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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
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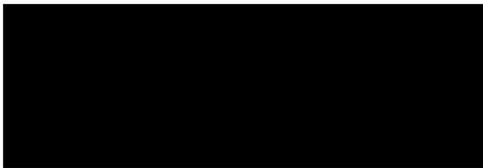
IN RE:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, states that it is engaged in the retail sale of cellular phones and accessories. It claims to be an affiliate of Ideal Collections, located in Mumbai, India.

The beneficiary was previously granted L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his status for two additional years so that he may continue to serve in the position of president and chief executive officer. The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity.

On appeal, counsel asserts that the beneficiary manages the overall U.S. organization including responsibility for supervising subordinate professional and managerial employees, and managing several essential functions. Counsel emphasizes that the U.S. company has achieved substantial growth since the beneficiary assumed the position of president in 2009. 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. Discussion

The primary issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

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;
- (ii) 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.

A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 12, 2010. The petitioner indicated on the petition that the U.S. company was established in 2008 and has six employees.

In a letter dated January 7, 2010, the petitioner indicated that the company is established "for the express purpose of marketing, retail and distribution of cellular products like cell phones, air cards and other cell phone accessories through retail locations."

The petitioner stated that the beneficiary will perform the following duties as the petitioner's president and CEO:

[The beneficiary] is employed at the highest position within the U.S. Company and oversees managers supervising employees who run day-to-day operations. In sum, [the beneficiary], has the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, supervising all financial aspects of the company and developing policies and objectives for the company.

* * *

[The beneficiary] has overall executive responsibility for developing, organizing, and establishing the purchase, sale and marketing of merchandise for sale in the U.S. market. His other duties include: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. retail market; (ii) negotiating and supervising the drafting of purchase agreements; (iii) marketing products to consumers according to [the foreign entity's] guidelines; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer

market strategies based on guidelines formulated by [the foreign entity]; (vi) developing and implementing plans to ensure [the petitioner's] profitable operation; and (vii) negotiating prices and sales terms, developing pricing policies and advertising techniques.

The petitioner further indicated that the beneficiary's time would be allocated as follows:

Management Decisions	40%
Company Representation	15%
Financial Decisions	10%
Supervision of day-to-day company functions	10%
Business Negotiations	15%
Organizational Development of Company	10%

The petitioner provided an organizational chart for the U.S. company, which indicates that the beneficiary supervises a vice president and general manager, who in turn supervises a finance manager, a retail manager, and a sales manager. The organizational chart reflects that the retail manager oversees an assistant manager, who in turn supervises cashiers. The petitioner did not identify any employees by name; however, it did provide descriptions for each position listed on the organizational chart. The petitioner indicated that the positions of vice president/general manager and finance manager require a college degree.

The petitioner provided a copy of its Texas Form C-3, Employer's Quarterly Report, the third quarter of 2009 which reflects that the company had six employees, including the beneficiary, as of October 31, 2009.

In support of the petition, the petitioner submitted a Certificate of Assumed name issued on December 5, 2007, which indicates that the company does business as "Cellular Zone." The petitioner submitted an agreement effective April 1, 2008 between the petitioner and [redacted] which granted the company authorization to provide [redacted] and services from two locations: [redacted]

On the Form I-129, the petitioner stated that the beneficiary would be working at [redacted]

The petitioner submitted modifications to a license agreement for the [redacted] address, which was executed on December 31, 2008. The agreement was made between [redacted] and a company called [redacted] with offices located at [redacted]. [redacted] signed the agreement on behalf of [redacted]. The agreement is for a 168 square foot kiosk located at Parkdale Mall.

The director issued a request for additional evidence (RFE) on February 1, 2010. The director instructed the petitioner to submit: a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis; a list of all employees of the U.S. company by name and job title; complete position descriptions for all employees; and a copy of the company's IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2009.

The director also requested that the petitioner clarify where its physical premises are located. The director noted that the petitioner did not provide a lease pertaining to the beneficiary's stated worksite at [redacted]

██████████ in Beaumont, Texas. The director requested photographs of the interior and exterior of all premises secured for the U.S. entity. In a response dated March 16, 2010, counsel for the petitioner further described the beneficiary's duties as follows:

[The beneficiary] serves as the President and CEO of our U.S. subsidiary . . . and continues to establish our U.S. operations. He is responsible for all our planning, expansion, banking, budgeting, and marketing. In addition, he hires and trains other managers and employees and is in charge of increasing the sales of the company. He is employed at the highest executive level and has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] assumes sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation.

[The beneficiary] supervises other professional and managerial employees, establishes goals and policies for the U.S. investment, and exercises wide latitude in discretionary decision-making under the direction of directors and shareholders of the Parent Company. Beneficiary's duties are clearly "Executive or Managerial" in nature. . . .

* * *

[The beneficiary] is employed at the highest position within the U.S. company, and oversees supervisors and managers who supervise employees running day-to-day operations. [The beneficiary] plans and directs the management of the Petitioner through its own employees, as well as outside contract employees who perform the legal and accounting duties. The beneficiary will be the individual responsible for establishing goals and policies and exercising wide latitude in discretionary decisions making duties, which includes supervising managerial level employees. In sum, [the beneficiary], will have the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, supervising all financial aspects of the company and developing policies and objectives for the company.

Counsel further stated that the beneficiary will be employed in a supervisory position over other managerial employees, and, alternatively, will be responsible "for managing the company's essential functions of marketing and finance."

The petitioner submitted an organizational chart which depicts the following employees under the beneficiary's supervision:

- Vice President and General Manager - ██████████
- Sales Manager - ██████████
- Manager, Retails - ██████████
- Finance Manager - ██████████
- Assistant Manager - ██████████
- Cashier - ██████████

The petitioner did not provide a copy of its IRS Form 941, Quarterly Federal Tax Return, for the fourth quarter of 2009 as requested. Instead, it submitted its "payroll journal report" for the months of October and November 2009. The payroll journals show wages paid to the beneficiary [REDACTED] and [REDACTED]. The petitioner did not provide evidence of wages paid to [REDACTED]. The payroll journal shows wages paid to a [REDACTED]. The petitioner provided evidence that the employee identified as finance manager, [REDACTED] has an M.B.A. in Marketing from an Indian university.

The petitioner also re-submitted the job descriptions for the subordinate employees, along with more detailed descriptions for the finance manager and vice president positions. Notably, the petitioner indicated that the retail manager's role is to "oversee operation of food store and gas sales," while the cashiers also appear to perform duties related to a retail food store, as their duties include "stock and reorder food." The petitioner has otherwise consistently claimed to operate retail stores offering cell phones and related accessories.

In response to the director's inquiries regarding the company's location and physical premises, the petitioner indicated that it maintains its headquarters at [REDACTED] and operates two "Cellular Zone" locations at [REDACTED]

The petitioner submitted a "Specialty License Agreement" dated September 11, 2009 for a mall kiosk located at the [REDACTED] address. The petitioner submitted copies of photographs of a [REDACTED] retail kiosk located in a shopping mall. The photographs are date stamped "2008/03/07." The petitioner also submitted photographs of a retail cell phone display at a different location that does not appear to be located in a shopping mall. The petitioner did not submit any exterior photographs pertaining to either location, nor did it submit any further evidence related to the beneficiary's claimed worksite at [REDACTED]

The director denied the petition on April 30, 2010, concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director questioned whether a shopping mall kiosk would support the six claimed employees, and noted that the company paid only \$26,065 in salaries and wages in 2008. The director concluded that the petitioner does not require the beneficiary to perform primarily managerial or executive duties.

On appeal, counsel emphasizes that the L-1 visa category is available to small companies, and argues that USCIS is required to consider the petitioner's "reasonable needs" and its stage of development. Counsel emphasizes that in 2009, the year the beneficiary commenced employment with the U.S. company, it has nearly tripled its sales and paid \$113,539 in salaries in 2009 compared to \$26,065 in 2008. In support of the appeal, the petitioner submits a letter from [REDACTED], who states that the company operates two retail locations and has an office located at [REDACTED] s.

The petitioner also submits a new organizational chart for the company which lists the following employees:

Vice President and General Manager:
Sales/Purchase Manager:
Manager-Retails:



Finance/Accounting/Credit:
Assistant Manager:
Cashier:

The petitioner submits a copy of a payroll journal report dated April 6, 2010 which shows wages paid to each of the named individuals, with the exception of the vice president and general manager. The petitioner also provides evidence of educational credentials for

B. Discussion

Upon review of the petition and the evidence, the petitioner has not established it will employ the beneficiary 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 either in an executive or managerial capacity. *Id.*

Counsel and the petitioner have repeatedly described the beneficiary's proposed position in very broad terms, noting his "complete authority to establish goals and policies," his discretionary decision-making authority, and his "overall responsibility of planning and developing the U.S. investment." 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 "management decisions," "company representation," "financial decisions," "business negotiations," "organizational development," and "supervision of day-to-day operations." 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.

The petitioner also addresses the beneficiary's responsibility for developing, organizing, and establishing the purchase, sale, and marketing of merchandise and notes that the beneficiary will be involved in negotiating and supervising the drafting of purchase agreements, "marketing products to consumers," developing trade and market strategies, negotiating prices and sales terms, overseeing financial issues and "developing pricing policies and advertising techniques." The petitioner's description does not clearly identify the managerial or executive duties to be performed with respect to the purchase, marketing, sales, finance and advertising functions of the petitioner's retail operations. 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 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. at 1108.

Thus, while several of the stated responsibilities would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual duties. Furthermore, 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 petitioner claims that "all day-to-day operations" are performed by the company's subordinate employees.

In reviewing the totality of the evidence, the AAO notes that the record does not clearly identify the location and scope of the petitioner's business or the beneficiary's worksite. The petitioner claims to operate two retail cell phone stores located [REDACTED]. The only lease agreements in the record are "licenses" for retail kiosks in shopping malls. One of these licenses expired on January 31, 2009 and bears the name of another company, [REDACTED], and not the petitioner's name. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not submitted a valid lease agreement for the [REDACTED] or [REDACTED] located at [REDACTED].

When asked to provide photographs of all of its leased premises, the petitioner submitted a photograph of a [REDACTED] in an unidentified shopping mall, which appears to pre-date the beneficiary's initial L-1A petition, and photographs of a second retail location which does not appear to be located in a shopping mall and therefore does not appear to correspond to either of the submitted shopping mall license agreements.

In addition, the director specifically requested evidence that the petitioner has secured physical premises at [REDACTED], which the petitioner identified as the location of the beneficiary's worksite. The petitioner's response to the RFE did not include any evidence related to this address. 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)).

On appeal, the petitioner submits a letter that is presumably meant to clarify the company's addresses. The letter does not mention the address identified on the petition, and it fails to clarify which alternate address actually serves as the beneficiary's worksite. The petitioner now claims to use [REDACTED] as an office address, but it has not submitted any evidence related to this address such as a lease agreement or photographs. However, other evidence in the record, specifically a document titled [REDACTED] indicates that [REDACTED] is the home address of [REDACTED] who is claimed to be a shareholder and vice president of the company.

Overall, the evidence fails to clearly establish the scope of the petitioner's operations in terms of its office and retail locations, and fails to clearly establish the beneficiary's work location.

The AAO's review of this matter is restricted by the petitioner's failure to clearly and consistently document its staffing structure. The record remains devoid of evidence of the actual number of employees working for the petitioner as of the date the petition was filed in January 2010. The petitioner gave no explanation for its failure to provide a copy of its IRS Form 941, Quarterly Federal Tax Return, for the last quarter of 2009, and it has not submitted this requested evidence in support of the appeal.

Further, while the petitioner has consistently claimed to employ six employees, it has provided inconsistent job titles and failed to corroborate its employment of several claimed workers. The petitioner has claimed two different employees, [REDACTED], as its vice president and general manager, but it has not submitted evidence of wages paid to either individual. The petitioner initially claimed that [REDACTED] is the company's sales manager, but, on appeal, claims that the position is held by [REDACTED]. The petitioner initially claimed that [REDACTED] was employed as the company's retail manager, and now claims that this position is held by [REDACTED]. The petitioner previously claimed that [REDACTED] held the position of finance manager. The only consistent claim made by the petitioner is that [REDACTED] is employed as the company's assistant manager.

Moreover, the petitioner has consistently stated that the company's retail manager and cashier perform duties related to the operation of a retail food store and gas station, while the petitioner indicates that it sells cellular phones. In a company with six employees, it is reasonable to expect the petitioner to submit a clear, consistent and corroborated account of its staffing structure. 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 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 claims that the beneficiary will supervise an executive (the vice president/general manager), first-line managers (the finance, sales and retail managers), clerical staff (an assistant manager), and a cashier. In addition, the petitioner indicates that the vice president/general manager and the finance manager are professionals. As noted above, the petitioner has not submitted evidence to corroborate exactly who worked for the company at the time of filing or what positions they held. Further, when analyzing whether a beneficiary will supervise managers, supervisors or professionals, the evidence must substantiate that the duties of the beneficiary and those of his or her subordinates correspond to their placement in an 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.

Even if the petitioner had documented the employment of the six workers claimed at the time of filing the petition, the totality of the record would not support a conclusion that the beneficiary's subordinates are

supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates would be required to perform the actual day-to-day tasks of operating the petitioner's two claimed retail stores. The petitioner has not explained how it would operate two retail locations on a day-to-day basis with six managers, executives and supervisors and a single cashier/retail salesperson. Counsel indicated in response to the RFE that each of the petitioner's retail locations would require a manager, an assistant manager and two cashiers. In fact, a review of the petitioner's evidence reveals that none of the petitioner's employees are claimed to actually perform duties related to the retail sale of cellular phones and services. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The AAO acknowledges the petitioner's claim that the company's vice president/general manager and finance manager are both professionals. The petitioner has not provided evidence that it employs either of the individuals who are claimed to serve in the position of vice president/general manager. The petitioner provided evidence that [REDACTED] has a bachelor's degree, but it has not provided a consistent job title for this individual. On appeal, the petitioner indicates that he is employed as retail manager, a position that, according to the petitioner, does not require a degree. The petitioner also introduces educational credentials for [REDACTED] but previously indicated that he serves in the non-professional position of retail manager. Finally, the petitioner submits educational credentials for [REDACTED], but it provided no evidence that he was employed at the time of filing.

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. Given the lack of employees to perform the day-to-day tasks of operating the petitioner's claimed retail stores and the questionable content of the job descriptions provided for certain employees claimed to be engaged in operating a gas station and food store, the petitioner has not established that it employs professional employees.

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 position description that clearly describes the duties to be

performed in managing the essential function, i.e. 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. 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. Here, counsel claims on appeal that the beneficiary is responsible for "managing the company's essential functions of business development, marketing and financial operations." As discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that he performs primarily managerial duties, nor has the petitioner identified these functions with specificity or established the proportion of the beneficiary's time attributed to managing such functions.

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-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 supervisory 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.* In this case, while the petitioner's general description suggests that the beneficiary would have the appropriate level of authority over the organization, the petitioner has not demonstrated that he would spend the majority of his time focused on the broad goals of the organization. As discussed further below, the petitioner has not established that it has subordinate staff in place to relieve the beneficiary from many day-to-day aspects of operating the business.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In reviewing the relevance of the number of employees a petitioner has, 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)). Furthermore, 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).

Here, the petitioner claims to operate two retail stores. It claims to employ a president, a vice president, a finance manager, a sales manager, a retail manager, an assistant manager and a cashier. The petitioner claims to have only one employee to perform the day-to-day sales and customer service duties of its

claimed businesses, and it is unclear how it staffs two stores in different cities with one retail manager, one assistant manager and one cashier. Collectively, the lack of staff to perform the essential day-to-day activities of the business brings into question how much of the beneficiary's time could actually be devoted to managerial or executive duties, and also raises questions as to the claimed job titles and duties of the employees identified. Considered in light of the fact that the petitioner has provided inconsistent accounts of its employees' job titles, job descriptions that appear unrelated to the type of business the company operates, and insufficient evidence to corroborate the company's staffing levels at the time of filing, the petitioner has not established that it has a subordinate staff to relieve the beneficiary from performing non-managerial and non-qualifying first-line supervisory functions.

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

III. Qualifying Relationship

Beyond the decision of the director, the remaining issue to be addressed is whether the petitioner established that the U.S. company and the foreign entity 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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns,

directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate means*

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner stated on Form I-129 that the beneficiary's foreign employer, [REDACTED], owns 50 percent of the petitioner's shares. The petitioner submitted a copy of the U.S. company's Certificate of Formation dated July 7, 2006, which indicates that the company is authorized to issue 1,000 shares with a par value of \$10.00 per share. The petitioner also submitted the minutes of an "organizational meeting" held on December 30, 2008, which indicates that the company president, [REDACTED] resolved to transfer his 50% ownership interest in the company to [REDACTED], with the following resulting ownership percentages: [REDACTED] (50%) and Ideal Collections (50%). The agreement bears only the beneficiary's signature, although the meeting minutes indicate that [REDACTED] called the meeting.

In addition, the petitioner submitted [REDACTED] Deed of Partnership, identifying the beneficiary as the owner of 60% of the foreign company.

The petitioner submitted copies of three stock certificates. On all three certificates, the name of the issuing company and certificate number are illegible. One certificate is dated July 7, 2006 and identifies [REDACTED] as the holder of 1,000 shares of the company's stock. This certificate has the word "cancelled" written on it. A second certificate dated December 30, 2008 bears [REDACTED] name and indicates that he owns 500 shares of company stock. The third certificate indicates that 500 shares of company stock were issued to [REDACTED] on December 30, 2008.

The petitioner's initial evidence also includes a copy of the U.S. company's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for the year ended December 31, 2008. According to the tax return at item I, there were two shareholders during the tax year. The company filed a Schedule K-1 for [REDACTED] and indicated that he owns 50 percent of the petitioner's stock. The company also filed Schedule K-1 for [REDACTED] and indicated that she owns the remaining 50 percent of the stock.

Upon review, the petitioner has not established that the U.S. and foreign entities have a qualifying relationship.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*,

18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The AAO has identified several deficiencies which prohibit a finding that the U.S. and foreign entities enjoy a qualifying relationship.

First, all three stock certificates provided in support of the petition are illegible and do not identify the certificate numbers or the issuing company's name.

Second, the petitioner's IRS Form 1120S for 2008 contradicts the petitioner's claim that [REDACTED] acquired a 50 percent ownership interest in the U.S. company on December 30, 2008, as it was not reported as a shareholder on Form Schedule K-1.

Third, the petitioner's purported stock certificates and the minutes of the organizational meeting suggest that [REDACTED] was the company's sole shareholder from the time of the company's establishment in July 2006 until the transfer of 50 percent of the shares to [REDACTED] on December 30, 2008. However, the information reported in the petitioner's tax returns contradicts the submitted evidence. According to the Form 1120S and Schedules K-1, Mumtaz Tejani was a 50 percent shareholder of the petitioning company throughout 2008. In addition, the petitioner submitted a [REDACTED] "Agent" which appears to have been prepared in 2007. This document identifies [REDACTED] as the owners of the petitioning company.

Fourth, the minutes of the organizational meeting are suspect as they do not bear the signature of [REDACTED] the shareholder who ostensibly called the meeting for the purpose of resigning his position as president and transferring his ownership interest to the foreign entity.

Finally, the AAO notes that public records made available by the Texas Secretary of State indicate that [REDACTED] remain as the only officers and directors of the corporation. *See Texas Comptroller of Public Accounts, Taxable Entity Search Results for [REDACTED]* (last accessed on May 7, 2012, a copy has been incorporated into the record of proceeding).

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In light of these serious discrepancies, the AAO finds the petitioner's illegible stock certificates and minutes of organizational meeting alone insufficient to establish that the foreign entity actually acquired the claimed ownership interest in the U.S. company. As ownership is a critical element of this visa classification, USCIS may reasonably look beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Here, there is no evidence that would bolster the claimed qualifying relationship beyond an illegible stock certificate. 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 for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 (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.