

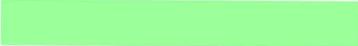


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 18 2013 Office: VERMONT SERVICE CENTER



IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to qualify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company established in October 2011, states it is engaged in the convenience store and gas station business. It claims to be wholly owned subsidiary of [REDACTED] located in Pakistan. The petitioner seeks to employ the beneficiary as the President and Chief Executive Officer of the "new office" in the United States for a period of one year.

The director denied the petition for multiple reasons. First, the director found that the petitioner had failed to establish that a qualifying relationship existed between the petitioner and the foreign employer. Further, the director determined that the petitioner had failed to establish that the beneficiary had been employed in an executive or managerial capacity with the foreign employer. Third, the director determined that the petitioner failed to establish that the intended United States operation, within one year of the approval of the petition, would support an executive or managerial position, as defined in the Act. The director concluded that the petitioner had failed to establish that the beneficiary would be employed in a managerial or executive position with the petitioner.¹

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel largely reiterates evidence previously submitted on the record and contends that the beneficiary has acted as an executive and manager with the foreign employer, and will act as an executive, personnel manager, and function manager with the petitioner as defined by the Act and regulations. Further, the petitioner submits financial results for the petitioner's subsidiary company [REDACTED] from March through September 2012 and a Florida Department of Revenue Employer's Quarterly Report from the third quarter of 2012.

I. The Law

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

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

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

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

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (I) 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.

II. The Issues on Appeal:

A. Qualifying Relationship

The first issue to be addressed is whether the petitioner established that the petitioner and foreign entity² are qualifying organizations, as required by 8 C.F.R. § 214.2(l)(3)(i).

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

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

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

* * *

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

* * *

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

(L) *Affiliate* means

- (I) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

² The term "foreign entity" is used interchangeably with "foreign employer."

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

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Further, the petitioner stated that it acquired a limited liability company called [REDACTED] that operates a convenience store; a [REDACTED] retail location, a [REDACTED] retail location and a car wash all in [REDACTED]. The petitioner submitted an operating agreement whereby [REDACTED] would operate the aforementioned retail franchise locations and this agreement set forth a potential franchising opportunity for [REDACTED] unrelated to the petitioner's stated relationship with the foreign employer. The director concluded that such a franchise relationship did not establish common ownership and control between the petitioner and the foreign employer necessary to establish a qualifying relationship. On appeal, counsel asserts that the qualifying relationship is established since the petitioner is wholly owned by the foreign employer. The AAO concurs that the director erred in concluding that a qualifying relationship did not exist based on a franchise relationship. As mentioned above, the petitioner is not maintaining that a qualifying relationship exists based upon the existence of a franchise relationship between the petitioner and foreign employer, but a parent-subsidiary relationship between these entities. As such, the nexus of the analysis should be whether the petitioner has submitted sufficient evidence to establish that the petitioner is wholly owned by the foreign employer as asserted.

The AAO finds that the petitioner has not met this burden of establishing that the petitioner is wholly owned by the foreign employer. In fact, the petitioner has not submitted any supporting documentary evidence on the record to establish ownership in [REDACTED]. Generally, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all

agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Without 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). Without disclosure of any relevant supporting documentation regarding the petitioner's ownership, United States Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control. Therefore, the appeal must be dismissed as a qualifying relationship between the petitioner and foreign employer has not been established.

B. Employment with the foreign employer in a managerial or executive capacity

The director also concluded that the petitioner had not established that the beneficiary is employed in an executive or managerial capacity with the foreign employer as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In support of the I-129 Petition for a Nonimmigrant Worker, the petitioner provided the following explanation of the beneficiary's duties with the foreign employer:

[The beneficiary] has worked as a Sole Proprietor/CEO for the parent since 2007, and has played a key role in the parent's success and notoriety. While working with the parent, [the beneficiary] has developed, implemented, and consistently applied business-related policies to optimize the quality and efficiency of the organization as well as its employees. He has also negotiated contracts and promoted sale of products and services, and was responsible for the recruitment of managers who operated the daily business. In addition, [the beneficiary] developed and implemented marketing strategies utilizing current market information, competitive and economic conditions, and innovative programs. Furthermore, [the beneficiary] developed pricing strategies, and responded to internal and external customer inquiry. He also met with the appropriate officials to: (i) propose transactions; (ii) negotiate confidentiality and service agreements; and (iii) coordinate the due diligence process with in-house counsel and outside auditors; he also directed the preparation and completion of sale contracts and other related documents.

In a Request for Evidence (RFE), the director advised the director asked the petitioner to submit the following: (1) payroll documentation supporting the beneficiary's employment aboard; (2) a letter from an authorized representative of the foreign employer more specifically articulating the beneficiary's managerial or executive role with the company; (3) a breakdown of the time spent by the beneficiary on

executive or managerial duties and other non-qualifying functions; and (4) detailed information on the beneficiary's foreign subordinates, including their job titles, complete position descriptions, and a breakdown of the number of hours devoted to each duty. In response, the petitioner submitted a support letter from the petitioner that largely reiterated the beneficiary's duties:

Over the course of his five year appointment, [the beneficiary] has accumulated an expert level of experience, engaging in multi-level business development, not only supervising upper and lower level management, but also: (i) creating and improving policies, implementing beneficial and efficient business practices; (ii) promotion of products and services; (iii) addressing human resource issues such as employee management; (iv) conferring with shareholders, clients, and contractors; and (v) adhering to manufacturing and safety regulations set forth by the district and the national government. In addition, he also utilized present market trends and customer habits to develop and implement marketing strategies to create and establish innovative programs. To foster a greater clientele base, [the beneficiary] also met with consumers and officials to negotiate service agreements, coordinate with personal counsel as well as outside auditors, and direct and execute service and product contracts.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has provided no specifics as to how the beneficiary carried out the general tasks and goals listed above as a part of his daily duties. For instance, the petitioner did not provide specific examples, or supporting documentation regarding policies, marketing strategies, or innovative programs created and implemented with the foreign employer; human resource issues addressed; or contracts negotiated, to give the job duties referenced more credibility or probative value. Indeed, there is little in the duties to distinguish them from those of any executive or manager with any company, and it is not possible to discern from the foreign duty description, due to the lack of specifics, within what industry the beneficiary operates. In fact, the foreign duty description for the beneficiary appears almost identical to his prospective U.S. duty description, despite the foreign position being in a completely different industry and country. Further, the foreign duties are largely repetitive of the statutory language. As such, the total lack of specificity or examples in the provided foreign duties casts doubt on their credibility. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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)). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, certain material discrepancies on the record related to the beneficiary's claimed foreign employment as President/CEO cast additional doubt as to their credibility. For instance, the petitioner stated that some of the beneficiary's job duties involved coordinating with foreign employer shareholders and a foreign board of directors that supervise his employment. However, the record also asserts that the beneficiary is the sole owner of the foreign employer, which operates as a sole proprietorship. Further, it is

questionable that the beneficiary would be supervised by a board of directors, retaining the right to hire and fire him as asserted in the record, when he is the sole owner of the company. Additionally, the petitioner's RFE response references the beneficiary working as CEO for a company called [REDACTED] providing further support for a conclusion that the beneficiary's foreign duty description is simply a boilerplate rendition of duties. Indeed, the petitioner regularly confuses the beneficiary foreign position title on the record, as he is alternatively referred to as the CEO, President, and Managing Director throughout the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner has not submitted sufficient evidence to establish that the beneficiary primarily performs executive or managerial tasks with the foreign employer, or that he has a level of managers or supervisors to delegate non-qualifying duties. In fact, the director specifically requested certain evidence that the beneficiary was primarily performing executive or managerial tasks and not non-qualifying day-to-day operational duties, including detailed descriptions of the duties of the beneficiary's foreign subordinates and a breakdown of the time the beneficiary allots to both executive or managerial tasks and non-qualifying operational tasks. However, the petitioner did not provide this evidence as specifically requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Instead, the petitioner submitted a spreadsheet listing twenty foreign entity employees, which it states is a payroll listing from July 2011 through April 2012. The aforementioned spreadsheet includes two stated managers or supervisors, a Product Manager and a Sales Supervisor. However, as noted, detailed duty descriptions for these claimed managers and supervisors were not provided to give the asserted positions credibility or to confirm that they are indeed relieving the beneficiary from primarily performing day-to-day operational duties. Further, the provided payroll spreadsheet does little to confirm that the claimed 18 subordinate employees and 2 stated managers are actually on the foreign employer's payroll. As mentioned, the petitioner has also failed to provide a breakdown of the beneficiary's duties and the number of hours devoted to executive or managerial tasks and non-qualifying tasks. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are managerial or executive in nature, and what proportion is non-managerial or non-executive. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This failure of documentation is important because several of the

beneficiary's daily tasks, such as promoting the sale of products and services; responding to customer inquiries; proposing transactions; preparing sales contracts; and assuring adherence to safety regulations, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing executive or managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

An individual will not be deemed a manager or executive under the statute simply because they have a managerial or executive title or because they are claimed to direct the enterprise as the owner or sole managerial employee. It is the petitioner's burden to show with specific duty descriptions and documentary evidence that a beneficiary acts primarily as a manager or executive with a foreign employer. *See* 8 C.F.R. § 214.2(l)(3)(ii). However, as noted, the petitioner has submitted sparse, vague and contradictory evidence related to the beneficiary's claimed foreign employment. As such, the AAO affirms the director's finding that the petitioner failed to establish that the beneficiary was primarily employed in a managerial or executive capacity with the foreign entity, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

For this additional reason, the appeal must be dismissed.

C. Employment with the petitioner in a managerial or executive capacity:

The third issue to be addressed is whether the petitioner established that the United States operation would support an executive or managerial position within one year of approval of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). Upon review of the record, and for the reasons discussed herein, the AAO concurs with the decision of the director that the petitioner has not established that it would support the claimed executive or managerial role for the beneficiary within one year.

The "new office" provision was meant as an accommodation for newly established enterprises and provided for by USCIS regulation to allow for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

However, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it

has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(1)(3)(v)(C).

In support of the I-129 Petition for a Nonimmigrant Worker, the petitioner submitted the following description of the beneficiary's job duties:

With the petitioner, [the beneficiary] will hold the position of President/CEO. At this executive-level capacity, [the beneficiary] will have the ability to shape both the petitioner and parent's future investments in the United States, and [sic] his knowledge and dedication the parent company will allow him to fruitfully do so. Furthermore, his employment at this executive position will allow him to better the practices of supervising both managers and employees, directing all executive functions of the petitioner while simultaneously protecting the investments of both the subsidiary and thus the parent company. [The beneficiary] will establish goals, policies and procedures for the petitioner and its further diversification into the U.S. consumer market and his current rapport with the parent [to] strengthen the relationship between the parent and subsidiary company. In other words, [the beneficiary] will have the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, determining the petitioner's next investment, conducting feasibility and market studies of future investments, advising owners of the Parent Company on where to further invest, supervising all financial aspects of the company and developing policies and objectives for the company. While the parent will retain complete control over its subsidiary's financial and managerial

decision [sic], [the beneficiary] will also have responsibility to map out consensual short and long term goals, incorporating the input and advice of [REDACTED]

The petitioner further broke down the beneficiary's duties into the following general categories, by percentage, denoting the time spent on each duty: Management Decisions- 30%, Company Representation- 15%, Financial Decisions- 20%, Business Negotiations- 25%, and Organizational Development of the Company- 10%.

On appeal, the petitioner further submits the following list of duties for the beneficiary:

As President of [REDACTED] United States subsidiary, Petitioner, [the beneficiary] will be required to perform the following complex duties:

- Planning and developing the U.S. investment;
- Developing policies and objectives for the company;
- Supervising all financial aspects of the company;
- Developing, organizing, and establishing operations for the purchase, sale, and marketing of merchandise for sale in the U.S. market;
- Supervising the work of the President/CEO, who will in turn be responsible for overseeing subordinate managers responsible for running daily operations;
- Identifying, recruiting and building a management team and staff with background in the U.S. retail market;
- Negotiating and supervising the drafting of purchasing agreements;
- Developing trade and consumer market strategies based on parent company guidelines;
- Overseeing the legal and financial due diligence process and resolving any related issues;
- Negotiating pricing and sales terms and developing pricing policies and sales techniques; and
- Developing and implementing plans to ensure the company's profitable operation.

Again, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his daily duties. For instance, the petitioner did not provide specifics, examples, or supporting documentation regarding goals, policies and procedures that will be implemented; feasibility or marketing studies that will be carried out; the extent and nature of the U.S. investment; or financial or managerial decisions that will be made; examples of contracts and purchase agreements that will be negotiated, to give the referenced job duties more credibility or probative value. Indeed, there is little on the in the duties to distinguish them from the duties of any executive or manager with any company, and it is not possible to discern from the duty description, due to the lack of specifics, within what industry the beneficiary will

³ The AAO notes that the petitioner makes reference in the duties to an unrelated business in the United States not otherwise mentioned on the record.

operate. Further, the duties are largely repetitive of the statutory language. As such, the total lack of specificity or examples in the provided foreign duties casts doubt on their credibility. Further, the stated coordination duties as between the petitioner and the foreign employer with respect to financial and managerial decisions, and the U.S. investment, is questionable considering that the beneficiary is offered as the sole owner of the foreign employer. In fact, the boilerplate nature of the provided duties is confirmed on the record since the duties themselves reference a completely different foreign employer [REDACTED] and on appeal, and additional entities are referenced as well, respectively, [REDACTED] and [REDACTED]. The petitioner also asserts that a duty of the beneficiary will be to put a management team in place, but in direct contradiction, states elsewhere on the record that the management team is already in place for the petitioner. Lastly, the petitioner mentions that the beneficiary will be supervising and directing the work of the President/CEO, or presumably himself, casting further doubt on the credibility of the provided duties. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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)). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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

When taking into account the totality of the circumstances, the beneficiary's stated U.S. duties are called further into question by the petitioner's failure to articulate investment plans as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). As directly referenced in the duties listed above, a significant portion of the beneficiary's responsibility will be devoted to molding the foreign employer's investment. However, at no point on the record is the planned investment in the United States specifically articulated in order to

determine whether the beneficiary could spend a majority of his time directing such investment or whether the venture has a reasonable opportunity of success.

The petitioner has stated in response to the RFE that it had acquired the company [REDACTED]. The petitioner asserts that [REDACTED] operates a convenience store, car wash, [REDACTED] sandwich shop collectively doing business as [REDACTED]. The petitioner asserts that it acquired a controlling 50% interest in [REDACTED] through a property transfer with shareholder [REDACTED] whereby the petitioner sold [REDACTED] a property in Pakistan as consideration for the transfer of her 500 shares (out of 1,000 issued) in [REDACTED] to the petitioner. The petitioner maintains that [REDACTED] earns approximately \$7.5 million in annual revenues. The petitioner further submits claimed "Special Power of Attorney" agreements pursuant to which, a [REDACTED] is given power of attorney for the beneficiary, and a [REDACTED] is given the same by [REDACTED] in order to effectuate the aforementioned property transfer in Pakistan. Lastly, an "Agreement of Sale" is submitted whereby [REDACTED] acquires, through the stated agents of the beneficiary and [REDACTED] title to an apartment unit in [REDACTED] Pakistan for \$112,000. However, the aforementioned foreign land transaction is left doubtful due to various material discrepancies and this transaction is not established as relevant to the petitioner's acquisition of [REDACTED]. First, no supporting documentation is presented on the record to affirm that this property transfer acted as consideration for the petitioner's acquisition of 500 shares in [REDACTED], such as minutes of the petitioner or [REDACTED] meetings or an agreement expressly documenting the sale of [REDACTED] shares to the petitioner. 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)). In fact, the petitioner's meetings minutes do not illustrate the transfer of shares to the petitioner, but the issuance of 500 shares to the petitioner. Further, the beneficiary agreeing to sell a property to Ms. [REDACTED] is of questionable consideration, since the property was not transferred to [REDACTED], but sold, as noted in the provided agreement of sale. It is doubtful that the petitioner would acquire a 50% controlling interest in a company that operates businesses claimed to earn approximately \$7.5 million in annual revenue for merely agreeing to sell a property for \$115,000. Lastly, the transaction is further left doubtful by the fact that the provided power of attorney offered as being between the beneficiary and Mr. [REDACTED] is in fact between [REDACTED]; therefore it is questionable whether [REDACTED] held legal power to complete the claimed sale of property for the beneficiary. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). If USCIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In sum, the petitioner failed to establish that it made a sufficient United States investment as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2), since its only asserted investment in the United States, the purchase of [REDACTED] is left questionable due to the lack of supporting evidence and discrepancies on the record related to this transaction. Also, the petitioner states in the beneficiary's job

duties that he will spend a majority of his time coordinating the U.S. investment, but does not demonstrate with sufficient evidence that such as U.S. investment exists.

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

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

Although all the requirements of a business plan in a *Matter of Ho* are not definitively required to establish a credible business plan, the failure to provide the majority of the relevant information above casts serious doubt as to the viability of a new business. In the present matter, the petitioner has provided little of the evidence suggested in the *Matter of Ho*, beyond unsupported financial projections and general market statistics related to the convenience store industry in the United States. For instance, the petitioner states an objective of increasing revenues to \$15 million dollar annually in the next two years, up from a current claimed \$7.5 million annually; but provides no details as to how this will be accomplished. In fact, the petitioner has not submitted sufficient documentation to support the assertion that the petitioner's subsidiary company [REDACTED] does indeed earn \$7.5 million in annual revenue. In order for a business plan to be deemed credible, it must at least illicit a conclusion that the specific business venture has a reasonable chance of success. The petitioner must demonstrate with a preponderance of the evidence that the venture has a realistic expectation of success such that it will 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). Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner has also not submitted sufficient evidence of its hiring plans for the new office necessary to support a conclusion that the beneficiary will be primarily delegating non-qualifying operational tasks to other managerial and supervisory employees as asserted by counsel. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees.

Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The petitioner has not credibly established that the beneficiary will have managers, supervisors, and professionals to whom he will delegate day-to-day operational duties. The petitioner states that it has four current managerial employees: 1) [REDACTED] Vice President and General Manager; 2) [REDACTED] Operations Manager; 3) [REDACTED] Manager; and 4) [REDACTED] Manager. The petitioner provided payroll documentation only for [REDACTED] which lists [REDACTED] as employees. However, the petitioner has submitting nothing to confirm that these employees work for [REDACTED] in their purported management roles with this company. The failure to submit petitioner payroll documentation particularly important, since as previously discussed, the petitioner's acquisition of [REDACTED] is left in doubt. Also, the stated duties of the General Manager, [REDACTED] are largely repetitive of the beneficiary's duties casting doubt on her role with the petitioner. The petitioner has also provided incomplete duty descriptions for his stated subordinates. For instance, the petitioner has provided duty descriptions for a General Manager, Accountant, and Operations Manager, but fails to provide duty descriptions, educational backgrounds, and salaries for all of his subordinates as requested by the director in the RFE. Also, the petitioner submits no duty descriptions for the stated [REDACTED] and [REDACTED] Managers. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Lastly, as is critical for a new office, the petitioner offers no specific future hiring plans for the petitioner, casting doubt on the statement that the beneficiary will be focused on organizing a management team for the petitioner. Indeed, the petitioner has alternatively stated that this management team is already in place. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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). In sum, the totality of the circumstances do not establish that the petitioner employs four managerial, supervisory, and professional subordinates as asserted; therefore, the beneficiary has not been established as a personnel manager as defined by the Act.

Counsel also maintains that the beneficiary qualifies as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section

101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided sufficient evidence that the beneficiary manages an essential function. In fact, the petitioner offers that the beneficiary has four managerial subordinates. Therefore, counsel's assertion that the beneficiary is also a function manager is questionable, since a function manager does not supervise or control the work of subordinate staff. Further, a function manager manages an essential function *within* an organization, not the organization in its entirety. Lastly, counsel has not articulated with specificity how the beneficiary will be employed as a function manager, or provided sufficient supporting evidence to establish this assertion. As such, the record does not indicate that the beneficiary will act as a function manager for the petitioner.

In conclusion, the petitioner has submitted insufficient and inconsistent evidence to establish that the beneficiary is likely to act primarily in an executive or managerial role after one year as required by the Act. For this additional reason, the appeal must be dismissed.

C. Sufficient physical premises to house the new office

Beyond the decision of the director, the petitioner has also failed to show that it has secured sufficient premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

When a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business. See 8 C.F.R. § 214.2(l)(3)(v)(A). In support of the Form I-129 Petitioner for a Nonimmigrant Worker, the petitioner submitted an office lease for a property located at [REDACTED], which expired on April 24, 2012. In response to the director's RFE, the petitioner stated that it had moved its offices to [REDACTED] the same address listed in the provided Operating Agreement executed by and between [REDACTED] pursuant to which the former will operate a convenience store doing business at this location as "Radiant." Further, the agreement also mentions that the parties had concurrently executed a "[REDACTED] Operating Agreement" and a "[REDACTED] Operating Agreement," which are not produced on the record. The petitioner also provides pictures of the exterior of

the [REDACTED] convenience store and a related car wash; and the interiors of a [REDACTED] store and a [REDACTED] store. However, at no point on the record is it explained where the petitioner will maintain its operations. The petitioner claims it will employ the beneficiary and four subordinate managers, including the Vice President and General Manager, Operations Manager, a [REDACTED] Manager; and a [REDACTED] Manager. Assuming that the latter store managers could operate out of their respective store locations, the petitioner still has not detailed sufficient physical premises for himself and the two other stated managers. Indeed, the above referenced Operating Agreement makes no mention of the petitioner or the allocation of office space to house the beneficiary and the other claimed managerial employees. As such, the ability of the petitioner to operate out of the [REDACTED] location is not adequately supported on the record. Further, the petitioner has not submitted sufficient evidence to establish that its subsidiary does indeed operate [REDACTED] locations as asserted. In fact, it is not made clear on the record where these stores are even located, as their claimed operating agreements have not been submitted on the record. 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)).

It is the petitioner's burden to clearly articulate that it has acquired sufficient premises to commence the new venture immediately through a thorough explanation of its business plans and details as to why the offered premises is sufficient for these purposes; appropriately supported by documentary evidence. In the present matter, the petitioner has not met this burden, as almost insufficient evidence is provided to support that the petitioner has sufficient premises to support its claimed managerial and administrative staff. Further, various discrepancies related to the claimed gas convenience and retail stores offered on the record cast doubt on whether these locations are legitimately being operated by the petitioner's subsidiary company; and additionally, that the petitioner even has a controlling interest in [REDACTED]. Therefore, the petitioner has not established that it has secured sufficient premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

III. Conclusion

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

ORDER: The appeal is dismissed.