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U.S. Citizenship  
and Immigration  
Services

DATE: **AUG 01 2013** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New Jersey corporation, is engaged in the wholesale of leather jackets. It claims to be a subsidiary of [REDACTED], located in Pakistan. The petitioner seeks to employ the beneficiary as its Marketing Manager for three years.

The director denied the petition, concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; and (2) that the foreign entity employed the beneficiary in a qualifying 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 for the petitioner asserts that the director failed to properly consider the beneficiary's job description, misunderstood the foreign entity's organizational chart, and incorrectly concluded that the beneficiary filled the position of a first-line supervisor. Counsel submits a brief and additional evidence on 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.

## II. Managerial or Executive Capacity

The first issue to be addressed is whether the beneficiary has been employed abroad, and will be employed in the United States, in a primarily managerial or executive capacity.

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.

A. Beneficiary's Employment in the United States

The petitioner filed the instant petition on May 31, 2012. The Form I-129 indicates that the petitioner is a wholesale supplier of leather jackets established in 1998. The petitioner claimed to have two employees at the time of filing and seeks to employ the beneficiary as its marketing manager.

The petitioner described the responsibilities of the marketing manager position as follows:

- Exercise full authority of hiring and firing of employees;
- Arrange finances and productivity to maintain uninterrupted provisioning imported goods;
- Exercise strong control over revenue generation through sales proceeds and recoveries of sales;
- Control over budget for purpose of identifying new business and sales targets;
- Develop and implement sales goals for the sales team;
- Drive the sales initiative through the development of sales campaigns and new business relationships.
- Keeping liaison with banks for outstanding credit facilities and other banking affairs.

The petitioner also stated that the beneficiary would have decision making authority delegating the tasks of the sales team, setting goals and policies for the sales team, and developing new markets.

On August 13, 2012, the director issued a Request for Evidence ("RFE") instructing the petitioner to provide further evidence that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director requested, *inter alia*: (1) a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; (2) list of U.S. employees including the name, position title, and a description of the number of hours devoted to each of the employees' job duties on a weekly basis; (3) an organizational chart depicting where the position of marketing manager fits into the organization; and (4) copies of the company's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first two quarters of 2012.

In response to the RFE, the petitioner provided the following description of the beneficiary's job duties and percentages of time the beneficiary allocates to each duty per week:

- Identify, develop, or evaluate marketing strategy, based on knowledge of establishment objectives, market characteristics, and cost and markup factors. 10%
- Use sales forecasting or strategic planning to ensure the sale and profitability of products, lines, or services, analyzing business developments and monitoring market trends. 10%
- Coordinate or participate in promotional activities or trade shows, working with developers, advertisers, or production managers, to market products or services. 10%
- Formulate, direct, and coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers. 5%
- Select products or accessories to be displayed at trade or special production shows. 5%
- Develop pricing strategies, balancing firm objectives and customer satisfaction. 5%
- Consult with buying personnel to gain advice regarding the types of products or services expected to be in demand. 5%
- Evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, or return-on-investment and profit-loss projections. 5%
- Exercise [f]ull authority of hiring and firing of employees and hire new employees to implement new marketing strategies. 5%
- Arrange finances and productivity to maintain uninterrupted provisioning imported goods. 5%
- Exercise strong control over revenue generation through sales proceeds and recoveries of sales. 5%
- Develop and implement sales goals and manage sales team to assure goals are exceeded. 10%
- Drive the sales initiative through the development of sales campaigns and new business relationships. 10%
- Manage the development of new e-commerce website for [the petitioner]. 10%

The petitioner also provided an organization chart for the U.S. entity indicating the marketing manager position reports to the president of the company and will have three subordinate employees: a marketing assistant, marketing web developer, and a sales representative. The petitioner did not identify any of the employees by name.

The petitioner's federal and state quarterly employer tax returns show that the petitioner had one employee during the first, second, and third quarters of 2012. In a letter dated December 5, 2012, the petitioner explained that the company intends to hire two additional employees to fill the positions of marketing assistant and marketing web developer. The petitioner named the employees to be hired on or after January 1, 2013 and provided position descriptions for the two prospective positions. The petitioner also provided a

position description for a sales representative position with the percentages of time that the sales representative spends performing each duty per week. The petitioner did not specifically indicate that it currently employs a sales representative or identify this employee by name.

The duties of the sales representative were described as follows:

- Determine price schedules and discount rates. 10%
- Monitor customer preferences to determine focus of sales efforts. 5%
- Review operational records and reports to project sales and determine profitability. 5%
- Resolve customer complaints regarding sales and service. 5%
- Confer or consult with department heads to plan advertising services and to secure information on equipment and customer specifications. 10%
- Confer with potential customers regarding equipment needs and advise customers on types of equipment to purchase. 5%
- Direct and coordinate activities involving sales of manufactured products, services, commodities, real estate or other subjects of sale. 10%
- Direct, coordinate, and review activities in sales and service accounting and recordkeeping, and in receiving and shipping operations. 5%
- Advise dealers and distributors on policies and operating procedures to ensure functional effectiveness of business. 5%
- Keep records of export correspondence, bid requests, and credit collections, and to maintain current information on tariffs, licenses, and restrictions. 10%
- Prepare invoices for sales. 10%
- Assure timely delivery of merchandise to clients. 10%
- Assure timely delivery of imports and arrange for all necessary documents, bonds, and forms. 10%

The director denied the petition finding that the petitioner failed to establish the beneficiary would be working in a managerial or executive capacity. The director determined that the record indicated the beneficiary would be performing all the tasks required for marketing including non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary will be a functional manager of the petitioner's marketing component. Counsel also asserts that the beneficiary will perform executive duties because he will lead the implementation of marketing goals and policies in order to expand the petitioner's business, establish the goals and policies related to the marketing of the corporation, and will exercise wide latitude in decision making because the shareholders intend that he will improve the company's marketing in the United States. Counsel claims that the beneficiary will receive only general supervision from the board and will consult the board only when needed.

Upon review, counsel's assertions are not persuasive. The petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity.

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 in either an executive or a 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 organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The 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 position description indicates that the beneficiary will be involved a number of day-to-day operational activities that do not typically qualify as managerial or executive. For example, the petitioner states that the beneficiary coordinates and participates in promotional activities for products and services; selects products or accessories to be displayed at trade shows; develops sales campaigns and new business relationships; consults with buying personnel; evaluates financial aspects such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections; and arranges finances and productivity. The petitioner has failed to explain how the beneficiary's performance of the company's sales, marketing, financial, and administrative functions rises to the level of managerial or executive capacity. While performing non-qualifying tasks necessary to produce a product or provide a 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).

Several of the beneficiary's other proposed duties are described in broad terms potentially encompassing both qualifying and non-qualifying daily activities. For example, the petitioner states that the beneficiary's duties include: driving sales initiatives, evaluating the financial aspects of development, developing and implementing sales goals, exercising control over revenue generation, and developing and evaluating marketing strategy. These vague descriptors fail to explain the beneficiary's daily duties and activities with enough specificity to determine whether the activities qualify as managerial or executive in nature. 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative or operational duties. Although the petitioner provided the percentage of time per week the beneficiary spends on each described duty, as mentioned above the duties are described in broad terms that potentially include both qualifying and non-qualifying duties. A single percentage of time given to vague description that includes qualifying and non-qualifying activities is insufficient to establish how the beneficiary spends the majority of his time. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Although the petitioner asserts in response to the RFE that the beneficiary will spend all of his time performing managerial duties, the position description provided does not support this assertion, but rather indicates that the beneficiary also performs duties that do not typically qualify as managerial or executive in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner states that the beneficiary will direct marketing activities and policies, exercise control over revenue, control the budget, and exercise the full authority to hire and fire employees. Although these duties suggest the beneficiary will have authority and discretion as marketing manager; the petitioner has failed to show the beneficiary's actual day-to-day duties, as of the time of filing, would be primarily managerial or executive in nature, or that the beneficiary's daily activities 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").

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). Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve the supervision of employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The petitioner indicated on the Form I-129 that it has two employees; however, the petitioner's state and federal quarterly tax returns indicate that the petitioner has only one current employee. While the petitioner submitted an organization chart showing the beneficiary will have three subordinate employees and provided position descriptions, the petitioner also indicated that at least two of the three positions were not currently filled and would be hired at a future date. The petition must be considered based on the facts in existence at the actual time of filing the petition. 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). The petitioner did not indicate that the sales representative was a future hire, but it also did not submit evidence that it currently employs a sales representative. The only current employee identified by name in the record is [REDACTED] the petitioner's president.

As the petitioner failed to establish that any of the beneficiary's proposed subordinates were actually employed at the time of filing, there is no evidence that the beneficiary would qualify as a personnel manager. Instead, counsel asserts on appeal that the beneficiary will be employed as a function manager.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). 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, or other non-qualifying duties, 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).

In the present matter, the petitioner has not established that it will employ the beneficiary as a function manager. Counsel asserts that the beneficiary will manage the company's marketing function, but does not clearly describe the duties related the marketing function or establish the proportion of time the beneficiary would spend managing the essential function. Additionally, the record does not show that the petitioner has any other departments or employees responsible for other the non-marketing tasks associated with the ongoing operation of the U.S. company, including the logistic, administrative, and financial tasks. Without employees to perform the duties associated with the company's non-marketing functions, it is unclear how the beneficiary would be able to devote his time to managing the marketing function, instead it seems likely that the beneficiary would be responsible for the entirety of the petitioner's operation.

Further, the petitioner must still show that the beneficiary's duties will be primarily managerial. The record fails to demonstrate that the petitioner's staffing is sufficient to relieve the beneficiary from performing the non-qualifying operational duties. While there is no requirement that a function manager directly supervise a subordinate staff, the petitioner must still establish that someone other than the beneficiary is available to perform non-qualifying duties associated with the function he is claimed to manage, as well as other non-managerial duties required for the operation of the company. As discussed, the petitioner has documented wages paid to only one employee as of the date of filing, and the only current employee identified in the record is the beneficiary's proposed supervisor, the president. Even if the petitioner had documented its employment of the sales representative subordinate to the beneficiary, the position descriptions suggest the beneficiary and sales representative will share several similar responsibilities. Both positions' duties include: pricing, directing and coordinating marketing activities and policies, consulting with buying personnel, and arranging financing and productivity. The petitioner has not provided adequate descriptions to demonstrate how the beneficiary's duties differ from those of his proposed subordinate employee or that the sole subordinate employee would be sufficient to relieve the beneficiary from performing all non-managerial marketing, logistics, administrative, and financial tasks.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel asserts on appeal that the beneficiary will be employed in an executive capacity, largely reiterating the statutory definition of the term in support of his claim. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section

101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

As discussed, the petitioner has not established that any of the beneficiary's subordinates had been hired as of the date of filing. Therefore, it has not been established that the beneficiary will be able to primarily focus on broad goals and policies. In fact, the beneficiary's vague duties and lack of subordinate employees indicate that the beneficiary will be performing day-to-day operational duties. Counsel does little other than directly recite the statutory definition of "executive capacity." 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 Obaigbena*, 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). 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.). Therefore, the petitioner has not provided sufficient evidence to establish the beneficiary as an executive according to the Act.

The petitioner has failed to establish that the beneficiary with petitioner would be in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

#### B. Beneficiary's Employment Abroad

The next issue to be addressed is whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

The petitioner submitted a letter from the Chief Executive concurrently with the Form I-129, certifying that the beneficiary was employed by the foreign entity as the production and budget manager from January 2, 2010 until November 12, 2011. The letter states that the beneficiary was subordinate only to the Chief Executive and was responsible for the following:

- Exercise full authority of hiring and firing of employees;
- Arrange finances and productivity to maintain uninterrupted provisioning imported goods;

- Exercise strong control over revenue generation through sales proceeds and recoveries of sales;
- Control over budget for purpose of identifying new business and sales targets;
- Identify new business and sales targets;
- Develop and implement sales goals for the sales team;
- Drive the sales initiative through the development of sales campaigns and new business relationships
- Submit taxes to government and act as close liaison with Federal Board of Revenue of Pakistan (FBR);
- Internal and external auditing;
- Keeping liaison with banks for outstanding credit facilities and other banking affairs.

The petitioner claimed the beneficiary supervised twenty-one employees and submitted a list of names and position titles for the beneficiary's subordinate employees. The position titles include: chief tanner, pattern master, export manager, purchaser, store keeper, accountant, a supervisor, electrician, driver, packer, eight general workers, and three security guards.

The director requested additional evidence that the beneficiary was employed with the foreign entity in a primarily managerial or executive capacity. Specifically, the director requested, *inter alia*: (1) payroll documents as evidence of the beneficiary's employment abroad; (2) a foreign organization chart; (3) a letter from an authorized representative of the foreign entity describing the role of production/budget manager within the organization; (4) a letter from an authorized representative of the foreign entity articulating the managerial decisions made by the beneficiary on behalf of the foreign organization and the typical managerial responsibilities that were performed by the beneficiary abroad; and (5) short answers describing the number of subordinate supervisors under the beneficiary's management, the job titles and duties of the employees managed by the beneficiary, the type of executive, managerial, and/or technical skill required to perform the overseas duties, the amount of time the beneficiary allotted to executive/managerial duties and to other executive/managerial functions, and the degree of discretionary authority in day-to-day operations in the overseas job.

In response to the RFE, the petitioner provided a further description of the beneficiary's decisions and tasks while employed by the foreign entity, stating that the beneficiary:

- Established and maintained relationships with individual and business customers.
- Recruited staff members and oversaw training programs.
- Oversaw the flow of cash or financial instruments.
- Reviewed collection reports to determine the status of collections and the amounts of outstanding balances.
- Networked within communities to find and attract new business.
- Evaluated data pertaining to costs to plain budgets.

- Evaluated financial reporting systems, accounting or collection procedures and made recommendations for changes to procedures, operating systems, budgets, or other financial control functions.
- Developed and analyzed information to assess the current or future financial status of the organization.
- Analyzed and classified risks to determine their potential impacts on the organization.
- Reviewed operations and confer with technical or administrative staff to resolve production or processing problems.
- Reviewed processing schedules or production orders to make decisions concerning inventory requirements, staffing requirements, work procedures, or duty assignments, considering budgetary limitations and time constraints.
- Coordinated and recommended procedures for facility or equipment maintenance or modification, including the replacement of machines.
- Directed and coordinated production, processing, distribution, or marketing activities of industrial organizations.
- Developed and implemented production tracking or quality control systems, analyzing production, quality control, maintenance, or other operational reports, to detect production problems.
- Set and monitored product standards, examining samples of raw products or directing testing during processing, to ensure finished products are of prescribed quality.
- Instituted employee suggestion or involvement programs.
- Reviewed plans and confer with research or support staff to develop new products or processes.
- Developed budgets or approve expenditures for supplies, materials, or human resources, ensuring that materials, labor, or equipment are used efficiently to meet production targets.

Further, the petitioner stated that the beneficiary's position with the foreign entity required skills in management, production scheduling, budgeting, and a background in finance and that the beneficiary had complete discretion over the day-to-day operations necessary to fulfill his responsibilities and was only required to comply with the Board of Director's general goals and policies when establishing procedure and guidelines. The petitioner stated that the beneficiary managed employees to ensure they met budgeting requirements and production schedules; evaluated employees to justify promotions, transfers, and terminations; identified training needs; provided feedback to employees on their performance; met with employees to assure compliance with protocol, procedures, and production deadlines; and advised subordinate supervisors on better implementing his policies in their respective departments.

The petitioner submitted an organization chart for the foreign entity. The chart indicates that the company has six general levels of hierarchy: the Chief Executive Officer holds the highest level of authority; the second level consists of two directors and one export director; the third level is shared by the general

manager and production and budget manager; the accountant, chief tanner, store keeper, export manager, and pattern master are the fourth level; the fifth level is comprised of the permanent and contract workers; and the sixth level is the daily wage workers subordinate to the permanent workers. Counsel for the petitioner claimed that the accountant, chief tanner, store keeper, purchaser, export manager, and pattern master are professional employees, while the petitioner identified these positions as subordinate supervisors. The petitioner provided descriptions for each of these positions.

The petitioner also submitted a list of the foreign entity's employees. This document places the beneficiary on the Board of Directors as Export Director. The document names the manager, tanner, pattern master, purchaser, store keeper, and checker as permanent employees; eighteen additional permanent workers; and twelve stitching contractors. The document states that approximately fifty unnamed employees are classified as daily wage workers. The petitioner submitted pay records from the foreign entity for July 2012 through October 2012 identifying the names of twenty-four to twenty-five employees for each month. The pay records annotate the positions of manager, accountant, tanner, pattern master, purchaser, store keeper, and supervisor. Information for the beneficiary is not included on the pay records provided.

The director denied the petition finding that the petitioner failed to establish the foreign entity employed the beneficiary in a primarily managerial or executive capacity. The director noted that the petitioner failed to provide payroll documents to establish that the beneficiary was employed with the foreign entity from January 2000 until November 2011 as claimed. Further the director noted that the organization chart provided lacked clear cut lines of authority and that the record failed to establish the beneficiary's subordinate employees were professionals or that the beneficiary's position abroad was more than a first-line supervisor.

On appeal, counsel for the petitioner claims that the beneficiary is not a first-line supervisor. Counsel claims that the director failed to consider the beneficiary's supervision and control of other managerial or supervisory employees, explaining that the organization chart for the foreign entity demonstrates that the beneficiary's six subordinate employees supervise the work of permanent workers, contract workers, and daily wage workers.

Upon review, the petitioner failed to establish that the beneficiary has been employed in an executive or managerial capacity with a foreign employer for one continuous year in the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

Although specifically requested by the director, the petitioner failed to provide payroll documents or other objective documentary evidence to document the beneficiary's employment with the foreign entity. The payroll documents provided do not include any payments to the beneficiary or otherwise demonstrate his employment with the foreign entity. 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 evidence that was submitted fails to establish that the beneficiary was employed in a managerial or executive capacity. A letter from the chief executive of the foreign entity stated that the beneficiary was employed by the foreign entity as the budget and production manager. However, a list of the foreign entity's employees provided in response to the RFE names the beneficiary as the export director. A list of foreign entity's permanent employees and payroll documents do not include the position of production and budget manager. The organization chart shows that the production and budget manager is subordinate to the export director. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Furthermore, the position description submitted for the production and budget manager fails to provide sufficient detail to demonstrate the beneficiary's actual duties in his claimed role as production and budget manager. Many of beneficiary's broadly described duties significantly overlap with the accountant's duties. For example, the foreign entity stated that both positions are responsible for duties related to budgeting, creating financial reports, auditing, tax functions, and analyzing financial data. The organization chart indicates additional overlap with the duties of the general manager, as the six positions subordinate to the beneficiary's position are also subordinate to the general manager. No position description was provided for the general manager to explain the division of the duties or authority. It is unclear exactly what duties the beneficiary performed on a day-to-day basis and what duties were performed by these overlapping positions.

The vague description of the beneficiary's duties, inconsistencies in the record, and lack of requested evidence leave the AAO unable to determine that the beneficiary was employed by the foreign entity in a managerial or executive capacity for at least one year in the three years preceding his admission to the United States in November 2011. For this additional reason, the appeal will be dismissed.

### III. Qualifying Relationship

Although not addressed in the director's decision, the evidence of record does not establish that the petitioner has a qualifying relationship with the foreign entity.

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

\* \* \*

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

\* \* \*

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

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

The Form I-129 indicates that the petitioner is a subsidiary of [REDACTED] located in Pakistan. A letter submitted in support of the petition states that the petitioner and the foreign entity have a qualifying relationship through common ownership. The letter states the foreign entity is owned by [REDACTED] (90%) and their son, [REDACTED] (10%) and that the petitioner is owned by [REDACTED] (65%), [REDACTED] (10%), and [REDACTED] (25%).

The petitioner submitted a document filed with the Company Registration Office in Lahore, Pakistan. The document names the shareholders of the foreign entity as [REDACTED] (seven shares), [REDACTED] (two

shares), and [REDACTED] (one share). The document is not dated or signed, but was certified as a true copy in by the Deputy Registrar of Companies on September, 29, 2009.

The petitioner also submitted its IRS Forms 1120, U.S. Corporation Income Tax Return for the 2008 and 2009 tax years. Schedule K of the Forms 1120 for both years names the individual owners of the company as [REDACTED] (75%); [REDACTED] (20%); and [REDACTED] (10%). The Schedule K also indicates that a citizen of Pakistan owns 45% of all voting power or classes of stock. The tax returns further indicate that the company's sole officer, [REDACTED] owns 25% of the corporation's common stock.

The stock information submitted with petition contained the petitioner's Certificate of Incorporation dated February 25, 1997, authorizing issuance of 500 shares of common stock without par value, and the following seven New Jersey stock certificates dated March 1, 1998:

<u>Certificate No.</u>	<u>Name</u>	<u>Shares</u>
1	[REDACTED]	500
2	[REDACTED]	125
3	[REDACTED]	500
4	[REDACTED]	500
5	[REDACTED]	125
6	[REDACTED]	500
7	[REDACTED]	250

Each stock certificate indicates on its face that the company is authorized to issue 500 shares.

The RFE issued by the director instructed the petitioner to provide additional evidence to establish a qualifying relationship with the beneficiary's employer abroad.

In response, the petitioner provided further information regarding the U.S. corporation's stock ownership. The petitioner's 2010 U.S. corporate tax return names [REDACTED] (45%), [REDACTED] (20%), [REDACTED] (10%), and [REDACTED] (25%) as the individual owners of the corporate voting stock. Minutes from a March 1, 1998 shareholder's meeting state that the shareholders agreed to authorize and issue 2,500 shares of common stock without par value as follows: [REDACTED] 625 shares; [REDACTED] 1,125 shares; [REDACTED] 250 shares; [REDACTED] 500 shares.

The petitioner also provided 2010 and 2011 income tax returns for the foreign entity naming [REDACTED] (70%), [REDACTED] (20%), and [REDACTED] (10%) as the corporate shareholders.

Upon review, the evidence on record is insufficient to establish a qualifying relationship between the petitioner and the foreign entity.

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.

Although the petitioner claimed to be a subsidiary of the foreign entity, it claims common ownership and control by individual shareholders, not by the foreign entity itself. In order to qualify as a subsidiary of the foreign entity under the regulations, the foreign entity must have ownership and/or control of the petitioner. *See* 8 C.F.R. § 214.2(l)(1)(iii)(K). Therefore, the petitioner does not qualify as the subsidiary of the foreign entity.

To establish eligibility as affiliates, it must be shown that the foreign employer and the petitioning entity share common ownership and control.

The evidence indicates that three individuals own the foreign company and four individuals own the U.S. petitioner. Accordingly, the two entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity . . ." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2)(emphasis added). USCIS cannot accept 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. Although counsel claims that the petitioning company and the foreign company are both majority owned and controlled by members of the same family, this familial relationship does not constitute a qualifying relationship under the regulations. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family").

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.

The evidence on record suggests that [REDACTED] owns a majority interest in the foreign entity but holds only 45% of the U.S. entity. As such, no individual owns a majority interest in both entities, and the companies do not have a qualifying affiliate relationship.

Further, it is noted that the petitioner's U.S. tax returns from 2008 and 2009 contain inconsistencies. Schedule K of the Form 1120, U.S. Corporate Tax Return, for both years name the individual owners of the company as [REDACTED] (75%); [REDACTED] (20%); and [REDACTED] (10%). The tax return also states

that Ali Elleahi, owns 25% of the corporation's common stock. The total claimed ownership in the tax documents is 130%. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Based on the foregoing discussion, the petitioner has not established that it has a qualifying relationship with the foreign entity and the petition cannot be approved for this additional reason.

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).

#### IV. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.