



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 03 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:

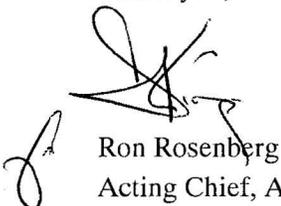
[REDACTED]

INSTRUCTIONS:

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

If you believe the 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 seeks to extend the beneficiary's employment as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Texas corporation established in 2010. It provides fitness education programs for children ages two to eight. The petitioner claims to be a subsidiary of [REDACTED] based in South Africa. The United States Citizenship and Immigration Services (USCIS) previously granted the petitioner an L-1A visa on behalf of the beneficiary in order for him to open a new office in the United States. The petitioner then applied to extend the beneficiary's status in order for him to serve an additional three years in the position of President.¹

The director denied the petition, finding the petitioner failed to establish: 1) that it will employ the beneficiary in a primarily managerial or executive capacity; and 2) that a qualifying relationship exists between the petitioner and the foreign entity. The director concluded that the beneficiary would primarily perform the everyday tasks of running the business and was therefore not a function manager, as claimed by the petitioner. The director also stated that, given the petitioner's status as a franchise, it did not provide sufficient evidence that the foreign entity has ownership and control.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO. On appeal, counsel for the petitioner submits a brief and additional evidence. Counsel asserts the petitioner has established: 1) that the beneficiary will be employed as a manager; and 2) that a qualifying relationship exists between the petitioner and the alleged South African parent.

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:

¹ An extension may only be authorized in increments of two years. 8 C.F.R. § 214.2(l)(15)(ii).

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(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.

Further, the regulation at 8 C.F.R. 214.2(I)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition must include the following with the Form I-129 petition:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The director denied the instant petition, in part, based on a finding that the petitioner would not employ the beneficiary in a qualifying 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.

The director also denied the petition, in part, due to the finding that the petitioner failed to show that a qualifying relationship exists between the petitioner and the foreign entity as defined in 8 C.F.R. § 214.2(l)(1)(ii):

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(I) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (I)(1)(ii) of this section;

...

(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, 50 percent of a 50-50 joint venture and has equal control and veto power of the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

II. The Issues on Appeal

The director denied the instant petition, finding that the petitioner failed to establish: 1) that it will employ the beneficiary in a primarily managerial or executive capacity; and 2) that a qualifying relationship exists between the petitioner and the foreign entity.

The petitioner is in the business of providing educational physical education programs for children ages two through eight. On its Form I-129, Petition for a Nonimmigrant Employee, the petitioner claimed to have four employees. It stated it is a subsidiary of the South African company, [REDACTED] which is its 51% owner. According to the petitioner, the foreign entity employed the beneficiary as Human Resources, Compliance, and Financial Manager from 2007 until his transfer to the United States in 2010.

In a letter accompanying the petition, the petitioner stated that the beneficiary will primarily do the following in the proposed position of President/ Human Resources, Compliance and Financial Manager:

- (1) Manage the organization, or a department, subdivision, function, or component of the organization;
- (2) Supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function within the organization, or a department or subdivision of the organization;

- (3) Have the authority to hire and fire or recommend those as well as other personnel actions . . . if another employee or other employees are directly supervised; if no other employee is directly supervised, function at a senior level within the organizational hierarchy or with respect to the function managed; and
- (4) Exercise discretion of 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.

The petitioner also listed the following duties, with the percentage of time that each will require

HUMAN RESOURCES – 25%

- Implementing Strategies and Policies relating to the Management of individuals.
- At a senior level, manage and coordinate administrative activities over a range of worker-related processes, including, salaries and labor-related issues;
- Exercising discretion over the organization's human capital and minimizing financial risk; and
- Oversee and direct employment of skilled and qualified individuals to enforce the organization's ongoing and future business plans.

Key functions also include:

1. Recruitment and Resource;
2. Organizational Development;
3. Personnel Data Management;
4. Compensation and Incentive Management;
5. Training and Development of Administrative Staff;
6. Performance, Conduct and Behavior Management; and
7. Implementation of policies, processes and standards.

COMPLIANCE – 30%

- Exercising discretion to ensure safe working conditions;
- Perform inspections at a senior level to ensure that health and safety standards are being met;
- Manage the review of business practices for Health and Safety and Franchise standards;
- Exercise discretion in evaluating the financial transactions of the company; and

- At a senior level, monitor insurance policies and public liability.

STRATEGIC PLANNING – 15%

- Manage the structuring of efforts to identify the direction that the [REDACTED] organization will pursue, and how that direction will allow us to achieve the short-term and long-term goals;
- Conduct constant assessment at his discretion of the franchise's strengths and weaknesses, and adjusting our organization accordingly;
- Exercise discretion over the establishment and implementation of the mission statement, along with the vision statement; and
- At a senior level, implement policies, procedures, and specific activities that relate back to the ultimate goals of our organization.

COST CONTROL AND FINANCIAL DUTIES—20%

- Manage financial, budget and accounting duties to ensure that we remain within budgetary limits;
- At a senior level, conduct credit control and expenses;
- Excursive discretion over the recording of business activities and preparation of periodic financial reports to inform co-management about progress; and
- Compare budget amounts to actual expenses.

UPDATING OF MANUALS AND GENERAL OFFICE WORK—5%

- [E]xercise discretion to establish Lesson plans per school term;
- At a senior level, design lessons to relate to all areas of a child's development;
- Manage the planning of age appropriate lessons;
- Research and correspond with specialists regarding the child development and school readiness; and
- Distribute equipment that correlated with the weekly programs.

GENERAL OFFICE WORK—5%

- Manage administrative staff;
- Manage weekly meetings;
- Media and Publicity; and Organize Promotions.

The petitioner's letter further stated it plans to hire additional staff and management as it expands, and that the beneficiary's role will evolve as the petitioner hires new employees.

Accompanying the petitioner, the petitioner submitted numerous documents. These included the beneficiary's resume, a 2010 business plan for the petitioner, and letters and lists of students from the schools and preschools at which the petitioner offers its services. The petitioner submitted a

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list of enrollment numbers which listed 401 students. The petitioner submitted numerous pictures and brochures showing the petitioner's equipment and how it is used by children. It also provided copies of lesson plans, which indicate they were copyrighted in 2011 by [REDACTED]

The minutes from the petitioner's organizational meeting on May 6, 2010 list the beneficiary as President, Secretary, and Treasurer. The beneficiary and [REDACTED] are listed as shareholders and the percentage of ownership next to each of their names is listed as "?????????" with 50% handwritten next to each name. The minutes are signed by the beneficiary and dated August 13, 2010.

The petitioner submitted a Membership Certificate Transfer Agreement dated November 29, 2010 which states that the present members, listed as the beneficiary and [REDACTED], will each transfer 25½ out of his 50 certificates to the new member, listed as [REDACTED]. The petitioner also provided a document entitled "Irrevocable Stock Power of Attorney" for both the beneficiary and [REDACTED] indicating that each transferred 25½ certificates of interest in the petitioner to [REDACTED]. This transfer is also reflected in the stock certificate ledger.

The petitioner submitted a certificate of ability to pay the beneficiary's proffered wage of \$50,000 per year. The petitioner also provided a list of employees for January 2012. The list shows the beneficiary as President/Director, [REDACTED] as Senior Instructor/Manager, and [REDACTED] and [REDACTED] as Qualified Instructors.

Internally-produced direct deposit records show the beneficiary received the following amounts in 2011:

10/28/2011: \$2,500
10/28/2011: \$1,000
11/11/2011: \$1,000
11/25/2011: \$3,500
12/09/2011: \$1,000

For [REDACTED] the petitioner submitted an employment contract dated October 1, 2011 and a Form W-4, Employee's Withholding Allowance Certificate, dated October 3, 2011. Internally-produced direct deposit records show the petitioner paid [REDACTED] the following amounts in 2011:

10/14/2011 \$470
11/11/2011 \$490
11/25/2011 \$490
12/09/2011 \$490

For [REDACTED] the petitioner submitted an employment contract and a Form W-4, Employee's Withholding Allowance Certificate, dated October 25, 2011. Internally-produced direct deposit records show the petitioner paid [REDACTED] the following amounts in 2011:

10/28/2011 \$350
11/11/2011 \$360
11/25/2011 \$360
12/09/2011 \$360

For [REDACTED], the petitioner submitted an employment contract and a Form W-4, Employee's Withholding Allowance Certificate, dated October 28, 2011. Internally-produced direct deposit records show that the petitioner paid [REDACTED] the following amounts in 2011:

11/11/2011 \$315
11/25/2011 \$315
12/09/2011 \$315

The petitioner provided a company profile for its franchisor, [REDACTED], stating that all distributed documentation is the sole property of the franchisor. The profile states this documentation includes the business plan, franchise agreement, training manuals, and lesson plans. The profile also provides the following information:

Movement Education Course

The minimum qualification for any instructor working in the field is the internal ME Course presented bi-annually by a representative of the franchisor. This course is compulsory for all new instructors to attend before they start teaching classes. A certificate is presented by the franchisor to all delegates successfully completing this course.

The petitioner provided a certificate indicating that the beneficiary completed the [REDACTED] Instructor Accreditation Course held from January 9 through January 14, 2007.

The director issued a Request for Evidence (RFE) instructing the petitioner to provide further information regarding several aspects of the petition including, *inter alia*, details regarding the beneficiary's duties in the past year and in the future, as well as evidence that the foreign entity has ownership and control of the petitioner by providing, for example, a copy of the franchise agreement.

In response to the RFE, the petitioner submitted a brief and additional evidence. In the brief, counsel stated that the beneficiary has served and will continue to serve in a function manager capacity. Counsel indicated that the beneficiary serves as President and Human Resources, Compliance, and Financial Manager and that the beneficiary's "specific senior level job duties fall

under the areas of Human Resources, Compliance, Strategic Planning, Cost Control/Financial, and Administration (Marketing and Public Relations)." For these positions, the petitioner primarily repeated the same duties previously provided. For the positions of Human Resource Manager, Compliance Manager, and Financial Manager, the petitioner added the positions' definitions from the Department of Labor's Occupational Handbook. It also provided the following elaboration for the position of Human Resources Manager:

For example, as a franchise of [REDACTED], it requires "accredited instructors" in order to operate. It has been and continues to be [the beneficiary] that is solely responsible for overseeing the implementation of the "New Instructor Accreditation Course" and discretionary adjustment of the "Lesson Plan Curricula" to further promote the company's growth and appeal to the local market. These are complex documents that require hundreds of man-hours to implement to ensure with the efficacy [sic] of the [petitioner's] brand. Instructors must be fully trained in [the petitioner's] proprietary methods of instruction and lesson plan curricula in order to successfully execute [the petitioner's] business operations. Additionally, [the beneficiary] ensures that his instructors pass criminal background and health checks as the operation serves children.

Counsel for the petitioner stated that the beneficiary is responsible for recruiting and hiring employees. This includes conducting interviews, contacting references, performing background checks, deciding whether or not to make an offer of employment, conducting orientation, and completing all financial paperwork. In addition, the beneficiary holds mandatory employee meetings every Friday at noon, at which time he distributes the schedules that he previously prepared. Counsel further stated that the petitioner had five instructors for the second quarter of 2012, but stated that two are on maternity leave.

The petitioner also submitted its Employer's Quarterly Tax Return for the first and second quarters of 2012. The Return for the first quarter of 2012 states the petitioner paid one employee \$4,490. However, the summary of funds immediately thereafter indicates the petitioner paid three employees the following amounts: [REDACTED] received \$3,810, [REDACTED] received \$360, and [REDACTED] received \$320. The Return for the second quarter of 2012 states the petitioner paid three employees a total of \$5,556.50. However, the summary of funds immediately thereafter indicates the petitioner paid four employees the following amounts: [REDACTED] received \$529.50, [REDACTED] received \$565.25, [REDACTED] received \$4,093.75, and [REDACTED] received \$368.00.

The petitioner provided an ownership chart showing the ownership of both the foreign entity and the petitioner. The chart shows that the foreign entity is owned by the beneficiary (20%), [REDACTED] (20%), [REDACTED] (30%), and [REDACTED] (30%). It then shows that the petitioner is owned by the foreign entity (51%), the beneficiary (24.5%), and [REDACTED] (24.5%).

The director denied the petition, finding that the petitioner did not establish 1) that it would employ the beneficiary in a qualifying capacity, and 2) that the foreign entity has the requisite control over the petitioner. Regarding the beneficiary's employment capacity, the director stated: "[it] appears the beneficiary performs all the managerial tasks of the organization and all of the everyday tasks of running the business outside of providing instruction to the children enrolled in the program." With regard to the issue of ownership and control of the petitioner, the director noted that the petitioner failed to provide the franchise agreement, although it was specifically requested in the RFE. The director found that, without this document, he could not determine the nature of the relationship between the petitioner and the franchisor, and therefore could not determine that the foreign entity had sufficient control of the company. In addition, the director noted that the beneficiary's 2011 income tax returns show that he received all of the petitioner's profits that year.

The petitioner submits a timely appeal accompanied by a brief and additional evidence. In the brief, counsel for the petitioner alleges that the director erred in his findings in that he failed to recognize that the majority of the beneficiary's duties are managerial in nature. The petitioner provided a franchise agreement showing that [REDACTED] licensed a [REDACTED] franchise for the [REDACTED] Texas area on February 8, 2010. The agreement includes a resolution signed by the other members of [REDACTED] authorizing the beneficiary to make financial decisions and sign on behalf of all members of the corporation.

Counsel for the petitioner asserts that the Vermont Service Center lacked a proper basis to issue the RFE because the petitioner already submitted sufficient evidence to demonstrate the beneficiary's eligibility.

In addition, counsel submits the franchise agreement between [REDACTED] as franchisee and [REDACTED] as franchisor. The franchise agreement is dated February 8, 2010 and contains certain standard franchise restrictions, such as those stating that the franchisee cannot advertise or enter agreements with co-franchisees without the written permission of the franchisor. The agreement lists the franchise area as [REDACTED] Texas and four of the surrounding counties.

In his denial, the director noted that the beneficiary claimed 100% of the petitioner's profits on his individual tax returns. The director reasoned that this indicated [REDACTED] the claimed parent, did not in fact have ownership and control over the petitioner. On appeal, the petitioner attributes the error to a mistake of its tax preparer and submits an amended 2011 income tax return for the beneficiary. The beneficiary's amended returns show he received \$11,126 as a 24.5% shareholder, as opposed to the 100% of the profits on the previous return. The petitioner's 2011 income tax shows ordinary business income of \$45,412. The resubmitted 2011 Schedule K-1s show the owners of the petitioner as the beneficiary (24.5%), [REDACTED] (24.5%), [REDACTED] (25.5%), and [REDACTED] (25.5%).

The petitioner also provides schedules and information for the First Annual North American [REDACTED] held on May 24, 2012. It submits receipts for rental accommodations in [REDACTED]. The agenda for the conference shows that the second day is reserved for new instructor training. No other information was provided regarding conference and training attendance.

III. Analysis

Upon review, the petitioner's assertions regarding the managerial capacity of the beneficiary's employment are not persuasive. For that reason, the petitioner's appeal is dismissed.

The petitioner's assertions regarding the ownership and control of the beneficiary are persuasive, and the director's finding on that issue alone is withdrawn.

Due to the petitioner's failure to establish that the beneficiary will be employed in a primarily managerial or executive capacity, the appeal is dismissed.

Managerial or executive capacity

The petitioner asserts that the beneficiary is a functional manager in that he performs the tasks necessary for several essential functions of the business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description that clearly explains the duties to be performed in managing the essential function, *i.e.* identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii).

When examining the managerial or executive 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 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 addition, the definitions of executive and managerial capacity have two parts. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in

the definitions. Second, the petitioner must prove the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The first of the petitioner's initial list of the beneficiary's job duties is taken verbatim from 8 C.F.R. § 214.2(l)(1)(ii)(B), which provides the definition of managerial capacity. Merely repeating the language of the statute or regulations is insufficient and will not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner thereafter expanded on the list and named several different functions the beneficiary will manage: human resources (30%), compliance (30%), strategic planning (15%), cost and control of financial duties (20%), updating of manuals and general office work (5%), and general office work (5%). The petitioner also claims that the beneficiary will fulfill the role of President. Under each of the functions, the petitioner listed several duties, reproduced in the previous section above.

Although the petitioner lists duties under each of the roles the beneficiary will perform, the descriptions lack specificity and fail to describe what the beneficiary will actually do on a daily basis. For example, the petitioner states that the beneficiary will manage the company's human resources by "implementing strategies and policies relating to the management of individuals," "managing and coordinating administrative activities over a range of worker related processes," "exercising discretion over the organization's human capital" and "overseeing the employment of skilled individuals to enforce the organization's plans." Based on these descriptions, it unclear what the beneficiary will actually do to perform the listed duties. 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, supra*. 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 actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

The RFE identified the problem of specificity and instructed the petitioner to provide additional details regarding the beneficiary's listed duties. For the position of human resources manager, the petitioner added the definition of human resources manager provided in the Department of Labor's Occupation Outlook Handbook. Such a response is misguided in that the RFE requested additional detail regarding what the beneficiary will do, not further detail regarding the definition of the claimed position. As previously noted, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

In addition, the petitioner claims that the beneficiary is responsible for the new employee training materials which requires "hundreds of man hours" to implement. The petitioner submitted an

example of the curriculum for one such course. However, the material is produced and copyrighted by the franchisor for use by all franchisees. The franchise agreement specifically states that such lesson plans are the property of the franchisor. There is no indication that the beneficiary had any role in the material's development. As a result, it is unclear how the documents require hundreds of the beneficiary's hours to implement. 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 (BIA 1988).

Despite this elaboration into the beneficiary's role as the human resources manager, the petitioner did not explain what the beneficiary will actually do for these cited duties. The petitioner states that there is a new instructor course which is "implemented and directed" by the beneficiary. However, this statement is complicated by the petitioner's franchise agreement, which states that only the franchisor, [REDACTED] can conduct the new instructor course. It is therefore unclear what the beneficiary actually does to implement or direct the course. In addition, although the petitioner provided an instructor accreditation certificate for the beneficiary, he did not provide such a certificate for any of the petitioner's other employees.

As stated in counsel's brief, the franchise agreement with [REDACTED] is specific in that it requires:

"accredited instructors" in order to operate. It has been and continues to be [REDACTED] that is solely responsible for overseeing the implementation of the "New Instructor Accreditation Course" and discretionary adjustment of the "Lesson Plan Curricula" to further promote the company's growth and appeal to the local market.

...
[the petitioner] requires every instructor to successfully complete their "New Instructor Accreditation Course." As previously mentioned, this is a labor intensive responsibility that is vital to [the petitioner's] business model and this course is implemented and directed by the [beneficiary].

Based on both the language of the franchise agreement and the petitioner's characterization, it is clear that the petitioner's courses may only be taught by certified instructors. The evidence submitted by the petitioner contains only one certification: that of the beneficiary. The petitioner provided an agenda and evidence of rental accommodations for a franchise conference held in May 2012. However, the petitioner did not provide evidence that any of the petitioner's other employees received the necessary teacher certification.² It is incumbent upon the petitioner to

² In addition, the AAO notes that, even if the petitioner's employees did receive teacher certification at the May 2012 conference, this occurred after the January 2012 submission of the initial petition, at which point the petitioner was already claiming that the beneficiary did not teach the classes himself, but merely supervised the instructors.

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).

Counsel for the petitioner stated that the beneficiary's role will evolve into an increasingly executive position as more of the functions he oversees are transitioned to other managers. This may be the case, however, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus the AAO must evaluate the beneficiary's role with the petitioner as it is currently, and not after additional employees are hired.

In this case, the lack of certified instructors combined with the the small size of the petitioner's staff is problematic. 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, 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., *Family Inc. v. USCIS*, 469 F.3d 103 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *id.*

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the staffing structure of the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as

opposed to 90 percent. However, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008). The petitioner must therefore demonstrate that the beneficiary will spend more than 50% of his time acting in a qualifying capacity.

The petitioner's primary purpose is to provide physical education courses for children. As stated above, only certified instructors can run these classes. The petitioner has only provided evidence of the beneficiary's accreditation. It is therefore unclear how anyone other than the beneficiary is in charge of running the classes. Furthermore, the list of the beneficiary's job duties makes no reference to the actual teaching of classes. This significant omission raises doubt to the validity of the job duties presented. 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, supra*.

To qualify as a function manager, the petitioner must demonstrate that the beneficiary spends his time primarily managing an essential function of the petitioner's business. In this case, the petitioner does not identify one essential function for which the beneficiary is responsible. Instead, the petitioner states that the beneficiary manages six functions and also serves as President. The petitioner does not allege that the beneficiary will spend the majority of his time on any one of the six functions. This is problematic. The petitioner cannot qualify as a function manager by claiming that each of his duties relates to a different function of the petitioner. This would be an untenable application of the function manager classification, as all tasks must necessarily relate to some function.

On appeal, counsel for the petitioner states that the beneficiary will serve less as a function manager and more as an executive manager.³ 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"

³ Although the L1A classification provides for employees acting in a managerial capacity or in an executive capacity, it does not provide for an executive manager. However, in conducting analysis, the AAO will consider the term executive manager to mean employment in an executive capacity.

and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

In the instant case, the beneficiary may have a sufficient degree of authority over some aspects of company operations. However, the evidence submitted indicates that the petitioner does not have latitude with regard to all of his claimed duties. Specifically, the franchisor provides all franchises with lesson plans, business plans, and other instructions. It also conducts the certification course for instructors. It is therefore unclear what authority the beneficiary has over these aspects of the petitioner's business. The fact that the petitioner claimed the beneficiary was himself responsible for creating and overseeing these aspects of the business raises doubts as to the validity of the other claims regarding the beneficiary's responsibilities.

In addition, the petitioner must demonstrate that the beneficiary primarily performs executive level duties, meaning that he spends at least 51% of his time on these high level tasks. Given the petitioner's claimed number of students and lack of other certified instructors, it appears as though the beneficiary must personally conduct the physical education classes. Because running the classes is in fact providing the petitioner's service, it cannot be considered an executive level function. The petitioner does not report this task on the beneficiary's list of job duties, and it is therefore impossible to determine what percentage of time this duty would require. Due to the lack of information provided, the petitioner has failed to demonstrate that the petitioner will spend his time primarily performing executive level job duties.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 8 C.F.R. § 214.2(i)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Most significantly, the lack of specificity in the beneficiary's listed duties, discussed in detail above, means the petitioner has failed to satisfy its burden of proof regarding the nature of the beneficiary's position. On review, the totality of the evidence in the record does not support the petitioner's contention that the beneficiary will be primarily engaged in managerial or executive level activities. For these reasons, the appeal is dismissed.

Qualifying relationship

The director also denied the instant petition on the ground that the petitioner failed to establish that the foreign entity has sufficient ownership and control of the petitioner. This finding was based in

part on the beneficiary's 2011 income tax returns, which show that the beneficiary received all of the petitioner's profits that year. This contradicts the claim that the foreign entity has a 51% ownership interest. The director also noted that the petitioner did not provide the franchise agreement, although it was specifically requested in the RFE. The director found that, without this document, he could not determine the nature of the relationship between the petitioner and the franchisor, and therefore could not determine that the foreign entity had sufficient control of the company. In response to the denial, the petitioner submitted amended income tax forms for the beneficiary. On the amended forms, the beneficiary claims as income 24.5% of the petitioner's profits, his ownership portion.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are "ownership" and "control." *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In general, a "franchise" is a cooperative business operation based on a contractual agreement in which the franchisee undertakes to conduct a business or to sell a product or service in accordance with methods and procedures prescribed by the franchiser, and, in return, the franchiser undertakes to assist the franchisee through advertising, promotion, and other advisory services. A franchise agreement, like a license, typically requires that the franchisee comply with the franchiser's restrictions, without actual ownership and control of the franchised operation. See *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual"). An association between a foreign and U.S. entity based on a contractual franchise agreement is usually insufficient to establish a qualifying relationship. *Id.*

On review, the director incorrectly focused on the petitioner's operation of a franchise rather than on the necessary qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner. The director noted that the franchise agreement gave the franchisor final say in the methods and standards of the operation and that the fundamental aspects of the business were ultimately controlled by the franchisor. Therefore, the director found that no qualifying relationship existed between the petitioner and the beneficiary's foreign employer because the primary control of petitioner, as a franchise owner, resided with the franchisor.

By itself, the fact that a petition involves a franchise will not automatically disqualify the petitioner. When reviewing a petition that involves a franchise, the director must carefully examine the record to determine how the franchise agreement affects the claimed qualifying

relationship. As discussed, if a foreign company enters into a franchise, license, or contractual relationship with a U.S. company, that contractual relationship can be terminated and will not establish a qualifying relationship between the two entities. See *Matter of Schick*, 13 I&N Dec. at 649. However, if a foreign company claims to be related to a U.S. company through common ownership and control, and that U.S. company is doing business as a franchisee, the director must examine whether the U.S. and foreign entities possess a qualifying relationship through common ownership and management.

Nonetheless, it is critical in all cases that the petitioner fully disclose the terms of any franchise agreement, especially as the agreement relates to the transfer of ownership, voting of shares, distribution of profit, management and direction of the franchisee, or any other factor affecting actual control of the entity. Cf. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-65.

In the present matter, the record reflects that the petitioner was incorporated in the State of Texas as a separate legal entity. The petitioner submitted the franchise agreement between the foreign entity and the franchisor, which explains the relationship between the two entities in relation to control of the petitioner. Although the franchise agreement indicates standardization of the franchise's product, such an agreement is typical in franchises and is not necessarily indicative of ownership and control of the enterprise. In this case, the evidence in the record indicates that actual ownership and control of the petitioner lies with the foreign entity, and not the franchisor.

Upon review of the record, the petitioner had provided evidence of ownership and control of the U.S. and foreign entities and has established that they have a qualifying affiliate relationship in accordance with 8 C.F.R. 204.5(j)(2)(A). The finding of the director on this issue alone is withdrawn.

IV. Conclusion

The petition will be denied and the appeal dismissed due to the petitioner's failure to demonstrate that he will be employed in a primarily managerial or executive capacity. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.