and liaising with outside professionals. This duty, which borrows from the statutory definition of executive

capacity, appears to imply that the beneficiary has oversight responsibility over the operation of the U.S. company beyond the scope of the engagement ring project, but the petitioner did not specify in any detail what duties he would perform on a day-to-day basis related to budget controls, or the nature and scope of his interactions with the unidentified "outside professionals." The petitioner further stated that the beneficiary would devote 15% of his time to "develop organizational policies to coordinate functions and design and marketing operations between departments." However, on appeal, counsel asserts that "Beneficiary will not set up company's policies and goals which are peculiar to the role of an executive." Therefore, it appears that the petitioner, through counsel, has retracted its earlier claim that the beneficiary will be involved in developing company policies. These broad areas of responsibility, which account for a significant portion of the beneficiary's time, offer little insight into what the beneficiary would actually be doing on a day-to-day basis in his role as project manager. 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 any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner indicated that the beneficiary will "interface between the US and India entities related to CAD designs/customization of jewelry," noting that this responsibility would include "inventory procurement, management and control." However, the petitioner did not explain how "interfacing" with respect to jewelry design or performing duties related to inventory procurement rise to the level of managerial capacity, nor does the record identify who among the petitioner's or foreign entity's existing staff would relieve the beneficiary from performing non-qualifying duties associated with this area of responsibility.

The petitioner stated that the beneficiary will "manage operations regarding the activities of our import/distribution of jewelry" but did not describe how he would accomplish this task, or explain how this responsibility corresponds to his management of the engagement ring project, which, as described in the record, will not require an import and distribution component. The petitioner indicated that the beneficiary will "negotiate contracts and deal with other operational issues" and "arrange and participate in jewelry trade shows." However, without further explanation, the AAO cannot discern whether any of these duties rise to the level of management-level duties, rather than sales, marketing or other operational and administrative tasks.

It should be emphasized that, after reviewing the petitioner's initial description of the beneficiary's duties, the director specifically requested a more detailed description, requested that the petitioner be more specific, and requested an account of the percentage of time the beneficiary would devote to each specific task. The petitioner's response took the original 16 job duties and condensed them into a list of 9 duties without adding any additional detail. The petitioner explained that to add further detail would "trivialize" the duties, and declined to expand upon the original description that was already reviewed and found to be deficient. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Overall, the AAO concurs with the director's conclusion that the petitioner's description of the beneficiary's position fails to establish that he would be engaged in primarily managerial duties.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the beneficiary's claimed managerial capacity, 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. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

In the case of a function manager, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. The petitioner initially stated that the beneficiary "is not expected to hire and supervise subordinate staff" in connection with the project during its implementation phase. In response to the RFE, the petitioner stated that the beneficiary will manage the petitioner's existing employees as a "small side function" but did not explain whether or how those employees are involved in the engagement ring project. A review of the position descriptions provided for the existing staff reveals no mention of any duties related to the project. The petitioner also suggests that the Indian affiliate and independent consultants, including "technical professionals," will be involved in the project. However, the petitioner has offered no further explanation or documentation regarding the nature or scope of their involvement, or how they would relieve the beneficiary from performing the day-to-day non-managerial tasks associated with the planning and implementation of the project. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Therefore, it appears that the non-managerial aspects of the petitioner's project would be performed by employees and consultants who have not been hired or retained. It is unclear who, other than the beneficiary, would perform non-managerial duties associated with the beneficiary's area of responsibility. Collectively, the "to be determined" status of the beneficiary's proposed subordinate staff raises questions as to whether there is a managerial position immediately available to him, or whether he will also be performing non-managerial duties associated with his assigned project for the immediate future. The definitions of executive and managerial capacity 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 prove 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).

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 duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). 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 petitioner has not sustained this burden.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

As noted above, the petitioner has consistently indicated that the beneficiary would be primarily employed as a function manager, specifically as a project manager. However, it has submitted organizational charts for the U.S. company which show his proposed position as "general manager," and ostensibly depict his authority over the retail store's existing staff. Neither of the submitted charts depict the proposed technical and marketing employees or consultants to be hired in the future, although the petitioner indicates that the beneficiary would be responsible for hiring such staff.

In addition, the AAO notes that the organizational chart submitted in response to the RFE bears little resemblance to the organizational chart submitted at the time the petition was filed, and, as noted above, the petitioner changed the job titles of several employees and added, without explanation, two tiers of management below the beneficiary's position when preparing the second organizational chart. 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). While the latter organizational chart appears to show a "personnel manager" position in that it depicts the beneficiary's supervision of at least two tiers of lower-level supervisors, it is not in line with the petitioner's statements regarding the beneficiary's duties, previous statements regarding the job titles of its employees, or the company's quarterly wage reports. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Even if the AAO were to consider a claim that the beneficiary will be employed primarily as a personnel manager, it would be compelled to rely on the initial organizational chart, which appears to depict the beneficiary as a first-line supervisor of non-professional sales staff and an accounting employee.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue in this matter is whether the petitioner established that the U.S. and foreign entities have a qualifying relationship. 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 an affiliate of [REDACTED] based on common ownership by the same individual, [REDACTED]. Specifically, the petitioner indicates that [REDACTED] owns 48.41% of the foreign entity and controls the entity, and that he owns 100% of the petitioning entity. As evidence of [REDACTED] control of the foreign entity, the petitioner submitted a copy of a board of director's resolution granting [REDACTED] veto power over other shareholders.

According to the evidence submitted, the petitioning company, [REDACTED], Inc. has issued a single stock certificate granting 1,399,556 of its shares to [REDACTED] Inc., a California corporation. The petitioner provided a copy of [REDACTED] sole issued stock certificate, which identifies [REDACTED] as the owner of 14,379 shares issued in 2001. The record includes IRS Forms 1120, U.S. Corporation Income Tax Return for [REDACTED] for 2006 and 2007, which identify the petitioning company as a subsidiary of [REDACTED]. However, the petitioner also provided evidence that the petitioner's U.S. parent company, [REDACTED] Inc., filed a Certificate of Election to Wind up and Dissolve with the California Secretary of State on December 31, 2008, prior to the filing of the petition. Given that its former parent company dissolved several months prior to the filing of the petition, the current ownership of the petitioning company is unclear.

In addition, on the organizational chart submitted in response to the RFE, the petitioner indicated that the beneficiary would report to the [REDACTED] three shareholders: [REDACTED]

[REDACTED] 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 evidence submitted does not support the petitioner's claim that [REDACTED] owns 100% of the U.S. company or otherwise establish the claimed affiliate relationship between the U.S. and foreign companies.

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

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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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

ORDER: The appeal is dismissed.