identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

D7

[redacted]

DATE: MAR 1 4 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The 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 California limited liability company established in October 2009, states that it intends to engage in promotional consulting, on-air product demonstrations, and infomercials. It claims to be an affiliate of Outstanding Productions, Inc., located in Toronto, Canada. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a period of one year.

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; (2) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of approval of the petition; or (3) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the beneficiary's proffered position is in an executive capacity and that the nature of the petitioner's and foreign entity's business requires the use of independent contractors on an "as-needed" basis. Counsel further states that the beneficiary is "in the process of securing premises for his business as it is newly established and in the process of expanding."

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 of 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 January 25, 2010, the date the petition was filed.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner indicated its mailing address as [redacted] and stated that this is also the beneficiary's current address in the United States. On Part 5 of the Form I-129, the petitioner indicated that the beneficiary will work at a different address, specifically at [redacted]

The petitioner submitted a copy of a "Specialty Retailing Program Temporary Revocable License" giving the company authorization to engage in the retail sale of "My Pillow Pets" from a small kiosk at the [redacted]

from November 1, 2009 through December 31, 2009. Although the petitioner indicated that it intends to engage in product promotions, on-air product presentations, and creation of infomercials, the petitioner did not provide a business plan outlining its physical premises requirements, nor did it submit an unexpired and valid lease agreement for the shopping mall kiosk or any other location.

The director issued a request for additional evidence ("RFE") on February 4, 2010. The director requested a copy of the U.S. company's floor plan for all work space, photographs of the interior and exterior of the U.S. business premises, and a complete copy of the U.S. company's valid lease that indicates the total square footage of the premises.

In a response dated March 17, 2010, counsel stated: "At present, the main administrative part of the business will be conducted from the residential address located at and production space will be rented according to the need to film infomercials."

The petitioner's response to the RFE included a business plan, in which it states the following regarding its space requirements at section 2.0, Company Summary:

> During the test phase, the administrative offices will be housed in the owner's personal residence located at There is a large office on the property that will serve as the company's corporate office until revenues justify relocating to larger space. Larger office space is not initially necessary as all clerical and production prep can be done from this space. [The company] does plan on moving to a larger office area eventually but would prefer to use its budget for production purposes.

The petitioner did not provide the requested floor plan or photographs of the U.S. company's premises or evidence of the beneficiary's lease or ownership of the residential property.

The director denied the petition on April 1, 2010, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. The director noted a discrepancy between the beneficiary's worksite as stated on the Form I-129, and the information provided by the petitioner in response to the RFE. The director acknowledged that some businesses operate from home offices, but found the evidence insufficient to establish that "a home-based office would be 'sufficient' to house an organization qualifying for classification under section 101(a)(15)(L) of the Act."

On appeal, counsel asserts that the beneficiary's home office is an administrative location for the petitioner's business and is "in addition to the petitioner providing copy of a lease for a working space at the Counsel emphasizes that the petitioner's business plan clearly stated that a larger area will be leased when needed and that actual film production will be conducted at a sound stage as needed.

Counsel asserts that the petitioner "has since moved the business from the large back house office to Counsel concludes by stating that the petitioner "has submitted documentary objective evidence to established [*sic*] that there is and at all times was a location which they had secured and such location is a sufficient physical premises to house the new operation."

In support of the appeal, the petitioner submits a letter dated May 20, 2010 from confirming that the company has "reserved a local business premises with us at our Beverly Hills, CA office." The letter indicates that the petitioner has a six month contract.

Upon review, the petitioner has not established that it has secured sufficient physical premises to house the new office.

With respect to the newly submitted evidence of the petitioner's or virtual office, the AAO emphasizes that 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). The petitioner does not claim to have entered the agreement with Davinci Virtual Offices prior to the filing of the petition, and therefore, the AAO will not consider this evidence.

At the time of filing, the petitioner provided an expired license for the operation of a retail shopping mall kiosk and indicated that the beneficiary would work at the shopping mall address. The petitioner has provided no evidence that this license was renewed or extended beyond its expiration on December 31, 2009. The petitioner appears to have abandoned its claim that this is the beneficiary's actual worksite without providing any explanation.

Instead, the petitioner indicates that the principal administration of the company will occur at an office located within the beneficiary's residence. The AAO acknowledges that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office, and observes that there may be cases in which a home office would satisfy the regulatory requirements. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A).

To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a home office, if required, evidence that the landlord, if any, has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling will meet the company's needs. Finally, photographs and floor plans of the leased premises may assist in determining that the premises secured are sufficient to accommodate the petitioner's business operations.

The director clearly and specifically requested evidence that the petitioner had secured sufficient physical premises and requested a floor plan, photographs of the premises, a lease for the business premises, and other evidence that would assist in establishing whether the petitioner satisfied the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(v)(A). While the petitioner responded to the RFE, it failed to provide any of the requested documentary evidence pertaining the company's physical premises. The petitioner's unsupported assertion that the home office can accommodate the business is insufficient. 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)). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner has not offered any additional evidence on appeal to show that the specific premises secured as of the date of filing are sufficient to accommodate the petitioner's intended business. Accordingly, the appeal will be dismissed.

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

Another issue to be addressed 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. 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.*

On the Form I-129, the petitioner stated that the U.S. company is engaged in promotional consulting, on-air product demonstrations and infomercials, and that it had one employee as of the date of filing. The petitioner described the beneficiary's proposed duties as the following: "Develop and oversee marketing campaigns, promote, market and distribute various products."

In a letter dated January 14, 2010, the petitioner indicated that its Canadian affiliate "has always been at the forefront of Infomercials and TV Shopping Channels around the world." The petitioner stated that the foreign entity's services include writing scripts and co-producing infomercials, developing sequence demonstrations for infomercials, creating product marketing campaigns and providing on-air talent. The petitioner indicates that the U.S. subsidiary would carry on the same activities, and that its first product was [redacted]. In this regard, the petitioner stated that it had co-written the script for the product's two minute infomercial, and also opened a booth in [redacted] to distribute the toys. The petitioner stated that it employed four people at the mall location, but did not provide evidence that the mall store remained open at the time of filing. As discussed above, the shopping mall license expired on December 31, 2009, prior to the filing of the petition.

The petitioner's initial evidence did not include a description of the beneficiary's proposed duties, or evidence of how the U.S. operation will support a managerial or executive position within one year, such as a description of the scope of the entity, its organizational structure and its financial goals; the size of the United States investment; and the organizational structure of the foreign entity. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

In the RFE issued on February 4, 2010, the director requested, *inter alia*, a letter from the foreign company which indicates the proposed number of U.S. employees to be hired within one year, the type of positions they will hold, the size of the United States investment, the size and staffing level of the foreign company, and an explanation of how the U.S. company expects to support a managerial or executive position within one year.

In addition, the director requested a proposed organizational chart for the U.S. company which clearly identifies the beneficiary's proposed position and all anticipated subordinate employees by job title, job duties, educational level, proposed annual salaries/wages, and source of remuneration.

In response, the petitioner submitted an "Infomercial Business Plan" and referred the director to the plan's start-up summary, management summary and personnel plan for the requested information. Counsel noted that the foreign entity and the U.S. company "rely heavily on staff hired per use due to the nature of the infomercial, i.e. professionals will be recruited as per the requirements of the different infomercials."

According to the business plan, the U.S. company's long-term objective is to develop multiple fitness products for introduction to the public through infomercials or . The petitioner intends to "lay out a precise plan for testing the company's first product, including outlining a 12-month timeline to develop and test the product." The petitioner indicates that after a successful test, the product would enter a full-scale rollout through the s channel and later enter traditional retail channels. The company also hopes to "develop a high recognizable brand name known for outstanding award winning DRTV campaigns."

In outlining the company's objectives, the plan notes that "with the script writing skills of [the beneficiary and his spouse] as well as the hands on involvement in all aspects of a campaign from Inception to Production, [the petitioner] is the natural choice for clients both in the world of and also Shopping Channel representation."

The petitioner's company summary at section 2.0 of the business plan states:

> The company is based on a subcontracting business model. All services are provided by specialized vendors (producer, director, cameramen, lighting, sound, hair and makeup as well as media buying and editing) to maintain the highest possible net profits within the company.

The petitioner's start-up summary further describes the company's plans:

> The company will spend the first seven months developing its first product and testing the product in the infomercial sales channel. If the results are positive, the product will be introduced to consumers through a full-scale infomercial rollout. . . .
>
> Funding for the test period is estimated at $50,000. This amount includes operational costs associated with testing, including infomercial production; manufacturing and inventory; telemarketing; fulfillment; media airtime; and administrative costs during the test period.

The petitioner's management summary indicates that the beneficiary and his spouse will jointly manage the new company. Specifically, the business plan states that the beneficiary "will steer the ship in the direction of shooting infomercials, writing scripts and also investment in new and unique products while [the beneficiary's spouse] will be responsible for booking talent, managing personnel as well as all of the clerical aspects involved."

The personnel plan outlined in the business plan indicates that the company owners "will manage all tasks and oversee vendors until net revenues support hiring employees." The petitioner states that for each infomercial, it will require camera operators, lighting and sound staff, editors, a grip, a gaffer, studio space, two media buyers, a production coordinator, a food stylist, and a call center. The petitioner estimates its first year payroll to be $79,800. The business plan indicates that the beneficiary would be performing the role of producer, director and writer for the infomercials.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be performing primarily managerial or executive duties in the United States. In denying the petition, the director noted that, based on the evidence submitted, the beneficiary's duties would be primarily focused on marketing tasks and other tasks associated with the day-to-day operations of the company.

On appeal, counsel asserts that the petitioner established that the beneficiary will be employed in an executive capacity. Specifically, counsel states that the evidence "clearly shows that it will be the beneficiary who will hire the independent contractor vendors to perform the day to day tasks," while the beneficiary's spouse will be responsible for overseeing the independent vendors.

Counsel further states:

> The beneficiary as a 15 year infomercial business relationship with television executives from "QVC" and "HSN." He will be the person meeting with the television executives to enter into agreements for the use of the petitioner's company, finalize the scripts, and obtaining investment in additional products for the petitioner's company . . . .

Counsel asserts that the director failed to consider whether the independent contractors will relieve the beneficiary from conducting the day-to-day business tasks. Counsel cites an unpublished decision to stand for the proposition that a beneficiary may be employed in a qualifying managerial or executive capacity where it is shown that he or she utilizes the services of independent contractors.

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 qualifying 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.*

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

Here, the petitioner's claim that the beneficiary will be employed in a managerial or executive capacity fails on an evidentiary basis, as the petitioner has submitted no detailed description of his proposed duties. 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,* 14 I&N Dec. 190 (Reg. Comm'r 1972)).

At the time of filing, the petitioner indicated that the beneficiary will "develop and oversee marketing campaigns," and "promote, market and distribute various products." While the beneficiary's job title is "president," these brief statements suggest the beneficiary will be directly involved in providing the company's services, which include "promotional consulting." 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 record contains little additional information regarding the beneficiary's proposed duties. The provided organizational flow chart refers to the beneficiary's role as "on-air talent/writer," again, suggesting that he directly performs the services of the company in terms of contributing to product demonstrations and the production of infomercials. Finally, as noted in the director's decision, the business plan indicates that the beneficiary will "steer the ship in the direction of shooting infomercials and also investment in new and unique products," as well as "demonstrating products, developing sequence demonstrations, or writing a creative script."

None of the information provided at the time of filing or in response to the RFE provided a clear description of the managerial or executive duties the beneficiary would perform. While the beneficiary is claimed to be responsible for the overall management of the company and accountable for its success, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On appeal, counsel asserts that the beneficiary will "direct the management of the company," with "wide latitude in the discretionary decision-making within the petitioner's company," duties that paraphrase the statutory definition of executive capacity. 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.).

Counsel further asserts that the director failed to take into account the duties to be performed by the beneficiary's spouse, independent contractors and vendors. Counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee, based on his supervision of independent contractors. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO does not doubt that some non-managerial duties associated with providing the petitioner's services will be performed by contracted staff or outsourced providers; however, the existence of the contracted staff does not excuse the petitioner from providing a detailed description of the beneficiary's actual duties, and the beneficiary cannot be considered to be employed as a manager or executive solely because he sometimes devotes some unidentified portion of his time to the supervision of contracted staff.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of demonstrating that his duties will be "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner failed to provide a complete and detailed description of the beneficiary's proposed duties in the United States. In addition, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. As discussed above, the beneficiary's few enumerated job duties include non-managerial tasks such as writing scripts, serving as "on-air talent," and performing the petitioner's consulting services, and the petitioner failed to quantify what portion of time the beneficiary would devote to such tasks. For this reason, the AAO cannot determine whether the beneficiary would be primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel's assertion on appeal that the beneficiary "does not spend a majority or even substantial amount of his time on day to day functions" is not supported by a statement of the beneficiary's duties, or corroborated by the minimal evidence in the record. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel further asserts that the beneficiary will be managing an essential function of the U.S. company. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of 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).

The record does not support counsel's claim that the beneficiary would be employed primarily as a function manager. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed above, the petitioner has not sustained this burden.

In sum, the AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. However, the petitioner's failure to provide a detailed description of the beneficiary's proposed duties and the amount of time that he will allocate to the performance of qualifying tasks, prohibits a determination as to whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

C. Employment Abroad in a Managerial or Executive Capacity

The third issue addressed by the director is whether the petitioner established that the beneficiary has been employed abroad in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

The petitioner submitted no specific description of the beneficiary's duties at the time of filing the petition, but its initial evidence included the beneficiary's self-prepared biography. He indicates that he enjoys "creating memorable demonstrations while at the same time striving to develop a powerful sales pitch." The beneficiary indicates that he has been recognized as "one of the ten best pitchmen/professional demonstrators in North America," and is skilled in "demonstrating your product, developing sequence demonstrations or writing a creative script for your next infomercial."

In addition, in its letter dated January 14, 2010, the petitioner stated:

> In Toronto [the foreign entity] had several people that it employed on an independent contractor basis as On Air talent on The Shopping Channel Canada as well as for food styling for products such as Lock and Lock storage containers, Acropolis Organics Olive Oil, and Space Bags vacuum bags, the following is a list of people that [the foreign entity] has and is currently working with on an independent contractor basis:

In the RFE, the director requested that the petitioner provide the following: (1) a detailed description of the beneficiary's duties abroad which identifies exactly who the beneficiary supervises, and the percentage of time the beneficiary allocates to specific duties; (2) the foreign entity's organizational chart; and (3) the names, job titles, educational level, annual salaries and detailed job descriptions for all employees working under the beneficiary's supervision.

In response, counsel stated that "beneficiary founded the company in 2003 and has 16 years of experience in the field of direct sales (please see resume, already submitted)." Counsel indicated that the petitioner was submitting as additional evidence of the beneficiary's expertise evidence that he has the rights to a new treatment for a reality television show called

The petitioner submitted a flowchart which depicts the allocation of responsibilities within the foreign company. According to the chart, the beneficiary is involved in infomercials as an on-air presenter and writer, and is responsible for developing creative demonstrations and coordinating productions. The beneficiary's other area of responsibility is "shopping channels." In this regard, the flow chart indicates that he serves as an on-air presenter and also hires talent for individual shows. Here, the chart identifies

The flow chart indicates that the beneficiary's spouse is involved in script writing and product testing related to infomercials, scheduling and invoicing tasks associated with the company's shopping channel work, and performing administrative tasks.

The director determined that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. In denying the petition, the director observed that the information provided indicates that a significant portion of the beneficiary's duties have been directly providing the services of the foreign entity."

On appeal, counsel focuses primarily on the U.S. company's business plans and intention to hire independent contractors in the United States, rather than addressing the beneficiary's employment with the foreign entity.

Counsel asserts that "the evidence supports that the beneficiary does not have a substantial part in the day to day business tasks and has not had such a role in the foreign entity." Counsel maintains that the beneficiary "has established the goals and policies of the company," and has wide latitude in discretionary decision making.

Upon review, counsel's assertions are not persuasive. As discussed above, 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.*

Based on the petitioner's representations, the petitioner and foreign entity are engaged in the same type of business, and the beneficiary's duties in the United States would be substantially similar as those he performs abroad. Accordingly, the AAO incorporates its previous discussion with respect to the deficiencies of the submitted evidence.

As with the U.S. position, the petitioner has provided no detailed description of the duties the beneficiary performs on a day-to-day basis as the president of the foreign entity. To the extent that the petitioner has delineated any of his duties, those duties are directly related to providing the services of the company. Specifically, the petitioner indicates that the beneficiary serves as a writer, works as an on-air presenter on infomercials and shopping channels, develops creative product demonstrations, and coordinates production of infomercials. The petitioner failed to identify any duties he performs in a managerial or executive capacity beyond broadly stating that he is charge of establishing goals and policies and exercising wide latitude in discretionary decision making. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The foreign entity's organizational flowchart fell significantly short of responding to the director's request for a detailed description of the beneficiary's specific duties and the amount of time he allocates to each duty. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO notes that the petitioner also referred the director to the beneficiary's resume for additional information regarding the nature of his duties with the foreign entity. The beneficiary is self-described as a "pitchman/professional demonstrator," a direct salesman, a frequent co-presenter on shopping channels, and a skilled creator of product sequence demonstrations. Pursuant to the strict statutory definitions, section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive," such as staff officers or specialists, self-employed persons involved in practicing a profession or trade, or a first-line supervisor of non-professional employees. *See* section 101(a)(44)(A)(iv) of the Act; *see also* 52 Fed. Reg. 5738, 5740 (February 26, 1987)(available at 1987 WL 127799).

The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(44)(A) and (B) of the Act. The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization. As

discussed above, the petitioner has not established this essential element of eligibility. While the AAO recognizes that the beneficiary exercises discretion over the day-to-day affairs of the business, the AAO cannot determine that the beneficiary's position with the foreign entity has been primarily managerial or executive in nature based on the evidence submitted with this petition. Accordingly, the appeal will be dismissed for this additional reason.

D. Qualifying Organizational Abroad

Beyond the decision of the director, a remaining issue in this matter is whether the petitioner's Canadian affiliate entity is currently operational and will continue to do business as a qualifying organization outside the United States. Based on the evidence submitted, the beneficiary and his spouse are the owners and only full-time workers of the foreign entity. Both the beneficiary and his spouse have been physically present in the United States continuously since April 2009 pursuant to E-2 visas originally granted in April 2008. According to the petitioner's statement on Form I-129, the beneficiary has been "managing and overseeing [redacted] since that time.

The petitioner filed this petition in January 2010, nearly two years after the beneficiary was granted E-2 status. The petitioner provided several tax returns for the foreign entity; however, the most recent one was dated 2006. Out of several foreign invoices submitted, the most recent one was dated December 19, 2007. The most recent evidence submitted with respect to the foreign entity was a Scotiabank "Statement of U.S. Dollar Current Account" for the month of May 2008. The petitioner did not provide sufficient evidence that the foreign entity has continued to do business during the beneficiary's stay in the United States in E-2 status.

The fact that the owner(s) and only employees of the foreign entity have been residing and intend to continue residing in the United States raises the question of whether the foreign affiliate is still doing business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). 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.