



U.S. Citizenship
and Immigration
Services

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DATE: **MAR 29 2013**

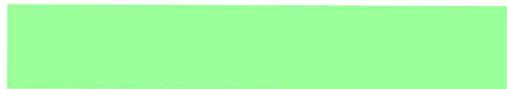
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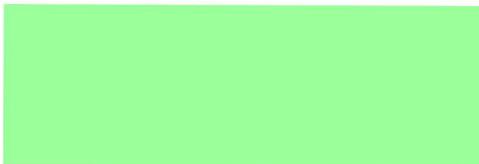
Petitioner:

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, California 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 California limited liability company established in December 2011, states it is engaged in the food service industry. It claims to be a wholly owned subsidiary of [REDACTED] located in the Republic of the Philippines. The petitioner seeks to employ the beneficiary as the Vice President of Operations of a "new office" in the United States for a period of two years.

The director denied the petition finding that the record failed to establish that the petitioner had a qualifying relationship with the foreign employer as defined by the Act. More specifically, the director concluded that there was not sufficient documentary evidence to support that the foreign employer and petitioner were owned and controlled by the same of group of individuals, owning and controlling approximately the same proportion of each entity as offered by the petitioner. The director pointed to the petitioner's failure to provide adequate evidence to support that the claimed shareholders of the petitioner paid consideration for the shares issued.

On appeal, counsel asserts as erroneous the director's finding that there was not a qualifying relationship between the petitioner and the foreign employer. Counsel maintains that consideration was paid by the foreign shareholders of the foreign employer to the petitioner in the form of cash dividends issued to the foreign shareholders who remitted these respective amounts to the petitioner as consideration for their various interests in the petitioner. Counsel states that these transfers were completed on an installment basis through [REDACTED] transfers made between agents of the foreign employer and the petitioner, and submits additional evidence on appeal in an effort to support this argument.

I. The Law

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

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

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

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

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

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

II. The Issues on Appeal:

A. Qualifying Relationship between the petitioner and foreign employer

The director denied the petition based on the petitioner's failure to establish that a qualifying relationship existed between the foreign employer and petitioner; or more specifically, that the foreign employer and

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petitioner are indeed controlled by the same group of individuals owning approximately the same proportion of shares.

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[.]

* * *

(L) *Affiliate* means

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

The petitioner states that the foreign employer, a corporation in the Philippines engaged in the food service industry, is controlled by various family members owning shares in the foreign entity. The owners of foreign employer shares, the amount of shares, and percentage of ownership are offered as follows: (1) [REDACTED] 250 common shares (20% ownership); [REDACTED] 250 common shares (20% ownership); [REDACTED] 125 common shares (10% ownership); and [REDACTED] 125 common shares (10% ownership).

On appeal, the petitioner claims that the foreign employer issued dividends to the above mentioned foreign shareholders who in turn paid these amounts as an initial capital contribution in the petitioner. As a result of this transaction, the petitioner states that the petitioner is owned by the foreign employer shareholders in the same proportion as that of the ownership structure of the foreign employer. Further, the petitioner maintains that each petitioner shareholder paid due consideration for their interest through the transference of the aforementioned foreign employer dividends via Western Union. Although the record reflects that no

such direct transference between the foreign employer shareholders and the petitioner took place, the petitioner asserts that these transfers were completed through various agents of the foreign employer and petitioner. The following is an illustration of the claimed ownership structure of the petitioner, including shares owned, percentage of shares owned, and amount of consideration claimed to have been paid for each respective interest according to a foreign employer "Secretary's Certificate" dated July 17, 2012: (1) [REDACTED] common shares 20,000 for \$20,000 (20% ownership); [REDACTED] 20,000 common shares for \$20,000 (20% ownership); [REDACTED] 10,000 common shares for \$10,000 (10% ownership); and [REDACTED] 10,000 for common shares \$10,000 (10% ownership). The record reflects that the petitioner shareholders are claimed to have made an aggregate \$100,000 initial capital contribution in the petitioner.

Upon review of the record, and for the reasons below, the AAO finds that the petitioner has not met the burden of establishing that the foreign employer and petitioner are affiliates under common ownership.

First, the director was correct to request that the petitioner submit sufficient documentary evidence that consideration was paid for the various share interests in the petitioner. As general evidence of a petitioner's claimed qualifying relationship, 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). Without full disclosure of all relevant documents, USCIS cannot determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the identification of a member of an LLC into the means by which this membership interest was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for the membership interest. Additional supporting evidence would include an operating agreement, minutes of relevant membership or management meetings, or other legal documents governing the acquisition of the ownership interest.

The record includes various material discrepancies related to the claimed purchase of petitioner shares by foreign employer shareholders that casts serious doubt on the legitimacy of the transaction; and in turn,

whether the offered affiliate relationship exists between the petitioner and the foreign employer. For instance, the petitioner is offered as issuing shares to various members of the [REDACTED] family claimed as owners of the petitioner. However, a limited liability company does not issue shares, but is formed on the basis of ownership interests established in a certificate of formation or organization, or an operating agreement; and reflected in the form of certificates of membership interest, not stock certificates issued. As such, the logical and legal fallacy of issuing stock in a limited liability company casts serious doubt on the offered transaction. 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).

Further, there are numerous discrepancies on the record related to the amount of consideration paid for the various member interests in the petitioner. The aforementioned "Secretary's Certificate" dated July 12, 2012 notes that the shareholders of the foreign employer were issued dividends in the amount of \$100,000 in percentage shares equal to their ownership interest in the foreign employer pursuant to a foreign board of director's meeting taking place on August 19, 2011. Further, the foreign "Secretary's Certificate" illustrates the intention of the shareholders to issue their dividend amounts to the petitioner as an initial capital contribution. However, the resolution is of questionable credibility as the "Secretary's Certificate" is dated nearly a year after the purported transaction was approved by the foreign employer board of directors, and no other supporting documentation from the petitioner or foreign employer records is provided to support that this resolution took place. 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)). Additionally, a letter dated July 16, 2012 from the petitioner's "designated agent" notes that a total initial contribution of \$86,000 was made by the foreign employer shareholders "consistent with their percentage of ownership in the foreign employer," in direct contradiction to the previously asserted \$100,000 contribution. Also, the petitioner submitted a breakdown of 48 separate Western Union transactions in greatly varying amounts between various agents of the foreign employer and petitioner (including supporting documents that these various wires were made). The petitioner claims these wire transfers reflect the initial capital contributions of the foreign shareholders. But, again in direct contradiction to the previously asserted initial contribution amounts, this aggregate contribution is reflected as \$88,377.86 in the petitioner submitted wire transfer log. Furthermore, the log of Western Union transactions does not clearly denote for which foreign employer shareholder each amount was paid, making it impossible to confirm whether adequate consideration was paid by the various members of the petitioner commensurate with their claimed interests. In fact, the convoluted nature of this payment scheme casts doubt on whether these wire amounts were made for the purpose of the foreign employer shareholders purchasing membership interests in the petitioner. It appears more likely, based on the aforementioned discrepancies and the inconsistent nature of the payments, that the foreign employer was providing as-needed financial support to the new operation in the United States without any relation to the claimed issuance of dividends or payment of consideration for foreign shareholder membership interests in the petitioner. 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. Again, 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).

As such, the petitioner has not established with sufficient evidence that the petitioner and the foreign employer are affiliates as claimed, and in turn, that such entities have a required qualifying relationship. For this reason, the appeal must be dismissed.

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

Beyond the decision of the director, the petitioner has also not established that the beneficiary is likely to act primarily in an executive or managerial role for the petitioner following one year of operation as a "new office" 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 Form I-129 Petition for a Nonimmigrant Worker, and a support letter submitted along with the petition, the beneficiary's position and duties are explained as follows:

[The beneficiary] will act as the Vice President for Operations for the US company. As vice president for operations she will be in charge of the following duties and responsibilities: (1) Formulate policies oversee and direct operations of the US corporation; (2) In coordination with the company's president, develop organizational management plans; (3) Develop Marketing strategies; business and market entry plans; (4) Direct the preparation of necessary feasibility studies, including site analysis, competition analysis, pricing and market acceptance; (5) Identify and coordinate food and equipment suppliers to meet with health and sanitation standards; (6) Recruit, hire and train new employees to ensure that the

company's standards of quality, service and efficiency are met; (7) Monitor food quality and ensure that the recipe of the company's food products are followed.

In this highly responsible position, [the beneficiary] will report directly to the Board of Directors of both the mother company and the US company, and will be responsible in setting up the new stores of the company.

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).

Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial or non-executive. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary will spend on them. This failure of documentation is important because some of the beneficiary's daily tasks, such as directing operations; identifying and coordinating with food and equipment suppliers; and monitoring food quality and ensuring that the recipe of the company's food product are followed, 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 the managerial or executive duties. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Thus, while some of the duties described by the petitioner may generally fall under the definitions of managerial or executive capacity, the failure to be specific regarding how the beneficiary's duties will shift from operational to managerial or executive duties 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 analyzing the totality of the record, the evidence presented does not support a finding that beneficiary will be primarily performing executive or managerial duties within one year, as the petitioner has not provided sufficient evidence to document its specific hiring or investment plans necessary to support such a conclusion. The petitioner provides an organizational chart for the new US operation which includes a

President to whom the President reports. Further, the organizational chart submitted by the petitioner shows a Chief Financial Officer, Corporate Secretary, and Store Manager of the San Francisco location reporting to the beneficiary. However, the petitioner provides no information on employees that are undoubtedly necessary to perform the day-to-day operational duties of the petitioner's business, and the claimed President is not identified. The beneficiary lists a cashier and "kitchen crew" working for the San Francisco restaurant location; but no information or supporting evidence is provided to confirm that these workers are employed by the petitioner or that immediate plans are in place to hire these employees. Indeed, the I-129 Petition for a Non-immigrant Worker confirms that the petitioner only has three employees; presumably, the Chief Financial Officer, Corporate Secretary, and Store Manager listed on the organizational chart. As such, without specifics related to operational employees, it is likely that the aforementioned administrative and managerial employees are performing day-to-day operational duties necessary to operate the San Francisco food service location. Additionally, the lack of clear hiring plans on the record casts doubt on whether the beneficiary, and his claimed fellow managers, will be relieved from primarily performing non-qualifying operational duties. 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)). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, the petitioner has provided insufficient and contradictory information on its investment plans in the United States, casting further doubt on whether the beneficiary will primarily perform executive or managerial duties after one year. For instance, the petitioner business plan and organizational chart reflect that the petitioner not only plans to operate a food service location in San Francisco, CA; but further plans on opening locations in New Jersey, San Diego, and Los Angeles during the first year of operation. The petitioner's business plan goes even farther to claim that the petitioner will aggressively expand to 20 branches in the United States in the first five years and construct a production facility to supply the locations in Vallejo, California. However, little supporting documentation or other evidence is provided to conclude that these aggressive plans are viable; or that the first phase of expansion is likely to take place in the first year. For instance, the specific amount to be invested in order to make this plan a reality is not made clear. In fact, the business plan notes that an initial \$3 million loan will be necessary to carry out the petitioner's plans in the United States; but there is no evidence on the record to support a conclusion that the petitioner is likely to receive a loan in this amount or that such a large investment is imminent. Indeed, the only amounts offered as being invested in the petitioner are in the form of claimed foreign employer shareholder dividends. As previously discussed in this decision, it appears more likely that the claimed shareholder capital contributions were simply monies paid to the petitioner to support the day-to-day operations of the San Francisco food service location, and bear little relation to the aggressive expansion plans offered on the record as a central part of the beneficiary's duties. Further, as previously discussed herein, the original investment amount in the petitioner is offered in varying amounts throughout the record, casting doubt on its credibility. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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)). Therefore, the petitioner has failed to clearly establish the amount of its investment in the new enterprise as required by 8 C.F.R. § 214.2(l)(3)(v)(2).

In conclusion, although the petitioner has shown that it likely has a food service location operating in San Francisco, CA; it has not provided sufficient explanations or supporting evidence to establish specific hiring and investment plans necessary to relieve the beneficiary from primarily performing non-qualifying day-to-day operations after one year as required of a "new office" under the Act. As such, the appeal will be dismissed for this additional reason.

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).

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

Lastly, and also beyond the decision of the director, the petitioner has not established that the beneficiary is employed primarily in a managerial or executive capacity with the foreign employer. See 8 C.F.R. § 214.2(l)(3)(iv).

As noted, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In response to the director's RFE, the foreign employer provided the following description of the beneficiary's duties with the foreign employer in a letter dated May 10, 2012, including percentages of time spent on various duties:

From June 2008 to October 2011[the beneficiary] was employed as our Operations Manager with overall responsibility for the operations of the company commissary and all company-owned stores. As Operations Manager, [the beneficiary] worked 50-60 hours a week and received a salary of 50,000 [Pilipino Pesos] per month. As Operations Manager, [the beneficiary] performed the following duties and functions:

- 60%** support and overall management of the day-to-day operations of the company's commissary and all company-owned stores; conduct regular store visits; work with store managers to achieve or exceed profit objectives;
- 10%** oversees the hiring and training of all employees;
- 5-10%** monitors compliance with company policies and standards;

- 10% conducts operations evaluation reports; ensure audits and safety, security and cash/operations controls;
- 5-10% implements product marketing strategies;
- 5-10% reviews financial statements, sales reports and other performance data to determine productivity and goal achievement; plans and sets goals; and formulates strategies to reduce costs and improve performance.

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 little specifics as to how the beneficiary carried out the general tasks and goals listed above as a part of his daily duties. In fact, portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's day-to-day activities, such as overseeing hiring and training of all employees; implementing product marketing strategies; or formulating strategies to reduce costs and improve performance. In each of the aforementioned cases, the petitioner has not provided details, specific examples or supporting evidence related to these vague functions; such as employees hired or training conducted; or actual product marketing, cost reduction, or performance improvement strategies implemented. 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. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

Indeed, to the extent that the petitioner provides specifics related to the beneficiary's duties, it suggests that the beneficiary is primarily performing day-to-day operational duties related to conducting site audits at the foreign employer's store locations. 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). As such, the petitioner's job duty description noting the primary performance of day-to-day operational duties is not sufficient to establish that the beneficiary primarily performs managerial or executive duties with the foreign employer as required by the Act.

Additionally, various discrepancies related to the beneficiary's claimed employment as Operations Manager with the foreign employer cast doubt on whether the beneficiary acts in the proffered executive or managerial role with the foreign employer. For example, in the I-129 Petition for a Non-immigrant Worker, the beneficiary is offered as working in the role as Operations Manager with the foreign employer from

January 2006 to the present. However, in the accompanying support letter, the beneficiary is stated as being in this role from June 2008 to the present. Thirdly, in the foreign employer's letter submitted in response to the director's RFE, the beneficiary is submitted as working in the role as Operations Manager from June 2008 through October 2011. The aforementioned foreign employer support letter raises further questions as to what role the beneficiary was performing from October 2011 through submittal of the petition in April 2012. In sum, the discrepancies related to the beneficiary's offered dates of employment as Operations Manager cast doubt on whether the beneficiary is employed as offered. 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).

In conclusion, the prevalence of non-qualifying duties in the beneficiary's foreign duty description; vagueness related to any submitted qualifying duties; and certain unresolved material discrepancies related to the beneficiary's foreign employment; leaves unsupported the beneficiary's claimed foreign employment in a managerial or executive capacity. Therefore, the appeal will be dismissed for this additional reason.

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.