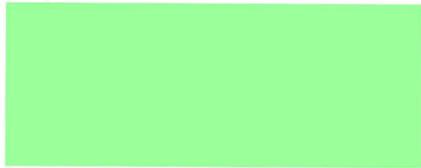


(b)(6)



U.S. Citizenship  
and Immigration  
Services



DATE: **APR 18 2013** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:

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 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 qualify 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 is a Florida corporation, established in 2010, engaged in the export and sale of cellular phones and electronics. It claims to be a subsidiary of [REDACTED] located in Venezuela. The petitioner seeks to employ the beneficiary as the executive manager of a "new office" in the United States for a period of two years.<sup>1</sup>

The director denied the petition, finding that the record did not include sufficient evidence to establish that the petitioner would operate at a level necessary to support the beneficiary's offered executive role within one year, as required of a new office. The director noted that the record was not clear regarding which employees would perform the day-to-day operations of the enterprise necessary to allow the beneficiary to primarily perform executive duties. Further, the director concluded that the petitioner had not shown that it had secured sufficient premises to house the proposed new office as required by 8 C.F.R. § 214.2(l)(3).

On appeal, counsel asserts that the record is sufficient to establish that the beneficiary will manage an essential function within the organization, thereby qualifying him as a function manager under the Act. Additionally, counsel maintains that the beneficiary qualifies as a personnel manager since he will be supervising and controlling the work of others. Lastly, counsel notes that the current office space, found inadequate by the director, is only temporary; and that a larger premises will be secured for the U.S. operation to hold additional employees once the business expands.

### 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.

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<sup>1</sup> The AAO notes that a petitioner applying as a "new office" in the United States, as in the present matter, may only be approved for one initial year consistent with 8 C.F.R. § 214.2(l)(7)(i)(A)(3).

- (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. Employment in the United States in a managerial or executive capacity**

As noted, the director denied the petition based on the petitioner's failure to establish that the beneficiary would act primarily in a managerial or executive capacity in the United States after one year. Upon review

of the record, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be likely to support the claimed executive or managerial role of the beneficiary after one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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 "new office" provision was meant as an accommodation for newly established enterprises and provided for by U.S. Citizenship and Immigration Services (USCIS) regulation to allow 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.

However, 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.*

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

In the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary would perform the following duties with the petitioner:

[The beneficiary] will be responsible for overseeing the day-to-day operations and general functioning of [the petitioner]. [The beneficiary's] duties will include, in general, the determination of the direction of the company, the coordination of corporate activities/investments, the review and implementation of corporate objectives. [The beneficiary] will coordinate the activities involving the parent company . . . that will receive cellular telephones and other electronic devices from by [the petitioner] to Venezuela, and ensure that the U.S. company is in compliance with applicable Venezuelan laws. Moreover, he will review and implement corporate objectives and conduct new strategies to expand [the petitioner's] export of cellular telephones and other electronic devices to potential clients in Venezuela and other Latin American Countries.

The director found that the beneficiary's job duty description lacked sufficient detail to establish the beneficiary as an executive or manager. As such, the director requested that the petitioner submit, *inter alia*, a description explicitly identifying the executive or managerial duties performed by the beneficiary including time allotted by the beneficiary to both executive/managerial and non-executive/managerial functions. In response, the petitioner provided the following job duty description:

The Executive Manager will devote forty (40) hours per week to his work, which will be distributed in the following manner:

- 10% Four (4) weekly hours: Develop sales and purchasing management procedures.
- 10% Four (4) weekly hours: Look for vendors that company with purchasing requirements.
- 5% Two (2) weekly hours: Make purchases and payments to vendors.
- 10% Four (4) weekly hours: Investigation of the market for the incorporation of new products to sales portfolio.
- 10% Four (4) weekly hours: Set an on-line sales project by Internet.
- 10% Four (4) weekly hours: Carry out interviews, selection and contract of personnel using simple methods . . .
- 5% Two (2) weekly hours: Supervise the employees and verify the results of the company's business operations.
- 10% Four (4) weekly hours: Collect customer payments.
- 25% Ten (10) weekly hours: Perform operations to increase the number of clients and sales orders in Latin American market.<sup>2</sup>

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. 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). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Here, the petitioner submits duties and responsibilities reflecting that the beneficiary will primarily perform day-to-day operational duties and not primarily managerial or executive duties. For instance, several of the beneficiary's listed duties in the duty description do not fall directly under traditional managerial duties as defined in the statute, such as searching for vendors; making purchases and payments to vendors; administering internet sales; collecting customer payments; and generally running operations to increase customers. Further, the originally provided duty description for the beneficiary primarily stresses his monitoring the receipt and shipment of electronics to Venezuela. Despite the prevalence of operational

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<sup>2</sup> The AAO notes that the petitioner has only accounted for 95% of the beneficiary's time in the job duty description.

duties in the provided duty description, the petitioner now claims on appeal that the beneficiary will perform only managerial or executive duties, and that the petitioner's sole employee ( Sales Administration) will perform all necessary operational duties. Claiming now on appeal that the beneficiary will perform no operational duties during the first year is questionable given the petitioner's current lack of support staff and its claimed status as a new office. Further doubt is cast on this claim since the petitioner notes in the business plan that it does not plan on hiring any additional employees until 2015. As such, it is doubtful that the beneficiary will be primarily performing managerial or executive tasks such as hiring employees or developing procedures after one year as there will be no employees to hire and a limited organization to make corporate procedures relevant. 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. 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, 591-92 (BIA 1988). In sum, due to the prevalence of non-qualifying duties in the beneficiary's duty description and discrepancies related to the beneficiary's claimed duties, it cannot be found that the petitioner has established that the beneficiary will primarily perform managerial or executive duties after one year.

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

In analyzing the totality of the record, the evidence presented does not support a finding that beneficiary will be primarily performing executive or managerial duties within one year, as the petitioner has not provided evidence of hiring plans sufficient to support the beneficiary's claimed managerial role or specific investment plans in the U.S. venture. The petitioner states that it currently has only one employee, - Sales Administration, currently residing in the United States and fully managing the petitioner's operations. The petitioner further claims in a proposed organizational chart that it will hire a Sales Manager, two Sales Advisors and an Administration Assistant. However, as noted, the petitioner's provided business plan notes that the petitioner will not make any additional hires until 2015, well more than one year after commencing operations. As such, the petitioner's sparse hiring plans do not support a conclusion that the petitioner will support the beneficiary primarily performing managerial or executive duties after one year. Further, as previously discussed, it is not clear who will perform the necessary operational duties of the enterprise with only two employees in the petitioner's organization after one year. Also, it is not clear what sales activities will be performed by the claimed Sales Manager and Sales

Advisors since the record reflects that the petitioner has no plans of continuously selling goods or providing services in the United States, but only shipping cellular phones and electronics back to Venezuela for sale. Again, 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).

Further, the petitioner has not provided specificity regarding its planned financial investment in the U.S. enterprise. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) states that the petitioner support a new office position with information regarding 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 immediately upon approval. Although the petitioner and foreign employer's bank records show various wire transfers by and between the petitioner and the foreign employer, the record does not reflect the petitioner's definitive investment plans in the U.S. operation, a questionable omission from the petitioner's provided business plan. 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)). Without such evidence, it cannot be concluded with any certainty that the new business will have a realistic expectation of success and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. See generally, 8 C.F.R. § 214.2(l)(3)(v). In fact, the totality of the circumstances strongly suggests that the foreign employer only intends to place an agent in the United States necessary to ship cellular phones and electronics back to Venezuela, and has no intention of continuously providing goods and services in the United States, casting further doubt on its ability to sustain the beneficiary in a managerial or executive capacity as defined by the Act. The AAO notes that the term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii).

Despite claiming that the beneficiary would act primarily in an executive capacity prior to appeal, counsel now asserts that the petitioner will act both as a, personnel, and function manager.

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 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'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner has not established that the beneficiary will direct subordinate managers, supervisors, or professionals. See § 101(a)(44)(A)(ii) and Section 101(a)(44)(B) of the Act. As previously discussed, the petitioner indicates that it will not hire any additional employees until 2015. As such, it would not be possible for the beneficiary to act as a manager of other managers or supervisors after the first year as the petitioner will only include one employee subordinate to the beneficiary. Further, the petitioner's lone subordinate, [REDACTED] - Sales Administration, has not been shown to be a professional consistent with the Act. The petitioner has provided no information on [REDACTED] educational credentials to establish that she has obtained the minimally required baccalaureate degree, or evidence to conclude that her role as a Sales Administrator requires knowledge of an advanced type gained by a prolonged course of specialized instruction and study. In fact, the petitioner did not provide any information on the educational credentials or requirements for the subordinate employee positions despite being requested by the director to provide the educational credentials of all U.S. subordinates. 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). 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)). As such, the petitioner has not established that the beneficiary will have any managerial, supervisory, or professional subordinates after one year, necessary to qualify as a personnel manager.

Additionally, counsel asserts that the beneficiary is established as a function manager consistent with the Act. 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 written job offer 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. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In this matter, the petitioner has not provided sufficient evidence that the beneficiary manages an essential function. In fact, the totality of the circumstances suggest that the beneficiary and [REDACTED] will be acting as mere agents in the United States purchasing cellular phones and electronics and shipping them back to the Venezuela for sale. As such, the record does not sufficiently establish that there will be separate functions or departments within the petitioner for an essential function to exist. As a matter of fact, the petitioner's hiring plans reflect that the beneficiary will be the only supervisory employee within the organization prior to 2015. Further, the petitioner has only vaguely offered the beneficiary as a function

manager, and has not articulated the function he supposedly manages with specificity. Further, as previously noted in this decision, the petitioner has not sufficiently established that the beneficiary will primarily perform executive or managerial duties. In fact, the preponderance of the evidence suggests that the beneficiary will be primarily performing day-to-day operational duties after one year, and will have few other employees to manage after one year. As such, the beneficiary has not been established as a function manager as defined by the Act.

In conclusion, when analyzing the totality of the record, the AAO cannot conclude that the record supports a finding that the beneficiary would be primarily employed in a managerial or executive capacity within one year. This conclusion is based on the prevalence of non-qualifying duties included in the beneficiary's duty description; the inadequacy of the petitioner's hiring plans during the first year; and the lack of evidence on the record regarding planned financial investment in the petitioner. For these reasons, the appeal must be dismissed.

#### **B. Sufficient Physical Premises:**

The director also denied the petition, by finding that the petitioner had failed to show it had secured sufficient premises to house the "new office" consistent with 8 C.F.R. § 214.2(l)(3). The director noted that the petitioner had only secured 300 square feet of office space, and that this was not sufficient to house the six employees the petitioner eventually planned to hire. On appeal, counsel maintains that the 300 square foot office is temporary, and that additional space will be secured once additional employees are hired. The AAO does not find counsel's argument persuasive.

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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Therefore, although the petitioner may have shown sufficient premises to house the beneficiary and the petitioner's lone employee, this is not sufficient space to accommodate additional employees necessary to establish the beneficiary in a managerial or executive capacity within one year. Further, the petitioner offers directly in the business plan that it has no intention of hiring additional employees until 2015, well after the one year start-up period afforded a new office under the regulations. A petitioner cannot fulfill sufficient premises by offering a lesser space with a promise of a greater space necessary to support the beneficiary's claimed role at a later date. Sufficient physical premises is not treated prospectively like establishing that a beneficiary will perform as a manager or executive after one year, but must be established at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Therefore, the AAO concurs with the conclusion of the director that the petitioner has not secured sufficient physical premises to house the new office as required by the regulations, and for this additional reason, the appeal must be dismissed.

#### **C. Qualifying relationship**

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Lastly, beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i).

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 (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.

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 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 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 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.

In the present matter, the petitioner asserts that it is a subsidiary of the foreign employer. The petitioner provides evidence showing that the foreign employer is jointly owned by the beneficiary and the aforementioned lone employee of the petitioner [REDACTED] each individual owning 250 shares. The petitioner offers the same ownership structure for the petitioner in the I-129 Petition for Nonimmigrant Worker, but provides little supporting documentation to confirm this ownership in the petitioner. That said, even if established, the 50/50 ownership in each entity does not establish the entities as parent/subsidiary as defined by the Act. As noted in the above definition, when there are two parties both owning 50% of any entity, one owner must have veto power over the other with respect to both entities in order to establish consistent ownership and control between the two entities. See 8 C.F.R. § 214.2(l)(1)(ii)(K). However, the AAO notes that it is possible that the entities could qualify as affiliates, since the two legal entities are owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. See 8 C.F.R. § 214.2(l)(1)(ii). However, the petitioner has submitted no supporting documentation to establish the claimed ownership interest in the petitioner, and has only noted this in the I-129 Petitioner for a Nonimmigrant Worker. 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)). As such, it cannot be determined with any certainty that the foreign employer and petitioner are controlled equally by the beneficiary and [REDACTED] as indicated. The petitioner has submitted IRS Form 1120S U.S. Income Tax Return for 2011 that discloses that the petitioner is 100% owned by [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. 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, 591-92 (BIA 1988).

Therefore, due to the lack of evidence presented on the record related to the ownership of the petitioner and the noted material discrepancy, it is not possible to conclude that a qualifying relationship exists between the petitioner and a foreign employer as required by the Act. 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).

### III. Conclusion

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

**ORDER:** The appeal is dismissed.