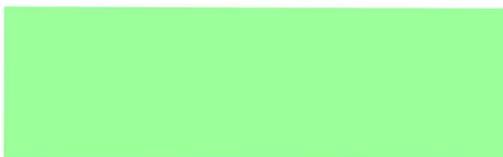


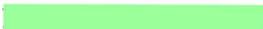
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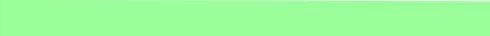
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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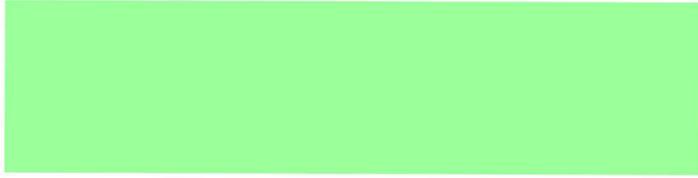


DATE: **JUN 25 2013** Office: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you.

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to qualify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner filed this nonimmigrant petition seeking to qualify the beneficiary's status as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Texas corporation, established in 2012, engaged in the import, export, and sale of electronics. The petitioner states that it is a wholly owned subsidiary of [REDACTED]. The petitioner seeks to employ the beneficiary as the president of a "new office" in the United States for a period of one year.

The director denied the petition, finding that the petitioner had not established that the beneficiary would function primarily in an executive or managerial capacity. The director reasoned that the record was insufficient to demonstrate that the beneficiary would be relieved from primarily performing non-qualifying day-to-day operational duties within one year of the approval of the petition. The director noted the vague nature of the duties submitted for the petitioner and her subordinates. Further, the director concluded that the petitioner had not shown that the beneficiary's subordinates would be supervisors, managers or professionals as necessary to raise the beneficiary above that of a first-line supervisor of non-professional employees.

On appeal, counsel asserts that the director's decision was an abuse of discretion and a violation of the petitioner's due process rights. Counsel contends that the director failed to consider the beneficiary sufficiently detailed duties, which establish him as an executive. Counsel also references the submitted organizational chart for the petitioner asserting that this further establishes the petitioner as an executive. Counsel notes that the failure to provide information on educational requirements for proposed U.S. positions is due to the fact that these positions have yet to be filled. Additionally, counsel maintains that the subordinate purchasing agents to be hired by the petitioner will act as professionals as defined by the Act.

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

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 (I)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

## II. The Issue on Appeal:

The sole issue to be addressed on appeal is whether the petitioner established that the beneficiary would act primarily in a managerial or executive capacity in the United States after one year. Upon review of the record, the petitioner has not established that it can support the claimed executive or managerial role of the beneficiary after one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The "new office" provision was meant as an accommodation for newly established enterprises and provided for by U.S. Citizenship and Immigration Services (USCIS) regulation to allow for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not

normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

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

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 support of the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated:

[The beneficiary's] duties in the USA, as the President/CEO will be to develop a strategic plan to advance the company's mission and objectives and to promote revenue, profitability, and growth as an organization. Oversee the company's operations to ensure production, sales, efficiency quality, service and cost-effective management of resources. Plan, develop and implement strategies for generating resources and/or revenue for the company. Approve company operational procedures, policies and standards. Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. Direct company planning and policy-making committees. Based upon her position she has the authority to hire and fire, and in her positions she works independently without supervision.

The director found that the record lacked sufficient detail to establish the beneficiary as an executive or manager. As such, the director requested that the petitioner submit additional evidence to establish that the beneficiary would be employed in a managerial or executive capacity with the petitioner. Specifically, the director requested that the petitioner provide job duties for each proposed position within the petitioner's organization, including the percentage of time each employee would spend on each duty. Although the petitioner provided a listing of job duties for both current and prospective employees of the petitioner, the petitioner did not provide a percentage breakdown of duties performed by the beneficiary and her subordinates to give the duties sufficient credibility. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In response to the Request for Evidence (RFE), the petitioner largely provided the same duties listed above, but slightly modified the duties, adding that the beneficiary would "function at a senior level within the organization," "establish goals and policies," and "direct the management of the organization."

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 the nature of the petitioner's operations in the United States; strategies that will be developed; or operational procedures and policies that will be created to give the referenced job duties more credibility or probative value. Indeed, there is little 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, the industry within which the beneficiary will operate. Further, the duties, and the record generally, are largely repetitive of the statutory language. As such, the total lack of specificity or examples in the provided U.S. 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.).

Thus, while some of the duties described by the petitioner may generally fall under the definitions of managerial or executive capacity, the vague nature of the duty description 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.

In his decision, the director found that the petitioner had submitted sufficient evidence concerning the size of the foreign employer's investment in the petitioner. However, the AAO does not agree that the petitioner established that the foreign employer's investment in the petitioner is sufficiently supported on the record and will withdraw this portion of the director's decision. In analyzing the totality of the record, the evidence presented does not support a finding that beneficiary will be primarily performing executive or managerial duties within one year, as the petitioner has not provided sufficient evidence regarding its investment plans with respect to the U.S. venture. The AAO notes that the petitioner has provided sufficient evidence to establish that the foreign employer is investing over \$100,000 in the U.S. venture, but the record is not specific as to how this amount will be sufficient to successfully launch the petitioner's operations and support the beneficiary in a managerial or executive role after one year. In fact, the record suggests that the initial investment is not likely to support the petitioner's initial operations. For instance, the petitioner submits a lease for office space dated August 1, 2012 that requires the payment of \$31,440 in rent on the first day of each month. In direct contradiction, the petitioner financial projections indicate that the petitioner will only have to pay \$500 per month in rent. Therefore, such a large material discrepancy in the petitioner's financial projections casts doubt upon the potential for the petitioner to support the beneficiary's role after one year. Further, with the petitioner holding such a large cost burden with respect to rent, it is also questionable whether the petitioner will be able to hire sufficient managers and professionals to relieve the beneficiary from primarily performing non-qualifying operational duties after first year. 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).

The AAO notes that the petitioner failed to submit a credible business plan. The director requested that the petitioner submit a business plan that detailed timetables for various proposed actions that would be undertaken in the first year to commence the petitioner's operations. 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.

*Id.*

Although the petitioner has provided some detail regarding marketing plans and pricing, the petitioner has not provided sufficient detail to demonstrate that the petitioner's proposed operation has a realistic expectation of success and 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). For instance, although the petitioner states that it will purchase laptops, GPS and other computer and hardware and software for resale in Nigeria, the business plan provides little detail regarding planned sources of supply for these items or demand for these items abroad. The petitioner further notes that it plans to partner with companies such as [REDACTED] but has provided no supporting evidence to determine whether these proposed partnerships are likely. 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)). Indeed, the business plan does not provide detailed actions and timetables necessary to assess whether the petitioner's plan is viable and likely to succeed, as was specifically requested by the director. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In sum, due to the lack of sufficient detail and supporting documentation, the business plan is not adequately credible to conclude that the business will grow rapidly to support the beneficiary, his General Manager, and purchasing agents within one year.

The petitioner's plans lack detail and contain inconsistencies regarding the petitioner's proposed subordinates. In the RFE, the director asked the petitioner to provide detailed descriptions of its prospective staff, including percentages of time spent on various tasks. In response, the petitioner provided job descriptions for a manager reporting to the beneficiary as president, a purchasing agent, an assistant/secretary, and sales representatives. However, the duty descriptions for these employees are insufficiently detailed to allow for credibility and probative value. To illustrate, the manager's duties include: "model[ing] and creat[ing] [an] environment in which the customer is always right" and "provid[ing] a quality product and customer service experience that delivers customer satisfaction." Additionally, the duties of the proposed purchasing agents include: "obtain[ing] the highest quality merchandise at the lowest possible cost" and "[choosing] the best suppliers of the product and service." Also, the proposed sales representatives are not included in the petitioner's income and expense projections, whereas all other proposed employees are included as a projected cost. In sum, due to the lack of specificity and inconsistencies related to the petitioner's proposed subordinates, the petitioner has failed to establish it will have adequate subordinates to support the beneficiary in a qualifying executive or managerial role after one year.

On appeal, counsel asserts that the petitioner's subordinate purchasing agents will be professionals, as defined by the Act. As such, the petitioner offers the beneficiary as a personnel manager, as defined by law. 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).

Here, the petitioner has not established that the beneficiary will likely direct subordinate managers, supervisors, or professionals. See § 101(a)(44)(A)(ii) and Section 101(a)(44)(B) of the Act. As noted, the petitioner has not provided sufficient detail on his proposed subordinates, including that of his only direct subordinate, the manager. Further, the AAO does not find convincing the argument that the proposed purchasing agents will act as professionals as defined by the Act. In fact, the U.S. Bureau of Labor Occupational Outlook Handbook the petitioner references as evidence of the professional nature of the purchasing agent position also states definitively that a high school diploma is sufficient for entry into the field. As noted above, to be deemed a professional by law, a subordinate must hold 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. The petitioner has not submitted adequate evidence to show that the proposed purchasing agents will have such advanced knowledge or require baccalaureate level degrees. Indeed, contrary to this, the petitioner states directly on the record that the educational credentials of the beneficiary's subordinates cannot be submitted, as they have not been hired, thereby suggesting that any level of education could qualify a candidate for hire and that a specific type of degree is not required for this position or the proposed supervisory manager position. In short, it is the petitioner's burden to establish that the beneficiary is likely to act as a personnel manager. In the present matter, the petitioner has not provided sufficiently detailed job duty descriptions for these employees, or educational requirements, to establish that they will be managers, supervisors or professionals. Further, the petitioner has provided inadequate investment and business plans for the first year. As such, it is not possible to determine that the petitioner has a realistic chance of success and is likely to support the proposed U.S. positions. 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).

Counsel further asserts on appeal that the beneficiary qualifies as an executive consistent with the Act and regulations. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of

the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will primarily direct the management of an organization and focus on establishing goals and policies after one year. The petitioner has provided a vague duty description for the beneficiary that reiterates the statutory definition of an executive. Also, as discussed above, the petitioner's first year investment and business plans are not sufficiently detailed and supported to conclude that the beneficiary will be relieved from primarily performing day-to-day operational duties after one year. Additionally, the petitioner has not established that he dictates to subordinate managerial employees within a complex organizational hierarchy. In fact, as stated, the petitioner offers that it has only one managerial subordinate, for which a vague duty description lacking credibility is provided. Again, 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.). While the AAO does not doubt that the beneficiary would likely exercise authority over the petitioner as an owner and senior employee, the petitioner has not established that she will primarily perform executive duties as defined by the Act.

Lastly, counsel suggests in his brief that the due process rights of the beneficiary have been violated. However, counsel has not articulated a violation of the regulations, let alone "substantial prejudice" to the beneficiary. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). As discussed in this decision, a review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition, and this is not sufficient to establish a violation of the beneficiary's due process rights. The AAO further notes that a violation of the beneficiary's due process in this case is not possible, as they are not considered an affected party in the proceeding. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, counsel's due process claim is without merit.

In conclusion, the petitioner has failed to establish that the beneficiary would be primarily employed in a managerial or executive capacity within one year. This conclusion is based the vague nature of the duties provided for the beneficiary and his proposed subordinates; and the inadequacy of the petitioner's investment, business, and hiring plans during the first year. For this reason, the appeal must be dismissed.

### III. Conclusion

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.