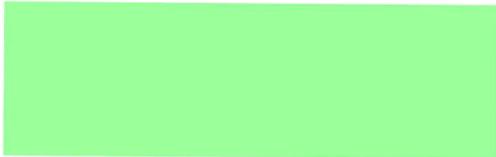


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

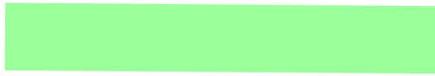


DATE: JUN 03 2013

Office: VERMONT SERVICE CENTER

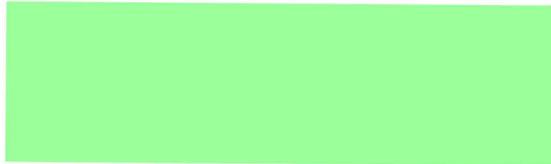
FILE: 

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Kentucky limited liability company established in August 2010, engages in the Brazilian thoroughbred publication business.¹ It claims to have a qualifying relationship with the beneficiary's foreign employer, [REDACTED] (the foreign entity), located in [REDACTED] Brazil.² The petitioner seeks to employ the beneficiary as the manager of its new office in the United States for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director also found that the petitioner failed to submit evidence establishing that the U.S. and foreign entities are qualifying organizations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner offers new evidence, and asserts that the new evidence supports the beneficiary's eligibility for the L-1 visa classification. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

¹ Although the petitioner indicated on Form I-129 that it was formed in 2003, the petitioner's Annual Report filed with the Secretary of State, Commonwealth of Kentucky, reflects that the petitioner was formed on August 13, 2010.

² The petitioner has not clearly indicated the nature of the claimed qualifying relationship with the foreign entity. On Form I-129 Supplement L, Section 1, the petitioner did not specify whether it was the parent, branch, subsidiary, affiliate, or joint venture of the foreign entity. On Form I-129 and in the supporting documentation, the petitioner described itself as a "local subsidiary" and the "American office" of the foreign entity.

- (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.

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.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

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

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

* * *

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

* * *

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

(L) *Affiliate* means

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

II. Facts and Procedural History

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker. On Form I-129, the petitioner indicated that it was seeking the L-1A classification for the beneficiary as a manager or executive. The petitioner listed the beneficiary's proposed duties in the United States, as "executive manager and sole employee of [the foreign entity's] local subsidiary," as the following: 1) sales selection, inspection and purchase at public auction or privately sell South American prospects to international clients; 2) continue stallion shuttling for the Southern Hemisphere breeding season and market the same; 3) coordinate the import and export of thoroughbred horses; 4) develop and coordinate racing or breeding relationships between U.S.

and Brazil; 5) conduct research and submit articles for publications regarding U.S. thoroughbred industry; and 6) conduct pedigree consulting.

In a letter accompanying the initial petition, counsel for the petitioner explained that the beneficiary has been offered the opportunity to act as “executive and manager of the new American office of [the foreign entity] . . . and more specifically as the company’s American blood stock agent and analyst in order to further marry the Brazilian and American thoroughbred markets.” Counsel explained that the beneficiary is also to provide research and written materials to the foreign entity for publication. Counsel asserted that the foreign entity’s goal is to establish itself as “the primary source of blood stock analysis and daily American thoroughbred information to its Brazilian readers and customer base.” Counsel affirmed that the beneficiary will be “the executive manager and sole employee of [the foreign entity’s] local subsidiary,” and reiterated the same job duties for the beneficiary as listed on Form I-129.

The petitioner submitted a letter from the President of the foreign entity describing the beneficiary’s employment abroad in the capacity as “a researcher, writer, and as a bloodstock agent securing horses for Brazilian horsemen.” This letter described the foreign entity’s main business objective as to strengthen ties between the United States and Brazilian thoroughbred industries, bringing information to Brazil through its publications, and to “do business as a bloodstock agent – through [the petitioner] – by purchasing horses for sale at auctions or privately in the United States, for the purpose of exporting to Brazil.”

The petitioner submitted its Employment Agreement with the beneficiary, dated December 1, 2011, describing the beneficiary’s proposed duties as the following: “manage the daily operations of [the petitioner], to provide research and reports to [the foreign entity], to submit written articles for publication, and to act as a Blood Stock agent for [the foreign entity] and its clients.”

The petitioner submitted a reference letter from [redacted] Owner/President of [redacted] stating that the beneficiary is “well qualified” for the position of Executive Bloodstock Analyst and the requested L-1 visa based upon her “great deal of work experience, training, and education within the local thoroughbred industry while here in [redacted] Kentucky.”

The petitioner submitted the foreign entity’s organizational chart. The chart depicted the beneficiary at the lowest tier of the organization in the position of [redacted].

The petitioner submitted its IRS Notice CP 575G, in which the petitioner was assigned an Employer Identification Number (EIN). The notice was addressed to the petitioner and “[the beneficiary] [redacted] [redacted].”

The petitioner submitted its Articles of Amendment, filed with the Secretary of State, Commonwealth of Kentucky, indicating that the petitioner’s name was changed from [redacted] [redacted] on July 25, 2011. This document contained the beneficiary’s signature with the title “Member.”

The petitioner submitted its Certificate of Assumed Name, reflecting the petitioner’s use of the name [redacted]. This document was signed by the beneficiary on August 4, 2011.

The petitioner submitted its Business Depository Resolution for its bank account at JP Morgan Chase Bank, confirming that the petitioner is a limited liability company and that the only person authorized to deposit and withdraw funds is the beneficiary, who bears the title "Member Managed."

The petitioner submitted a print-out from the Federal Republic of Brazil's National Register of Legal Company Entities, confirming the foreign entity's formation on April 24, 2003 as a limited liability company, its main economic activity as "printing of books, magazines and other periodicals," and its secondary economic activity as "newspaper printing."

The director issued a request for evidence ("RFE"), in which he instructed the petitioner to submit additional evidence to support the petition.

Counsel for the petitioner submitted a letter in response to the director's RFE. In this letter, counsel stated that no subordinate supervisors will be under the beneficiary's management. Counsel described the employees managed and their job duties as follows: "An office worker will type, help with payroll and bookkeeping and answer the telephone. An assistant analyst would examine horses in the field and provide reports to the beneficiary with regard to the horses' overall quality and value." Counsel asserted that the beneficiary would spend 75% of her time on managerial/executive duties, and 25% of her time on non-executive/managerial duties. With regards to the degree of discretionary duty the beneficiary would have over day-to-day operations, counsel stated: "The beneficiary will communicate with the home office on a daily basis and will provide weekly analysis of foreign operations." Counsel asserted that while the U.S. office has not yet hired any U.S. employees, it anticipates said hiring if the beneficiary is approved for the instant visa.

As "evidence of the foreign entity's ability to invest in the U.S. entity," the petitioner submitted its bank statements from October 2011 to December 2011. These bank statements showed that the petitioner received deposits and additions from the following sources:

[REDACTED]

[REDACTED] The petitioner also submitted a document from [REDACTED] confirming that the foreign entity has, on average, USD \$60,000 in its account(s).

As "evidence of continuous contact between the Petitioner and Beneficiary," the petitioner submitted correspondences from Chase Bank to the beneficiary alerting her of incoming wire transfers. The correspondences did not identify the remitters of the wire transfers, although one correspondence was forwarded by the beneficiary to [REDACTED]. The petitioner also submitted details of wire transfers it made to the following recipients: [REDACTED] escrow agent, [REDACTED] and [REDACTED].

The petitioner submitted its Annual Report, filed with the Secretary of State, Commonwealth of Kentucky, in March 2012, listing its sole manager as the beneficiary, who signed as "owner/manager."

The petitioner resubmitted the print-out from the Federal Republic of Brazil's National Register of Legal Company Entities, confirming the foreign entity's formation on April 24, 2003 as a limited liability company.

As evidence of the qualifying relationship, the petitioner submitted a print-out from an unidentified source confirming that the petitioner is a limited liability company managed by its members, and listing the beneficiary as the sole manager.

As evidence of the beneficiary's "foreign qualifications," the petitioner submitted a new letter from the foreign entity stating the following:

Our beneficiary, [REDACTED] has unique, peculiar, and specialized knowledge and talent in the screening and analysis of thoroughbred horses for sale and/or purchase. During her tenure with our company, [the beneficiary] has had full charge of our research and analysis of the North American thoroughbred market. In her previous full-time position with our company in Brazil, [the beneficiary] was employed continuously by us for more than one year in an executive capacity as our North American Blood Stock specialist. This position requires specialized knowledge of the Brazilian and North American thoroughbred industries. After [the beneficiary] entered her H-3 training program in Kentucky, she continued her relationship with our company in a part-time basis providing us with analysis of the Brazilian thoroughbred industry.

While working with our company as an executive Blood Stock Analyst in Brazil, [the beneficiary] did not supervise other employees as this division of our company has been spearheaded by [the beneficiary] and is a small and distinct aspect of our company that we cannot further develop without the establishment of an office in the United States of America. Once our office there is established, we anticipate that the beneficiary will be directed to hire an office assistant as well as an assistant in the field to examine horses with and for [the beneficiary] at horse sales and private viewings. We anticipate that [the beneficiary] will continue to solely produce all written articles and instruments of analysis in the near and foreseeable future.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. In denying the petition, the director found that the petitioner failed to submit a business plan and evidence that the foreign entity had invested in the U.S. entity. The director also concluded that the petitioner failed to establish that the U.S. and foreign entities are qualifying organizations.

The petitioner filed Form I-290B, Notice of Appeal or Motion. In support of the appeal, counsel provides new assertions and evidence in support of the beneficiary's eligibility. Counsel specifically asserts that the beneficiary will be employed in a primarily managerial or executive position in the United States, because the foreign entity has invested over USD \$600,000 for the establishment of the new U.S. office. Counsel asserts that the foreign entity's large investment "supports the hire of subordinate employees that will perform the bulk of the non-qualifying functions."

Counsel describes the nature of the beneficiary's employment in the United States, as follows:

The beneficiary will be employed to manage the essential function of communicating blood stock analysis of the North American horse stock to the Brazilian headquarters and

simultaneously to the individual Brazilian Clients. This essential function is derived from field analysis performed by the beneficiary and her subordinate field analyst whose primary job will be to trim the entire available Thoroughbred stock for sale per auction to the most desirable candidates for viewing and decision making by the beneficiary. Likewise, the subordinate's notes with regard to same will be provided to the beneficiary for review, revision, translation and then transmission of communication to Brazil.

Furthermore, communications from Brazilian clients regarding decisions to purchase and with regards to racing and training decisions will be provided directly to the beneficiary who will in turn rely on the subordinate to arrange for Thoroughbred scopes and x-rays and to relay daily instructions to the horse trainer and staff . . .

[The beneficiary] will exercise discretion over the day to day operations of Immensity Bloodstock with most field assignments being given to the U.S. subordinate hire and most budgetary responsibilities handled by the Brazilian headquarters.

Counsel asserts that the foreign entity employed the beneficiary in a specialized knowledge capacity as a Thoroughbred research analyst and writer for one year within the three years preceding the filing of the instant petition. Counsel asserts:

[The beneficiary's] specialized knowledge is predicated on her exceptional knowledge of the Brazilian and North American Thoroughbred industries and her ability to communicate fluently to the home office, the individual Clients and U.S. horse trainers, sales directors, breeders and consignors and other U.S. equine operatives, in both English and Portuguese. [The beneficiary] is the only [foreign entity] employee with such exceptional language skills. [The beneficiary's] ability to judge and analyze horse stock in the United States and to convey that information to the home office and its Brazilian clients for review in making decisions regarding the purchase of Thoroughbred horses in the United States is extremely specialized in nature. In addition, [the beneficiary] has been trained in the U.S. to perform the specific specialized skill of analyzing the pedigree and confirmation of Thoroughbred horses. This skill includes the ability to analyze veterinary records for deficiencies. The beneficiary's specialized skill is derived from her experience working in the Thoroughbred industry since childhood; working in a hands-on position as for [redacted] KY and completing the [redacted] H-3 program. Furthermore, [the beneficiary's] skill with regard to conveying the results of her blood stock analysis; is derived from her previous experience as a Thoroughbred writer for the petitioner.

In support of the appeal, counsel submits, *inter alia*, the petitioner's business plan, dated May 1, 2013, which states, in part, that the initial two employees of the U.S. office will be the beneficiary as Executive Manager, and [redacted] as a field blood stock agent. The business plan listed the beneficiary's proposed job duties as including the following: direct supervisory responsibility for local employees and making decisions regarding job duties, pay, and benefits; previewing horses with the assistance of the field analyst; verifying consignor veterinarian reports and visually inspecting horses; creating reports of these inspections to be delivered to Headquarters and individual Brazilian clients; attending all local sales; communicating direct instructions to the trainer, [redacted] providing instructions to field agent; writing articles regarding

North American trends in the industries; acting as the North American representative for the Brazilian clients with horses in training in the United States; attending race meets as required by clients; acting as a purchase agent at auctions for Brazilian clients; and pinhooking horses purchased by clients for re-sale in the United States. The duties of Mr. [REDACTED] are listed as: analyzing pedigrees and conformation to assess value of Thoroughbreds being offered for sale; reporting his findings to the beneficiary; and advising the beneficiary as to breeding plans and facilitating the booking of these mares to stallions. The business plan confirms that the petitioner is formed as a limited liability company with the beneficiary being the initial member.

As evidence of the foreign entity's investment in the U.S. entity, the petitioner submits its Chase Bank business account statements listing all incoming and outgoing wire transfers from 2011 to 2013. No transactions were highlighted or explained. A review of all incoming wire transfers shows one wire transfer originating from [REDACTED] on January 30, 2013; all other transfers originated from other sources. The petitioner submits a letter from [REDACTED] dated September 13, 2012, confirming that the beneficiary's account, opened in 2003, has a balance "in the mid six-figure range." The petitioner also submits an undated letter from the foreign entity declaring that it transferred, in the last 12 months, approximately \$150,000 to invest, support, and develop the U.S. office. The letter stated, without any further detail, that these transfers "have been done from multiple accounts in Brazil and in other countries where [the foreign entity] maintain [sic] business partners and collaborators."

III. Discussion

1. *Employment Capacity in the United States*

The first issue to be addressed is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year, and whether the U.S. office could support the beneficiary in a primarily managerial or executive capacity.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in the United States in a managerial or executive capacity and that the U.S. office could support the beneficiary in a primarily or executive capacity within one year.

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

In the instant matter, the petitioner has not clearly articulated the nature of the beneficiary's proposed employment in the United States. For instance, with the initial petition, the petitioner and counsel described the beneficiary's proposed position as an "executive manager" and "executive and manager." The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

Regardless, the petitioner has not established that the beneficiary will be primarily employed in either an executive or managerial capacity. The only description the petitioner provided with the initial petition regarding the beneficiary's managerial or executive duties was that the beneficiary would "manage the daily operations of [the petitioner]." In response to the director's RFE, counsel asserted that the beneficiary would have no subordinate supervisors. With regards to the degree of discretionary duty the beneficiary would have over the U.S. entity's day-to-day operations, counsel stated, without elaboration: "The beneficiary will communicate with the home office on a daily basis and will provide weekly analysis of foreign operations." These vague statements are insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity. 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* Conclusory assertions regarding the beneficiary's employment capacity are not sufficient.

On appeal, counsel asserts for the first time that the beneficiary will be a function manager, managing the essential function of "communicating blood stock analysis of the North American horse stock to the Brazilian headquarters and simultaneously to the individual Brazilian Clients." However, the petitioner failed to establish that the beneficiary qualifies as a function manager. The evidence in the record reflects that the beneficiary will be primarily performing the duties of the function, rather than managing the function. On appeal, counsel specifically asserts that communications from Brazilian clients regarding decisions to purchase and with regards to racing and training decisions will be provided directly to the beneficiary, and that the beneficiary herself would review, revise, translate and transmit field analysis notes to Brazil. The petitioner's business plan specifically listed the beneficiary's job duties as including creating reports of inspections to be delivered to Headquarters and individual Brazilian clients, acting as the North American representative for the Brazilian clients with horses in training in the United States, attending race meets as required by clients, and acting as a purchase agent at auctions for Brazilian clients. The foreign entity's letter states that it anticipates that the beneficiary "will continue to solely produce all written articles and instruments of analysis in the near and foreseeable future."

Based on these descriptions, the record reflects that the beneficiary will be the sole person responsible for the company's communications to and from Brazil. The petitioner has not articulated nor demonstrated how the beneficiary will be managing, rather than performing, the essential function of communication blood stock analysis to the Brazilian headquarters and Brazilian clients.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

A critical review of the beneficiary's proposed job duties reflects that the majority of her job duties will be non-qualifying operational tasks. The petitioner has consistently described one of the beneficiary's primary job duties in the United States as being the company's "blood stock agent and analyst." As the blood stock agent and analyst, the beneficiary's proposed duties include direct field work such as: sales selection, inspection and purchase at auction or privately sell South American prospects to international clients; previewing horses "solely or with the assistance of the field analyst;" attending all local sales; conducting pedigree consulting; and coordinating the import and export of thoroughbred horses. The petitioner also asserted that the beneficiary will be solely responsible for conducting research, writing, and submitting articles for publication to the foreign entity. These job duties constitute performing the tasks necessary to produce a product or to provide the services of the U.S. entity. 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; *Matter of Church Scientology International*, 19 I&N Dec. at 604.

While the petitioner indicates that the beneficiary will be assisted by an assistant field analyst, the petitioner's claim that it will employ a field assistant for the beneficiary is not entirely credible or consistent with the evidence in the record. With the initial petition, the petitioner repeatedly asserted that the beneficiary would be the sole employee of the U.S. office. It was not until after the director issued the RFE did the petitioner claim that it will employ an assistant analyst who would help examine horses in the field and provide reports to the beneficiary.³ When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request

³ The petitioner also claimed in its response to the RFE that it would employ an office worker who will help perform administrative duties. However, the petitioner appears to have later abandoned this claim, as the petitioner's business plan, submitted on appeal, does not mention any plans to employ an office worker.

for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Even assuming *arguendo* that the beneficiary will be assisted by a subordinate assistant field analyst, the petitioner's descriptions of the assistant field analyst's limited job duties fail to establish that he will substantially relieve the beneficiary from primarily performing non-qualifying duties. The petitioner described the assistant's primary job as "to trim the entire available Thoroughbred stock for sale per auction to the most desirable candidates for viewing and decision making by the beneficiary." To accomplish this goal, the field assistant will assist the beneficiary by previewing and examining horses in the field, provide reports to the beneficiary with regard to the horses' overall quality and value, arrange for Thoroughbred scopes and x-rays, relay daily instructions to the horse trainer and staff, advise the beneficiary as to breeding plans, and facilitate said bookings. However, the beneficiary remains responsible for previewing all horses; notably, the business plan states that the beneficiary "will preview horses solely or with the assistance of the field analyst." The beneficiary also remains responsible for attending all local sales, providing all communications to and from clients and the Brazilian headquarters, and researching and writing articles. From the petitioner's descriptions of the field assistant's limited job duties, the petitioner failed to establish that the field assistant would relieve the beneficiary from primarily performing non-qualifying duties.

The petitioner also failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. In particular, the petitioner failed to establish the size of the foreign entity's investment in the United States, and accordingly, the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States.

In response to the RFE, the petitioner submitted its bank statements from October 2011 to December 2011 as purported evidence of the foreign entity's ability to invest in the U.S. entity. However, the petitioner failed to establish that any of these deposits and additions originated from the foreign entity. The bank statements showed the originating sources as:

[REDACTED] t
[REDACTED] The petitioner failed to explain and establish how any of the transactions from the above companies and individuals represent the transfers by the foreign entity.

On appeal, counsel submits new documents purporting to show that the foreign entity has invested over USD \$600,000 in the U.S. office. Again, the petitioner failed to establish that any of the deposits and additions it received originated from the foreign entity as investment money in the U.S. office. A review of all incoming wire transfers shows only one wire transfer originating from [REDACTED] on January 30, 2013 for \$8,000; all other transfers originated from other sources. Assuming *arguendo* that the January 30, 2013 transfer originated from the foreign entity, the date and amount of the transfer fails to establish that, as of the date of filing, the foreign entity had invested sufficient funds to remunerate the beneficiary and to commence doing business in the United States. The petitioner failed to explain and establish how the wire transfers from other sources represent investments originating from the foreign entity.

On appeal, the petitioner submits a letter from [REDACTED] confirming that the beneficiary has a balance "in the mid six-figure range" in her personal account. Previously, the petitioner

submitted a document from [REDACTED] confirming that the foreign entity has, on average, USD \$60,000 in its account(s). None of these documents establish that the foreign entity remitted funds to the petitioner.

On appeal, the petitioner submits an undated letter from the foreign entity declaring that it transferred, in the last 12 months, approximately \$150,000 to invest, support, and develop the U.S. office. This letter contradicts the petitioner's claim that the foreign entity invested over USD \$600,000 in the U.S. office. Furthermore, while the letter stated that these transfers "have been done from multiple accounts in Brazil and in other countries where [the foreign entity] maintain [sic] business partners and collaborators," the petitioner provides no explanation or evidence regarding the foreign entity's claimed multiple accounts. Without any documentary evidence to support the assertions in this letter, the foreign entity's letter, alone is insufficient to prove the size its investment in the U.S. office. 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)).

Overall, the record prohibits a determination that the petitioner would employ the beneficiary in a primarily managerial or executive position within one year, or that the U.S. office could support the beneficiary in a primarily managerial or executive position within one year. Accordingly, the appeal will be dismissed.

2. *Qualifying Relationship*

Upon review of the evidence, the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

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 instant matter, the petitioner has not clearly indicated the nature of the claimed qualifying relationship with the foreign entity. On Form I-129 Supplement L, Section 1, the petitioner did not specify whether it was the parent, branch, subsidiary, affiliate, or joint venture of the foreign entity. On Form I-129 and in the supporting documentation, the petitioner described itself as a "local subsidiary" and the "American office" of the foreign entity.

The evidence in the record reflects, and the petitioner has acknowledged, that the petitioner is organized as a limited liability company with the beneficiary as its sole member (owner). Therefore, the petitioner cannot qualify as a subsidiary or branch office of the foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(K).

In addition, the petitioner failed to provide any evidence to establish that it qualifies as an affiliate of the foreign entity. The petitioner failed to provide any evidence establishing the membership or ownership structure of the foreign entity. While the petitioner submitted a print-out from the Federal Republic of Brazil's National Register of Legal Company Entities confirming the foreign entity's formation on April 24, 2003 as a limited liability company, this document provides no information regarding the foreign entity's membership or ownership structure. Without any evidence of the foreign entity's membership or ownership structure, the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign

employer as an affiliate or in any other capacity. See 8 C.F.R. § 214.2(l)(1)(ii)(L). For this additional reason, the appeal will be dismissed.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (Comm'r 1998). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

3. *Employment Capacity Abroad*

Beyond the decision of the director, the petitioner submitted insufficient evidence to establish that the beneficiary was employed abroad in a capacity requiring specialized knowledge.

The statutory definition of specialized knowledge at Section 214(c)(2)(B) of the Act is comprised of two equal but distinct subparts or prongs. First, an individual is considered to be employed in a capacity involving specialized knowledge if that person "has a special knowledge of the company product and its application in international markets." Second, an individual is considered to be serving in a capacity involving specialized knowledge if that person "has an advanced level of knowledge of processes and procedures of the company." See also 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner may establish eligibility by submitting evidence that the beneficiary satisfies either prong of the definition.

USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge. Once the petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. *Id.*

As both "special" and "advanced" are relative terms, determining whether a given beneficiary's knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge against that of others in the petitioning company and/or against others holding comparable positions in the industry. The ultimate question is whether the petitioner has met its burden of demonstrating by a preponderance of the evidence that the beneficiary's knowledge or expertise is special or advanced, and that the beneficiary's position requires such knowledge.

In the instant matter, the petitioner has not identified which prong of the statutory definition its claims are based upon, i.e., whether the petitioner has "a special knowledge of the company product and its application in international markets," or "an advanced level of knowledge of processes and procedures of the company." The petitioner has not articulated with any specificity the nature of the claimed specialized knowledge. The petitioner has provided only broad, conclusory statements as to the beneficiary's claimed specialized

knowledge of the Brazilian and North American Thoroughbred industries, her exceptional language skills and ability to communicate fluently in both English and Portuguese, and her specialized skill of screening and analyzing thoroughbred horses for sale and/or purchase. Other than these broad and conclusory assertions, however, the petitioner has not explained in any detail how the beneficiary's knowledge constitutes special knowledge. Moreover, the petitioner failed to explain or establish how the beneficiary's claimed specialized knowledge is specific to the petitioning company. See Section 214(c)(2)(B) of the Act (requiring specialized knowledge *with respect to a company* (emphasis added)); 8 C.F.R. § 214.2(I)(1)(ii)(D) (requiring an individual to possess special knowledge of *the petitioning organization's product, service, research, equipment, techniques, management or other interests* and its application in international markets, or an advanced level of knowledge or expertise *in the organization's processes and procedures* (emphasis added)). Finally, the petitioner failed to explain or articulate with any specificity why the beneficiary's job duties abroad required specialized knowledge. Without such information and evidence, the petitioner failed to establish that the beneficiary's level of knowledge is truly special and advanced, and that her position abroad required specialized knowledge.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

For the reasons above, the petitioner failed to establish that the beneficiary's employment abroad was in a specialized knowledge capacity. The petitioner's claims fail on an evidentiary basis.

IV. Conclusion

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

ORDER: The appeal is dismissed.