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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

PUBLIC COPY



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DATE: MAR 15 2012

Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the 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 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 New Jersey corporation established in November 2009, states that it intends to operate a grocery store. It claims to be a subsidiary of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as the vice president of its new office in the United States for a period of 35 months.¹

The director denied the petition, concluding that the petitioner failed to establish: (1) that the petitioner has secured sufficient physical premises to house the new office; and (2) that the U.S. company would support a qualifying managerial or executive position within one year.

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, the petitioner asserts that it provided sufficient evidence of the company's business plans and anticipated expansion for the first year of petition to support the approval of the petition. The petitioner further submits that it provided evidence of its intended purchase of an existing convenience store that is sufficient to satisfy the requirement that the physical premises requirement pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A).

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.

¹ Pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

II. The Issues on Appeal

A. Physical Premises to House the New Office

The first issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A), as of December 17, 2009, the date the petition was filed.

On the Form I-129, the petitioner indicated its mailing address as [REDACTED] Passaic, New Jersey 07055. The petitioner indicated this same address as the beneficiary's current U.S. address and intended worksite.

Although the petitioner indicated that the beneficiary would be working in Passaic, New Jersey, the petitioner submitted a lease agreement for premises located at [REDACTED] in West Orange, New Jersey. The lease is dated August 31, 2006 and indicates that the petitioner has leased the premises for the period

January 12, 2009 through October 31, 2010. The AAO notes that the petitioning company was incorporated in New Jersey on November 26, 2009 and could not have entered a lease agreement in either August 2006 or January 2009.

According to the terms of the lease agreement, the petitioner is permitted to occupy and use the 275 square foot premises for "Trading Business." The petitioner submitted a photograph of a piece of paper printed with the beneficiary's name, job title and the name of the U.S. company, as well as a close-up photograph of the beneficiary seated behind a desk with a computer workstation.

The petitioner submitted a four-page business plan in which it indicates that its initial plan is to acquire a successful and well-established grocery store in New Jersey. The petitioner stated that it has approximately \$10,000 in the bank, but did not provide details such as its budget or anticipated costs associated with the acquisition of a business, identify potential available locations for the store, or provide an anticipated timeline for the acquisition.

The director issued a request for additional evidence on December 24, 2009. The director instructed the petitioner to provide documentary evidence to establish that it has acquired premises of sufficient size to conduct business, noting that such evidence may include the original lease agreement, a statement from its lessor identifying the square footage and floor plan of the leased premises, and photographs of the interior and exterior of all premises secured for the U.S. company. In addition, the director requested a more detailed business plan and instructed the petitioner to further explain the nature of the intended business in the United States.

In response, the petitioner noted that "the company is very keen to set up a consumer store business with gas station & number of employees needed will be 4 & when the business expand we need more." The petitioner submitted a revised version of the lease agreement for the premises located at [REDACTED] in West Orange, New Jersey. The name of the landlord was changed from [REDACTED] [REDACTED]' The term of the lease is the same (commencing on January 12, 2009), but the revised agreement did not reflect a date of August 31, 2006.

The petitioner further stated:

We have a pleasure informing you that [the U.S. company] is seriously intending to set up a new business very soon. Let me say rather immediately after the approval even we have enter into an agreement with [REDACTED] having its principle [sic] place of business located at [REDACTED] Lodi, New Jersey 07026 and the further details are herewith in Exhibit 4.

The petitioner submitted a copy of an asset purchase agreement which indicates that [REDACTED] intends to sell its assets in the business known as [REDACTED] to the petitioning company for a purchase price of \$250,000. The agreement was signed on January 14, 2010.

The petitioner submitted additional photographs of a small office that appears to be located in the back of a convenience store.

The director denied the petition on February 16, 2010, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director acknowledged receipt of the lease agreement between the petitioner and [REDACTED]. The director noted that, based on the submitted photographs, the petitioner is sharing the office with its landlord and that the leased premises would not accommodate any additional employees of the petitioning company. The director also emphasized that the petitioner failed to submit the requested floor plan for the leased premises.

The director acknowledged the petitioner's submission of the asset purchase agreement in response to the RFE. The director noted that the agreement does not specify a closing date and provides insufficient evidence that the petitioner has purchased or will purchase a grocery or convenience store as stated in the business plan.

On appeal, the petitioner suggests that the director did not give proper weight to the asset purchase agreement submitted in response to the RFE, and asserts that it has "moved far ahead in that direction with a closing of that business." The petitioner further asserts that the office it leased from [REDACTED] was "our first step towards business activities."

In support of the appeal, the petitioner submits: (1) a new asset purchase agreement dated February 9, 2010 under which the petitioner would purchase the assets of [REDACTED] doing business as [REDACTED] for \$250,000; (2) a promissory note dated February 9, 2010 in the amount of \$120,000, which would require the petitioner to pay \$3,000 per month to Sahja 2, LLC from April 2010 until October 2013; (3) evidence that the beneficiary obtained two cashiers' checks totaling \$120,000 and made out to an attorney trust account; (4) a unanimous consent of the members of [REDACTED] dated February 9, 2010, in which the company's members resolved to sell the assets of the business to the petitioning company in accordance with the terms of the asset purchase agreement; (5) an "Omnibus Bill of Sale and Instrument of Assignment" executed on February 9, 2010; and (6) an assignment and assumption of lease dated February 9, 2010 for the premises at [REDACTED] in Lodi, New Jersey.

Upon review, the petitioner has not established that it had secured sufficient physical premises to house the intended new office as of the date the petition was filed.

When a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(1)(3)(v).

Therefore, if the petitioner indicates that it intends to do business as a grocery retailer, it is reasonable to expect the petitioner to provide evidence that it is prepared to commence business as a grocery retailer upon approval of the petition. Here, at the time of filing the petition, the petitioner indicated on the Form I-129 that the beneficiary would work from an address in Passaic, New Jersey for which no lease was provided. At the same time, the petitioner provided a lease for an office located in an existing and operating grocery or convenience store in West Orange, New Jersey rather than a lease for the beneficiary's stated work site. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The evidence of record does not establish that either the beneficiary's home address in Passaic or an office that is already being used by the existing grocery store, [REDACTED] would be sufficient for the petitioner's operation of its own grocery or convenience store in the United States. In fact, the inconsistencies in the record with respect to the address indicated on the Form I-129, the August 2006 and January 2009 dates on the initial lease agreement allegedly executed in December 2009, and the submitted photographs, raise questions as to whether the petitioner ever occupied or intended to occupy the premises for which it submitted the lease agreement. The record does not contain, for example, evidence that the petitioner paid the security deposit required by the lease agreement or any rent payments for the office. It is unclear how an existing retail business with a single desk and workstation in its back office could realistically share that office with another company.

While the petitioner has supplemented the record with additional evidence relating to the purchase of assets and assumption of a lease agreement with respect to an existing store, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As of the date of filing, the petitioner intended to operate from either the beneficiary's home address or from an apparently shared small office in a convenience store, and clearly did not have premises from which it could operate a retail business. Furthermore, there is no evidence that the petitioner had even identified a potential retail business for purchase as of the date of filing the petition.

Accordingly, the appeal will be dismissed.

B. Employment in the United States in a Managerial or Executive Capacity

The remaining issue addressed by the director is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

In a letter dated December 7, 2009, the petitioner stated that the beneficiary will perform the following duties in his position as vice president of the U.S. company: policy matters (30%); business development (40%); operational management (15%); and human resources (15%). The petitioner indicated that the U.S. company has \$10,000 in the bank for initial expenses, and stated that its claimed parent company is willing and able to transfer additional funds in the future as needed for expansion of the company.

In addition, the petitioner submitted the following description of the beneficiary's proposed duties:

He will direct & participate in the development, interpretation, evaluation & recommendation of goals, policies, operation of company. He will have broad authority in company's decision making process. He will have complete authority over department managers. He will receive

only general supervision from the company president. He will work closely with the company's senior management so company will continue to achieve further development & growth in the US market place.

His duties in the U.S. will include:

1. Supervising a team of general managers, who manage finance, accounting administration, sales & marketing.
2. Complete managing the responsibilities of major operation in the United States, which includes the following.
3. Supervise a team of top management personnel who manage the entire operation of [the company].
4. Manage finance accounts policies, marketing strategies & administration services. Set guidance for finance & accounting, administration, sales & marketing, IT.
5. Communicate company's financial status to top management recommendation regarding accounting & finance.
6. Develop effective human resources management plans & strategies for the company.
7. Responsible for overseeing & managing new business implementation & business integration related activities to ensure the business process & system support are aligned with business growth strategies.
8. Establish major economic objectives & policies for the company & prepare report the outlines the company's financial position in the area of income, earning base on past, present & future operation.

As noted above, the petitioner's initial evidence included a four-page business plan, which indicates that the company intends to engage in retail grocery store management, hospitality/property development and management, and health and nutritional business development. The business plan states that the company's initial goal is to acquire a well-established grocery store. The petitioner indicated that it anticipates sales of \$800,000 in 2010 and \$1.25 million by 2012, and the plan includes a separate chart labeled "project financial statement" with projected annual revenues, expenses and net profit through 2013.

In the request for evidence issued on December 24, 2009, the director requested evidence to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position. Specifically, the director instructed the petitioner to provide: (1) a business plan for commencing the start-up of the U.S. company, including a timetable for each proposed action for the first year of operation; (2) a detailed description of the proposed staffing of the new office including the number of employees to be hired and their anticipated wages or salaries, job titles and detailed position descriptions; and (3) a breakdown of the number of hours the beneficiary will devote to each of his proposed job duties on a weekly basis.

In response, the petitioner re-submitted the business plan provided at the time of filing. The petitioner stated that "the company is very keen to set up a consumer store business with gas station" and that it would need four employees, with more hired as the company expands. Specifically, the petitioner stated that "the job title will be store clerk & front desk people & material purchase executive & assistant." The petitioner also reiterated that the beneficiary will devote 30% of his time to "policy matter," 40% of his time to "business develop," 15% of his time to operational management, and 15% of his time to human resources management.

The director concluded that the evidence failed to establish that the new company would grow to a sufficient size to support a managerial or executive position within one year. The director observed that the petitioner's business plan does not include a timetable for the hiring of employees or the types of employees to be hired, and therefore does not support a conclusion that the beneficiary would be relieved from performing non-qualifying duties within one year of approval of the petition.

On appeal, the petitioner notes that it did submit a business plan "indicating a time for such things" and notes that the plan shows that the company will in fact require employees. The petitioner notes that the evidence on appeal establishes the company's commitment to acquire a convenience store, and asserts that it has already hired one employee. The petitioner maintains that it has met its burden to demonstrate that it will be able to support a managerial or executive position within one year. The evidence on appeal includes the above-referenced documentation relating to the acquisition of [REDACTED]

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner has repeatedly described the beneficiary's proposed position in very broad terms, noting his development of goals and policies, establishment of objectives and policies, "broad authority in the decision making authority," and receipt of only general supervision from the company's president. These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Similarly, although the petitioner provided a breakdown of how the beneficiary's time would be allocated among his various responsibilities, this description was even more vague, indicating that the beneficiary would devote his time to "policy matter," "business develop," "operational management," and "HR." The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. Specifics are clearly an important indication of whether a beneficiary's duties are

primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In addition, some of the beneficiary's listed duties are not consistent with the petitioner's stated business and hiring plans, which raises questions regarding the credibility of the job description. For example, the petitioner states that the beneficiary will be "supervising a team of top management," and "a team of general managers who manage finance, accounting administration, sales & marketing." The petitioner's plan for the first year is to operate a convenience store and it intends to employ clerks, "front desk people," a purchasing employee, and an assistant, rather than subordinate general managers or clearly defined sales, marketing and finance departments. 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).

Thus, while several of the duties generally described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

The petitioner seeks to rely upon its proposed acquisition of an existing business in lieu of submitting a detailed business and hiring plan. However, the initial evidence did not include evidence that the petitioner had purchased an existing business or that it had imminent plans to do so at the time the petition was filed. Further, even if the AAO were persuaded that the petitioner intended to acquire the convenience store, the petitioner failed to provide any evidence related to the level of staffing this business supports.

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

The petitioner indicates that it will operate a retail store and that the beneficiary will manage subordinate general managers. The petitioner simultaneously asserts, however, that its initial staff will include only a store clerk, front desk people, a material purchase executive and an assistant.

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.

The petitioner has not provided position descriptions for any proposed subordinates such that the AAO could determine whether any of them could be considered professional positions. Nor has the petitioner 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. The record does not establish that the subordinate clerk, front desk people, material purchase employee or assistant would hold managerial or supervisory positions.

The AAO's analysis of this issue is severely restricted by the petitioner's failure to submit an adequate business plan. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

In this matter, a review of the totality of the evidence submitted provides very little information regarding the number of employees to be hired, the timeline for hiring employees, the financial position of the U.S. company, the petitioner's anticipated start-up costs and financial objectives for the first year of operations, and the physical premises secured by the U.S. company. The petitioner's submission of a vague job description

for the beneficiary, a bank statement showing \$10,000 in an account, and a four-page business plan, falls significantly short of meeting its burden to establish that the company will be able to support a primarily managerial or executive position within a twelve-month period. The regulations require the petitioner to present a credible picture of where the company will stand in exactly one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. 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. at 165 (citing *Matter of Treasure Craft of California*, 14I&N Dec. 190 (Reg. Comm'r. 1972)).

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its vice president. The definitions of executive and managerial capacity, however, 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 time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Overall, the vague job description provided for the beneficiary, considered in light of the petitioner's business and hiring plans for the first year of operations, prohibits a determination that the petitioner could realistically support a managerial or executive position within one year. Accordingly, the appeal will be dismissed.

C. *Qualifying Relationship*

Beyond the decision of the director, a remaining issue in this matter is whether the petitioner has established that it has a qualifying relationship with the beneficiary's claimed foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See *generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner indicates that it is a subsidiary of [REDACTED] an Indian partnership firm. However, the petitioner's Certificate of Incorporation filed with the New Jersey Department of Treasury on November 26, 2009 indicates that the beneficiary owns 510 shares of the U.S. corporation, while the remaining 490 shares are held by [REDACTED]. Therefore, the petitioner's evidence does not support the petitioner's claim that it is owned by the beneficiary's claimed foreign employer.

The AAO has also reviewed the record for evidence of an affiliate relationship between the U.S. and foreign entities. The foreign entity's most recent tax documents, for assessment year 2009-10, reflect that its partners are [REDACTED] (52%), [REDACTED] (24%), and [REDACTED] (24%). While it appears that the two companies may be owned by members of the same family, there is no evidence of any common ownership between the two companies by a single individual or the same group of individuals, and therefore there is no qualifying relationship.

The AAO notes that based on the foreign entity's partnership deed dated July 2005, the beneficiary previously held a 33.33% interest in the company. However, a statement from the foreign entity's accountant, dated May 4, 2009, indicates that the beneficiary retired from the firm on November 26, 2008. Regardless, the beneficiary's minority interest in the foreign company, even if he had held such interest at the time this

petition was filed, would be insufficient to establish the requisite common ownership and control between the U.S. and foreign entities. For this additional reason, the petition cannot be approved.

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

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, Inc. v. United States*, 229 F. Supp. 2d at 1043, *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.