

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

D7



DATE: NOV 28 2012 OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker under 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 in accordance with the instructions on 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.


Ron Rosenberg
Acting 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 seeking 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 Virginia corporation, states that it operates a specialty foods business. The petitioner claims to be a subsidiary of [REDACTED], located in Antalya, Turkey. The petitioner seeks to employ the beneficiary as the Executive Director of its new office in the United States for a period of one year.

The director denied the petition on July 20, 2011, concluding that the petitioner failed to establish: (1) that the U.S. and foreign entities have a qualifying relationship; (2) that it has secured sufficient physical premises to house the new office; and (3) that the new U.S. company would support a managerial or executive position within one year of the approval of the petition. The director further observed that the petitioner failed to provide evidence of that the beneficiary was employed by the foreign employer for one year within the last three years prior to filing the petition.

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. The petitioner 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)(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. Qualifying Relationship

The first issue on appeal is whether the petitioner has established that it has a qualifying relationship with the beneficiary's last 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 pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (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 (I)(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.

On the L Classification Supplement to Form I-129, the petitioner indicated that it is a subsidiary of [REDACTED] the beneficiary's claimed employer in Turkey since 2006. It described the company ownership and managerial control of each company as follows: "U.S. is a fully owned and financed subsidiary."

The petitioner submitted a certified translation for the Articles of Corporation for "[REDACTED]" stating that the company had three founders: [REDACTED] and [REDACTED]. The petitioner also submitted a certified translation of a document labeled "Certificate of Organize Fairs in Stateside" for [REDACTED]. The petitioner's initial evidence also included an activity report registration certificate, and tax documents for a company called [REDACTED] or "[REDACTED]". The AAO notes that the organizational chart submitted to document the beneficiary's position within the foreign entity's hierarchy is labeled [REDACTED].

Research & Development Limited Company Organizational Chart," which appears to be a separate legal entity from the foreign employer named on the Form I-129.

The petitioner did not provide evidence of ownership for this second Turkish company, nor describe its relationship to the beneficiary, the petitioner, or the beneficiary's claimed foreign employer. However, most of the supporting evidence submitted to establish that the foreign employer is doing business related to this entity and not to the stated foreign employer, [REDACTED]. Moreover, the petitioner provided evidence that it received a wire transfer in the amount of \$15,300 from [REDACTED] on July 22, 2010, presumably as evidence of the size of the investment in the United States company pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

The petitioner also submitted its Certificate of Organization from the Commonwealth of Virginia State Corporation Commission indicating that it was established on July 16, 2010, as well as a copy of its Articles of Organization.

The director issued a request for additional evidence ("RFE") on October 18, 2010. The director requested *inter alia* evidence of the ownership and control of the United States entity.

In a letter dated January 11, 2011, the petitioner stated that "both the Turkish entity and the U.S. entity are owned by the same three partners." The petitioner appears to claim that an affiliate relationship exists between the foreign employer and the U.S. entity, as counsel previously stated, "both the Turkish entity and the U.S. entity are owned by the same three partners that have formed limited liability companies in both countries." In addition to the documents submitted with the initial petition, the petitioner submitted a certified translation of a "Partnership Document" for "[REDACTED]". The document lists the shareholders and the number of shares held as follows:

[REDACTED]	33.0
[REDACTED]	34.0
[REDACTED]	33.0

The petitioner also submitted a copy of its operating agreement signed on July 17, 2010. Exhibit A at page 15 of the Operating Agreement provides the following list of members and membership interests for [REDACTED]

[REDACTED]	33.0%
[REDACTED]	33.0%
[REDACTED]	33.0%
[REDACTED]	1%

In a decision dated July 20, 2010, the director determined that the petitioner failed to establish the claimed subsidiary relationship between the U.S. and foreign entities. In reaching this conclusion, the director observed that the companies are not owned by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity.

On appeal, the petitioner states that regardless of whether the entities are related as parent-subsidary or affiliates, both are qualifying relationships for L-1 purposes.

Upon review, the petitioner has not established that it has a qualifying relationship with the foreign entity, and thus the appeal will be dismissed.

The regulation and precedent 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'r 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.

The petitioning company is owned by four individuals, and no one individual owns a majority interest in the company. The beneficiary's foreign employer is directly owned by three individuals: [REDACTED] and [REDACTED]. Despite the fact that the same three individuals have ownership interests in the petitioner and ownership interest in the beneficiary's claimed foreign employer, USCIS has never accepted a combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies. Here, the petitioner has submitted no evidence that these three shareholders are bound together as a unit, and has not otherwise established that the companies are owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

To establish eligibility, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners.

In this case, the U.S. entity is owned by four individuals, only three of which also have an ownership interest in the foreign entity. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Here, the petitioner has not submitted any evidence of control of the foreign entity.

A petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, or any other factor affecting actual control of the entity. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Therefore, while the petitioner and the beneficiary's claimed foreign

employers may be related in ownership, the petitioner has not submitted evidence to establish that the two entities maintain a qualifying relationship as defined at 8 C.F.R. § 214.2(1)(1)(ii)(G).

Further, the petitioner has submitted evidence, including an organizational chart purportedly depicting the beneficiary's last foreign position, related to a different Turkish company than the one with which it is claiming a qualifying relationship. As noted above, the petitioner has not provided any explanation for its submission of an organizational chart and evidence of a wire transfer to the U.S. company from [REDACTED]

[REDACTED] " when the petitioner's claimed foreign employer is [REDACTED]

The submitted Turkish company registrations appear to indicate that these are two separate legal entities. Accordingly, even if the petitioner had established that it has a qualifying relationship with [REDACTED] questions would remain regarding whether that company is the beneficiary's actual foreign employer. 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).

For the foregoing reasons, the appeal will be dismissed.

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

The second issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a managerial or executive capacity.

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

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

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

supervisor's supervisory duties unless the employees supervised are professional.

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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 23, 2010. The petitioner stated that it operates a specialty foods business for with one employee and estimated gross sales of \$260,000. The petitioner stated the beneficiary will be working as its Executive Director. The petitioner submitted a translation of an unnamed Turkish company's resolution dated April 2, 2010. The resolutions states that the beneficiary is given authority to "look for new strategic investment and development opportunities outside the country." Furthermore, the duties include conducting research, making investments, opening new branches, offices, and establishing a company "if necessary."

The director issued a request for additional evidence ("RFE") on October 18, 2010. The director requested that the petitioner provide, *inter alia*: (1) a breakdown of the number of hours devoted to each of the beneficiary's proposed duties on a weekly basis; (2) the number of proposed employees and wages or salary to be paid to each; (3) the job titles and duties with percentage of time dedicated to each duty to be performed by each employees; and (4) a description of the proposed management and personnel structures of the U.S. office.

The petitioner provided a job description for the proffered position of General Manager. The petitioner provided six main duties to be performed by the beneficiary as follows: (1) planning, research, & financials (14-16 hours a week); (2) setting up new locations (10-12 hours a week); (3) building pushcarts (4-6 hours a

week); (4) employee relations (4-6 hours a week); (5) working in the field (10-12 hours a week); and (6) purchasing (2-4 hours a week). The petitioner provided additional details regarding the beneficiary's proposed duties under each of the subcategories.

The petitioner provided an organizational chart for the United States entity showing the beneficiary as the General Manager. Reporting to the beneficiary was an administrative assistant and two sales associate positions. The petitioner did not provide the requested job descriptions or wages for the beneficiary's proposed subordinates.

In lieu of a business plan, the petitioner provided a short description of the nature and scope of the company's intended operations. The company described a three phase operation with the first phase as follows:

The business model that [REDACTED] is operating is to open self contained operational units of Popcorn and Cotton Candy stands in major malls on the East Coast. To date, there are two opened in Atlanta, GA and one at Potomac Mills Mall in Virginia.

The petitioner further described the beneficiary's duties as President would be to establish goals and policies as the petitioner seeks markets and venues, establish best practices as the petitioner prepares to franchise, and have wide decision making authority. The petitioner referred to an attached "business plan, prepared by the company's CPA firm and supported by the company bank statements." However, there is no formal business plan in the record and it does not appear to have been submitted with the petition or in response to the request for evidence.

The director denied the petition on July 20, 2010. In denying the petition, the director found that the petitioner failed to establish that the beneficiary will be employed in a managerial or executive capacity within one year of approval of the petition. The director observed that the petitioner did not establish that the new company will grow to be of sufficient size to support a managerial or executive position.

On appeal, the petitioner states that there is sufficient evidence on record to establish that the beneficiary will be employed in a managerial or executive level position with one year of approval of the petition. The petitioner submits a revised organizational chart showing a multi-tiered management structure with sites in various states. Counsel states that the petitioner submitted a business plan, in the form of a forecasted financial statement, in response to the RFE. The petitioner also submits a business plan including a management summary with an organization structure and personnel plan in support of the appeal.

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).

A number of the beneficiary's job duties submitted in response to the RFE indicate that the beneficiary would be performing non-managerial functions. Specifically, duties such as analyzing revenue and expenses to measure profitability, visiting malls and shopping centers, applying for state permits, guiding the manufacturer in building pushcarts, working at the pushcarts, ordering supplies, ordering machines, and requesting repairs services are not managerial in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The 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 specialty foods business and that the beneficiary will supervise one assistant and two sales clerks. In response to the RFE, the petitioner submitted two organizational charts, one of which showed the beneficiary as head of a multi-tiered management structure with many lower level employees. Another chart shows two sales associates and an administrative assistant reporting to the beneficiary and no other employees. The second organizational showing the beneficiary as head of a more complex organization than the first, with various professional and managerial level employees reporting to him. 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).

Furthermore, 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 two sales clerks 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 \$15,264.20 in an account, and a one paragraph 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)).

Furthermore, the petitioner failed to provide any evidence that it submitted forecasted financial statements in response to the director's RFE. The director stated in his denial that "it is noted that a review of your attorney's letter states that a business plan is being submitted; however, please be advised that no business plan was submitted." On appeal, counsel states that the business plan was "given as forecasted financial statement." Counsel failed to submit a copy of the financial statement on appeal, or otherwise provide evidence that the statement was in fact submitted in response to the RFE. Without documentary evidence to

support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that a revised business plan was submitted on appeal. The petitioner, however, was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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.

The AAO notes that the director also addressed whether the petitioner secured physical premises to house the new location and that the beneficiary was not employed in a managerial or executive capacity for one year within the past three years immediately preceding the filing on the petition. On appeal, counsel for the petitioner states that the record supports a finding that sufficient physical premises were secured and that the beneficiary was employed in a managerial or executive capacity for the foreign employer. The AAO agrees with the petitioner's assertions and the director's adverse findings regarding sufficient physical premises and the beneficiary's one year of qualifying employment within the three years prior to filing the petition will be withdrawn.

However, the appeal will be dismissed, pursuant to the discussion above, based on the petitioner's failure to establish a qualifying relationship with the beneficiary's foreign employer and failure to establish that it would employ the beneficiary in a primarily managerial or executive capacity within one year of the approval of the petition.

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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.