

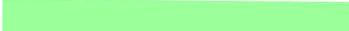


U.S. Citizenship  
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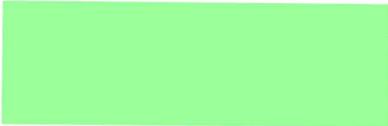


DATE: **FEB 08 2013** Office: VERMONT SERVICE CENTER FILE: 

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, a Texas corporation established in January 2011, states it is engaged in the transportation and truck sales business. It claims to be wholly owned subsidiary of [REDACTED] located in El Salvador. The petitioner seeks to employ the beneficiary as the Manager of a "new office" in the United States for a period of one year.

The director denied the petition concluding that the petitioner had failed to establish that it had secured sufficient premises to house a new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The director reasoned that the property rented by the petitioner was only 146 square feet and therefore insufficient for the twelve employees the petitioner planned on hiring during the first year of operations. Further, the director determined that the beneficiary had not shown that the beneficiary acted primarily in a managerial or executive capacity with the foreign employer due to insufficient evidence on the beneficiary's subordinates provided on the record. Lastly, the director concluded that the petitioner also did not establish that the beneficiary was likely to act primarily in a managerial or executive capacity with the petitioner after one year of operation as required by the Act.

On appeal, counsel asserts that the petitioner owns several multifaceted properties in the United States, but has not had an opportunity to fully develop such properties necessary for the operation of its trucking business and claims that the beneficiary is currently "working out of a trailer." Additionally, counsel argues that the petitioner has provided sufficiently comprehensive descriptions of the beneficiary's duties that clearly establish him as a manager or executive supervising professional employees and exercising full discretion over a multi-million dollar business.

### **I. The Law**

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

## II. The Issues on Appeal:

### A. Employment with the foreign employer in a managerial or executive capacity:

As noted, the director denied the petition, in part, based on the petitioner's failure to establish that the beneficiary acted primarily in a managerial or executive capacity with the foreign employer. Upon review of the record, and for the reasons discussed herein, the petitioner has not established that 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 as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

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.

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.* In the instant matter, the petitioner has not provided a sufficient description of the beneficiary's foreign job duties, nor sufficient supporting documentary evidence related thereto, but only vaguely asserts that the beneficiary manages the foreign employer as its sole owner. The director was well aware of this inadequacy in the record and in the Request for Evidence (RFE) asked that the beneficiary provide various types of evidence necessary to determine whether the beneficiary was acting in a managerial or executive capacity with the foreign employer, including: (1) the typical managerial responsibilities performed by the beneficiary; (2) the method of the beneficiary's evaluation of his foreign subordinates; (3) the managerial decisions made by the beneficiary with the foreign employer; (4) the job duties and education levels of the beneficiary's foreign subordinates; (5) the executive and technical skills the beneficiary was required to perform with the foreign employer; (6) the amount of time the beneficiary allotted to executive duties versus non-executive functions; and (7) the level of discretionary authority the beneficiary held over the day-to-day operations of the foreign employer. However, as noted, the beneficiary did not sufficiently provide the information above. In fact, the petitioner provides little regarding the beneficiary's foreign employment other than that he owns the foreign employer and that he was paid by the same from January 2010 through August 2011. 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 actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Further, 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).

Additionally, the definitions of executive and managerial capacity 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 prove 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). Yet, the petitioner has not submitted sufficient evidence related to the beneficiary's foreign employment to make such a determination. An individual will not be deemed a manager or executive under the statute simply because they have a managerial or executive title or because they are claimed to direct the enterprise as the owner or sole managerial employee. It is the petitioner's burden to show with specific duty descriptions and documentary evidence that a beneficiary acts primarily as a manager or executive with a foreign employer. *See* 8 C.F.R. § 214.2(l)(3)(ii) However, as noted, the petitioner has submitted almost no evidence to establish this requirement. As such, due to the lack of evidence provided by the petitioner regarding the beneficiary's foreign employment it cannot be found that the beneficiary was primarily employed in a managerial or

executive capacity with the foreign employer for one continuous year in the three year period preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(A). For this reason, the appeal must be dismissed.

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

As noted, the director also denied the petition based on the petitioner's failure to establish that the beneficiary would act primarily in a managerial or executive capacity with the petitioner after one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C). Upon review of the record, and for the reasons discussed herein, the AAO concurs with the decision of the director that the petitioner has not established that the petitioner would be likely to support the claimed executive or managerial role of the beneficiary within one year.

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.*

As previously noted, 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(1)(3)(v).

In support of the I-129 Petitioner for a Nonimmigrant Worker, the petitioner submitted the following duties for the beneficiary with the petitioner:

- Managing the overall performance of the company.
- Marketing.
- Selection of the appropriate vendors, and monitoring financial performance of the company.
- Directing the recruitment, interviewing, hiring, motivation, and evaluation of staff.
- Controlling fiscal aspects of business operations and meeting financial goals.
- Coordinating work schedules.
- Managing the preventative maintenance and upkeep of equipment, facility, and grounds.
- Ensuring a safe workplace and pleasant customer service experience.
- Supervise daily operations, creating policies and delegating how materials and human resources are utilized.
- Develop annual facility budget and ensure group adherence to budget.
- Direct and assign work; set performance objectives and monitor performance of all warehouse departments.
- Manage all truck yard activities, costs, operations and forecasts. Monitor progress towards goals.
- Secure additional business and maintain positive relationships with customer's success.

Subsequently, the director requested additional information in the RFE regarding the beneficiary's offered employment with the petitioner necessary to establish that he would be employed in a managerial or executive capacity. In response, the petitioner submitted the following job duty description for the beneficiary with the petitioner:

- Manage the professional development of the company in the automotive area.
- In charge of the planning and development and entrepreneurial strategies which will make [the petitioner] an alternative in the automotive area.
- Make sure that the entire work team is acquainted with the company vision and mission statements and all goals established in its five year plan.

- As the owner and main investor of [the petitioner], he's in charge of identify [sic] situations that may present and solve these issues in the shortest time possible, this way the company will reach all financial and corporate development goals.
- He will establish commercial relationships with banks as well as providers at the business level.
- Immerse himself in all different information available to him in order to maintain an active management when it comes to price/cost area.
- Will make sure that all personnel working for [petitioner] has [sic] good working conditions so that they can improve their quality of life.

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 provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his daily duties. For instance, the petitioner does not provided specifics on what development and entrepreneurial strategies will be undertaken; vision and mission statements will be articulated; financial and corporate development goals that will be driven; prices and costs that will be monitored; or actions that will be taken to improve the quality of the lives of the beneficiary's claimed subordinates. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner has submitted two completely conflicting job duty descriptions which bear little relation to each other. In fact, the second job duty description submitted in response to the RFE mentions few of the duties originally offered by the petitioner in the original duty description; such as, but not necessarily limited to, the following: (1) marketing; (2) monitoring financial and fiscal performance; (3) directing all recruitment; (4) controlling finances of the petitioner; (5) coordinating work schedules of employees; (6) managing preventive maintenance of petitioner property; (7) supervising daily operations of the petitioner; and (8) managing truck yard activities. The petitioner has provided no explanation as to the drastically different job duty descriptions submitted on the record, casting doubt on their credibility. 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).

Additionally, 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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important as several of the beneficiary's listed duties in both job duty descriptions do not fall directly under traditional

managerial duties as defined in the statute, such as coordinating work schedules; managing preventative maintenance of equipment; ensuring a safe workplace; supervising daily operations; directing and assigning operational duties; managing the day-to-day operations of truck yards; and monitoring daily cost and pricing data. In total, it appears the majority of the beneficiary's duties would be directly related to the day-to-day operations of the business. 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 International*, 19 I&N Dec. 593, 604 (Comm'r 1988). Therefore, due to the predominance of non-qualifying duties and the petitioner's failure to document which duties are managerial or executive, the AAO cannot determine whether the beneficiary will be primarily performing the duties of a manager or an executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Thus, while some of the duties described by the petitioner may generally fall under the definitions of managerial or executive capacity, the contradictory nature of the two duty descriptions provided on the record, the vagueness of the provided duties, and the predominance of non-managerial and non-executive duties in the initial description raise 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 sufficient evidence to document its business and hiring plans during the first year. For instance, the petitioner states that it plans on hiring 12 employees during the first year, 10 of which will be engaged in "mainline operations" and two in the management area. However, the petitioner has provided almost no information on these subordinates including their job duties, education levels, or salaries; despite being specifically requested to provide this information by the director. Again, 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). In fact, the organizational chart provided by the petitioner stands in direct contradiction to the petitioner's stated hiring plans as it reflects only five additional employees other than the petitioner. Over, 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, the petitioner has not provided sufficient evidence to support the assertion that the petitioner will hire employees subordinate to the beneficiary within the first year necessary to relieve the beneficiary from performing primarily operations duties. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Further, the AAO's analysis of the viability of the new business is severely restricted by the petitioner's failure to submit a credible business plan. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

*Id.*

In this matter, the petitioner has not provided a credible business plan to sufficiently establish that the U.S. employer will support a manager or executive within the one year timeframe. In the provided business plan, the petitioner has not provided any financial information or viable projections related to the business. In fact, the petitioner's "five year plan" provides little beyond vague generalities and includes little in the way of specifics regarding the business. Indeed, it is not even clear from the business plan the specific nature of the business the petitioner will be conducting during the first year of operations. 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 noted, the petitioner provides an organizational chart in the business plan that illustrates five employees other than the petitioner, in direct contradiction to the petitioner's previous assertion that it will be hiring 12 employees during the first year. Further, this offered organization chart in the business plan does not show any employees needed to perform the actual day-to-day duties presumably required to run a trucking business, such as mechanics and drivers. Therefore, the petitioner's business plan is not credible and does not support the claim that the petitioner will support the beneficiary in a managerial or executive capacity after one year.

On appeal, counsel asserts that the beneficiary is clearly established as supervising professionals and therefore a personnel manager pursuant to the Act. 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). The petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. 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). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The AAO notes that the petitioner does not claim that the beneficiary's subordinates have subordinates of their own; therefore they cannot be supervisors or managers according to the Act but can only be established as professionals to qualify the beneficiary as a personnel manager under the Act. Additionally, as noted previously, the petitioner has not provided any details regarding his planned subordinates, such as their job duty descriptions or education levels, despite being specifically requested to do so by the director. Due to the insufficiency of the evidence presented regarding the beneficiary's subordinates, it cannot be determined that the beneficiary will manage professionals. Therefore, the AAO cannot conclude that the beneficiary will act as a personnel manager as asserted by counsel.

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 contradictory and vague duty descriptions submitted for the beneficiary; the predominance of non-qualifying duties included in the beneficiary's duty description; a lack of specificity regarding the petitioner's business and hiring plans; and a failure to show that sufficient managerial or professional employees will exist after one year to relieve the beneficiary from performing non-qualifying duties. For this additional reason, the petition cannot be approved.

### C. Sufficient physical premises to house the new office

The director also dismissed the petition due to the petitioner's failure to show that it had secured sufficient premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The AAO concurs with the director's decision due to insufficient evidence on the record related to the petitioner's various properties necessary to confirm that such are sufficient for the new business to commence business immediately upon approval of the petition.

When a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. 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 commence business. See 8 C.F.R. § 214.2(l)(3)(v)(A). In support of the I-129

Petitioner for a Nonimmigrant Worker, the petitioner submitted a lease dated July 1, 2011 claiming to secure 146 square feet of office space located at [REDACTED] Houston, TX. Based on a floor plan of the lease, the leased premises is one office amongst twelve others on the third floor. The director specifically requested in the RFE that the petitioner provide pictures of the exterior and interior of this property to confirm its use for the purposes claimed by the petitioner. However, the petitioner provided no such pictures to confirm the property would be ready to commence business immediately or house the twelve additional employees the petitioner claims to be hiring in the first year of operation. Again, 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). Indeed, on appeal, the petitioner suggests that this property is not ready for the immediate commencement of business as the petitioner claims to be currently working out of trailer at an unidentified location, and admits on the record that its various properties are left undeveloped. Further, the petitioner provides no information as to the extent or location of the aforementioned trailer and whether such would be sufficient to accommodate the petitioner's plans to hire twelve employees in the first year. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner further submits evidence confirming that the petitioner holds title to various properties in Houston, TX, including: (1) [REDACTED] (2) [REDACTED] In the record, the petitioner clarifies that it plans to use the [REDACTED] for the sale of heavy transportation equipment and the property at [REDACTED] as a truck yard. But, pictures submitted on the record suggest that the aforementioned [REDACTED] is completely vacant and undeveloped. In fact, the petitioner admits this on appeal and submits apparent plans to build offices at this location. However, the record provides no specifics regarding the plans at this location, such as how long the building of offices will take, or when the location will be ready to commence the sale of heavy transportation equipment. As such, it is not possible to conclude that the property is indeed sufficient to commence doing business immediately upon approval. Further, the petitioner provides almost no information on the property at [REDACTED] to confirm that it is sufficient for use as a truck yard, such as square footage, pictures, maps, or floor plans. Lastly, the record includes no information on the purpose of the property at [REDACTED] as it relates to the petitioner's business operations. In fact, a map of the property provided on the record shows this is a residence not likely zoned for commercial use, casting doubt as to whether it will be used at all by the petitioner for business purposes.

It is the petitioner's burden to clearly articulate that it has acquired sufficient premises to commence the new venture immediately through a thorough explanation of its business plans and details as to why its offered premises are sufficient for these purposes; appropriately supported by documentary evidence. In the present matter, the petitioner has not met this burden, as almost no information is provided as to the petitioner's plans at the listed properties beyond vague, and unsupported, generalities. In fact, as mentioned, the petitioner admits on appeal that its properties are left undeveloped and thereby insufficient to commence business immediately. Therefore, the petitioner has not established that it has secured

sufficient premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). For this additional reason, the appeal must be dismissed.

#### D. Qualifying relationship

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).

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). In the I-129 Petitioner for a Nonimmigrant worker, the foreign employer is listed as [REDACTED] and is described as an affiliate company of the petitioner. However, elsewhere on the record, the petitioner offers that the beneficiary owns and manages several service stations in El Salvador under the name [REDACTED] which are incorporated under the name of [REDACTED]. However, the record includes no documentation to support these claims or to confirm that the foreign entities exist and that the beneficiary owns either claimed entity. Indeed, no documentary evidence is provided to even establish that the beneficiary owns the petitioner as claimed. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Therefore, due to contradictions presented on the record related to the identity of the foreign employer and insufficient evidence of the ownership interests in any of the entities presented on the record, 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 appeal must be dismissed.

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.

(b)(6)

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**ORDER:** The appeal is dismissed.