



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 23 2013**

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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)

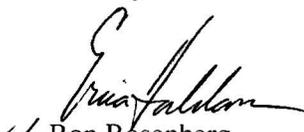
ON BEHALF OF PETITIONER:

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, 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 employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation established in June 2012, states that it operates a Syrian specialty food business. The petitioner claims to be an affiliate of [REDACTED] located in Syria. The petitioner seeks to employ the beneficiary as the CEO and president of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the U.S. company is an affiliate of the foreign entity based on the beneficiary's majority ownership of each company. The petitioner submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

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

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.
- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the beneficiary's foreign employer and the U.S. company are qualifying organizations. 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).

A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 14, 2012. On the L Classification Supplement to Form I-129, the petitioner identified the beneficiary's last foreign employer as [REDACTED] and stated that the foreign and U.S. companies have an affiliate relationship based on the following description of the stock ownership and control of each company: [REDACTED] However, the petitioner failed to explain how the beneficiary's claimed foreign employer and the U.S. company have an affiliate or other qualifying relationship.

Counsel's letter dated September 6, 2012, described the relationship between the foreign and U.S. entities as follows:

Attached please find the following documentation regarding the relationship between [the petitioner] and its affiliated company in Syria, [the foreign entity]:

1. Articles of Incorporation and Bylaws for [the petitioner];
2. Document from the Syrian Ministry of Economy and Trade; and
3. Letter from the U.S. Internal Revenue Service (IRS).

These documents are to verify that [the beneficiary] is a controlling shareholder of both US and Syrian companies at 51%. As a result, both [the petitioner] and [the foreign entity] are affiliates of one another.

The above enclosed documents clearly verify that [the beneficiary] owns 51% of both [the petitioner] and [the foreign entity]. It establishes that both [the petitioner] and [the foreign entity] are affiliates based on [the beneficiary's] majority shares in both companies. Thus, both companies have a qualifying relationship as defined in the regulations.

In support of the petition, the petitioner submitted the following documents as evidence of its ownership:

- Articles of Incorporation dated June 14, 2012 authorizing the U.S. company to issue 100,000 total shares of stock;
- Corporate by-laws, including Exhibit A: Shareholders, listing the following owners:
 - [The beneficiary] 25,500 shares (51%)
 - [redacted] 24,500 shares (49%)
- Stock certificate #2 issuing 24,500 shares to [redacted] on July 18, 2012. The certificate is lacking the signature of the secretary and the president;
- Its stock ledger indicating that certificate #1 (25,500 shares) was issued to the beneficiary on July 18, 2012, and certificate #2 (24,500 shares) was issued to [redacted] on July 18, 2012;
- A copy of its [redacted] account summary information statement indicating that a business account was opened on July 24, 2012;
- Two [redacted] wire transfer documents indicating that [redacted] transferred \$79,961 to the beneficiary's personal account on June 15, 2012, and \$10,967 on June 19, 2012.

With respect to the foreign entity, the petitioner submitted the following documentation as evidence of its ownership:

- An undated document from the Syrian Arab Republic Ministry of Economy and Trade referencing the ownership of "[redacted] group for Trade and Industry." The statement indicates that, according to the company's agreement kept in the ministry's office, "[redacted] [sic] is the general director of the Partnerships group" and owns 51% of capital and interests, and the remaining capital and interests are equally divided among the partners "[redacted], [redacted], [redacted] and [redacted]"; and

- An undated document from "[REDACTED] group for trade and industry" indicating that the owners consist of "[REDACTED] and that [REDACTED] is the general manager and the head of the board of directors since the establishment of the company.

The AAO notes that although the petitioner submitted over 100 pages of evidence in "Exhibit C: Evidence of Qualifying Relationship (From Company Abroad)," the documentation presented, with the exception of these two statements, does not reference the name of the foreign entity nor does the petitioner provide an explanation as to the significance of said documentation.

The director issued a request for evidence ("RFE") on September 26, 2012, instructing the petitioner to submit, *inter alia*: (1) proof of capital contribution to the U.S. entity; (2) proof of stock purchase or capital contribution in exchange for ownership; and (3) a detailed list of owners for the foreign entity.

In response to the RFE, counsel the petitioner once again explained the ownership of the entities, and emphasized that the beneficiary controls both the U.S. company and the foreign entity as 51% owner. Counsel explains the beneficiary's capital contributions and proof of 51% ownership of the U.S. company as follows:

The bank statement and the cashier's checks show that on July 3, 2012 and July 9, 2012, \$40,010 and \$12,010 were withdrawn to pay for the purchase of a restaurant business [REDACTED] from the owner, [REDACTED] and to pay six-months' deposit to [REDACTED] the landlord of the leased premises at [REDACTED] San Francisco, CA, respectively.

* * *

These bank statements evidence the transfer of \$5,000 on July 24, 2012 from beneficiary's bank account to [the petitioner's] bank account with [REDACTED]

* * *

These bank statements and deposit receipts show that \$3,919.05 was transferred on September 7, 2012 from beneficiary's bank account to [the petitioner's] bank account. They also evidence transfers of \$5,000 and \$4,000 from beneficiary's personal account to [the petitioner's] bank account, on September 17 and September 19, 2012, respectively.

* * *

The Certification provides that beneficiary owns 51% of [the petitioner]. The remaining 49% is owned in equal shares by beneficiary's three partners. Thus the ownership of the foreign company is as follows:

| Name | Percentage of Ownership |
|---------------|-------------------------|
| 1. [REDACTED] | 51.00% |
| 2. [REDACTED] | 16.333% |
| 3. [REDACTED] | 16.333% |
| 4. [REDACTED] | <u>16.333%</u> |
| Total | 100.00% |

The petitioner submitted copies of cashier's checks for the purchase of the existing restaurant and the six-month deposit on the lease. The petitioner also submitted the beneficiary's personal bank statements for June 12, 2012 through July 11, 2012 showing the two wire transfers from [REDACTED] and the two withdrawals for \$40,010 and \$12,010 on July 3 and July 9, 2012, respectively. The petitioner included additional bank statements for the beneficiary's personal account and for the U.S. company to show that the beneficiary transferred monies from his personal account to that of the U.S. company. As evidence of the foreign entity's current ownership, the petitioner submitted the same undated document from the Syrian Arab Republic Ministry of Economy and Trade.

The director denied the petition on January 16, 2013, concluding that the petitioner failed to establish that the petitioner and the foreign entity are affiliates as defined by the regulations. In denying the petition, the director found the petitioner did not present any documentary evidence to support the purchase of stock by the beneficiary. The director observed that the evidence of wire transfers from [REDACTED] to the beneficiary show that the originator of the wire transfers is a minority owner of the foreign company and there is no indication as to what the funds were to be used for. The director further observed that the U.S. company's bank statements do not list any wire transfers originating from the beneficiary.

On appeal, counsel for the petitioner reiterates the explanation of ownership for both companies. Counsel further explains that the beneficiary had placed money in his brother's, [REDACTED], personal account in Jordan in order to transfer it to his own personal account in the United States once he opened it, which is why the wire transfers originated with his brother, a minority owner of the foreign entity. Counsel also explains that the \$40,000 cashier's check for the purchase of the existing restaurant and the \$12,000 cashier's check for the six-month payment of the lease were provided by the beneficiary as consideration for his purchase of majority ownership in the U.S. company.

The petitioner submits [REDACTED] bank statement from the [REDACTED] for December 31, 2011 through August 22, 2012 showing that the beneficiary transferred \$59,000 to this account on August 4, 2012 and that two transfers of \$80,000 and \$11,000 were made from this account on June 13 and June 17, 2012, respectively. The petitioner submits a letter from [REDACTED] dated January 28, 2013, stating that he transferred the monies he was holding for his brother. The petitioner also submits a document titled "Action by Unanimous Written Consent of Shareholders in lieu of a Meeting" of the petitioning company, dated February 5, 2013, stating, in part, the following:

RESOLVED, that the Company ratifies the actions of [the beneficiary] in sending the amount of \$1,300.00 . . . for attorney's fees for performing Company work.

* * *

RESOLVED, that the Company ratifies [redacted] sending to [the beneficiary] the sum of \$90,928.00 from a portion of his 51% ownership in his Syrian company, [redacted], to purchase the 51% of the assets of the corporation (25,500 shares) in San Francisco, CA, and to use toward a security deposit for the lease of the [redacted] in San Francisco, CA.

RESOLVED, that the Company ratifies the purchase of the assets of the [redacted] in San Francisco, CA for the sum of Eighty Thousand dollars (\$80,000.00), and the payment of a Twelve Thousand (\$12,000.00) security deposit the landlord of the building in which the [redacted] is leasing space.

The petitioner submits a copy of its stock certificate #1 issuing 25,500 shares of the U.S. company to the beneficiary on July 18, 2012, signed by both the secretary and the president, and its certificate #2 issuing 24,500 shares of the U.S. company to [redacted] on July 18, 2012, signed by both the secretary and the president.

The petitioner submits a written declaration, dated February 8, 2013, from the beneficiary, who states, in part:

[redacted] and I were introduced to [redacted] attorney at law, and asked her to set up a corporation, which she did so that I could obtain a visa and immigrate to the United States to be with my family.

I am the 51% owner of a California corporation, [the petitioner]. I purchased the shares from my money that [redacted] wired to me. . . .

Said corporation consists of my owning 51% of the corporate stock and [redacted] owning 49%, according to the bylaws that our attorney drew up.

It has 100,000 shares of stock authorized, of which 50,000 shares are outstanding. . . .

* * *

It was agreed that in exchange for a 51% share in [the petitioner], I would pay for \$40,000 of the purchase price of the restaurant's assets and \$12,000 for the security deposit of the lease. I instructed my brother [redacted] to wire funds from Jordan so that I could purchase [the petitioner's] shares, which in turn would be used to buy the restaurant's assets and to pay the security deposit.

I brought in a cashier's check for \$40,000 from [redacted] for my share of the purchase price; [redacted] brought in a cashier's check for \$40,000.00 drawn on [redacted] for his share of the purchase price, which we gave to [redacted] on or about July 5, 2012.

It was decided that our attorney should put the \$80,000.00 in her trust account to save us from a substantial business escrow fee until the purchase agreement was signed by all parties, and we could transfer the money to the seller.

On July 3, 2012, the seller of the restaurant assets, my attorney and [REDACTED] and I met in my attorney's office to sign the purchase agreement. At that time, she gave the seller of the restaurant \$80,000.00, plus an additional \$12,000 for a security deposit from me, and made payable to the Landlord of the restaurant property, which also came from my money in Syria.

The petitioner also submits a written declaration, dated January 31, 2013, from [REDACTED] the petitioner's corporate attorney, that states, in part:

[REDACTED] and [REDACTED] are clients . . . of my law practice.

On or about June 14, 2012, Clients approached me to purchase the assets of an existing restaurant in San Francisco, whose current owner wanted to sell said assets for a price of \$80,000.00. They were also going to assume the existing lease with the landlord of the building in which the restaurant was located and needed to pay the landlord a security deposit of \$12,000.00 which [the beneficiary] did upon signing all the purchase documents.

I understood from [the beneficiary] attorney [sic], [REDACTED] that [the beneficiary] was applying for an immigration visa and needed to establish a company in the United States with his own money in order to fulfill some of the visa requirements.

My Clients asked me to set up a corporation to purchase the restaurant assets, which I did.

B. Analysis

Upon review, counsel's assertions and the presented evidence are not persuasive. The petitioner has not established that the U.S. company has a qualifying relationship with the foreign entity.

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 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 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.

Here, the record contains inconsistent evidence regarding the asset purchase of the existing restaurant and the stock certificates for the U.S. company shares.

According to the statements provided by the petitioner, counsel, and the beneficiary, the beneficiary provided \$40,000 for the purchase of the existing restaurant and \$12,000 toward the security deposit of the existing lease. The beneficiary explains that the funds used for those transactions originated from his monies in his brother's bank account that were wired to his account in the United States. The petitioner provided a copy of a cashier's check for \$40,000 from the beneficiary to [REDACTED] the seller of the existing restaurant, dated July 3, 2012, and indicated that this was the beneficiary's portion of the \$80,000 purchase. The petitioner also provided a copy of a cashier's check for \$40,000 from [REDACTED] presumably from [REDACTED] to [REDACTED] dated July 3, 2012, and indicated that this was his portion of the purchase. However, in a document titled "Receipt of Funds for Asset Purchase," dated July 11, 2012, [REDACTED] states:

Received from [REDACTED], Esq., the sum of Eighty Thousand Dollars (\$80,000) in the form of four cashier's checks from the [REDACTED] of Twenty Thousand Dollars each (\$20,000) as payment in full for the purchase of assets listed in that certain Asset Purchase Agreement dated July 3, 2012 by and between [REDACTED] as Seller and [the petitioner] as Buyer.

The seller's statement above contradicts evidence presented by the petitioner in the form of two cashier's checks made payable to the seller, in the amount of \$40,000 each, for the purchase of the existing restaurant. Although the beneficiary's and counsel's written declarations on appeal state that counsel deposited the monies into a trust account and later paid the seller \$80,000, such evidence has not been presented. Further, the beneficiary states that he and [REDACTED] each gave their \$40,000 checks to the attorney on July 5, 2012, and simultaneously states that the attorney gave these same checks to the seller on July 3, 2012. 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).

Additionally, the stock certificate initially presented in support of the petition, and the stock certificate presented on appeal, are different. The initial copy of certificate #2 was not signed by the secretary or the president; the copy of certificate #2 presented on appeal bears the signature of the secretary and the president, while all else appears to be the same. 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 (BIA 1988).

The AAO cannot determine whether the beneficiary, the claimed 51% owner of the U.S. company and the foreign entity, has made any capital contributions to the U.S. company, thus the petitioner's claim that the foreign entity has an affiliate relationship with the U.S. company has not been established. 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. at 591-92.

Further, even if the AAO found that the evidence supported a finding that the beneficiary owns 51% of the U.S. company, the record contains insufficient evidence of the ownership and operation of the claimed

foreign affiliate, [REDACTED] and the businesses known as "[REDACTED]" "[REDACTED]" and [REDACTED] all of which, along with "[REDACTED]" are claimed to be the beneficiary's foreign employers.

In the instant matter, the petitioner failed to submit sufficient evidence of the ownership of the foreign entity. The petitioner submitted a document from the Syrian Arab Republic Ministry of Economy and Trade referencing the ownership of "[REDACTED] companies group for Trade and Industry"; however, said document references a "company agreement" that was not submitted as part of the record. As such, the actual ownership and control of the foreign entity has not been sufficiently documented. As noted above, the vast majority of the documentation presented to establish the existence and operation of the claimed foreign affiliate does not name any of the businesses mentioned by the petitioner. Rather, the petitioner submitted various documentation related to individual tax payments made by each of the claimed owners of the foreign entity, but no company tax returns, invoices, or other evidence that [REDACTED] is doing business independently or through the claimed businesses. Aside from a company brochure in Arabic with the name "[REDACTED]" the petitioner has not submitted sufficient evidence of the foreign entity's existence or its ownership.

Accordingly, the petitioner has not established that it has a qualifying relationship with the foreign entity and the appeal will be dismissed.

III. MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the AAO finds that the record is not persuasive in demonstrating that the beneficiary will be employed in the United States in a managerial or executive capacity within one year of the approval of the petition.

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.

On the Form I-129, the petitioner stated that the beneficiary will be employed as the CEO and president of the U.S. company. In support of the petition, counsel described the beneficiary's proposed duties as follows:

[The beneficiary] will fill the position of the CEO at the [redacted] restaurant doing business as [redacted]. This position is a key managerial position within the company. [The beneficiary] brings his experience and knowhow from Syria to develop and introduce this unusual cuisine to the Bay Area. He has experience supervising the work of others and he will supervise the work of the team here in the United States at the [redacted]. He must coordinate with the vendors to obtain all the necessary ingredients for the cuisine that will be served at [redacted].

[The beneficiary] will be responsible for overseeing the entire operation as well as making sure that the day to day operation is going smoothly under the direction of a store manager. [The beneficiary] will make sure that the [redacted] is making money and will price products according to the cost. [The beneficiary] will earn \$100,000.00 a year for this temporary position. We understand that it will be granted for one year and then after that we expect that [the beneficiary] will continue to work at [redacted] for a few more years until it is up and running smoothly.

The petitioner submitted a letter in support of the petition describing the beneficiary's proposed duties as follows:

[The beneficiary] will be transferred to the U.S. affiliate to serve as CEO and President. In this capacity, [the beneficiary] will be consistently interacting with the U.S. customer base. [The beneficiary] job duties will include the following:

- Plan and design new [redacted] retail and production facility in San Francisco;
- Recruit and train staff on the art of traditional Syrian ice cream making, design, and construct Syrian ice cream machines from scratch in the U.S.;

- Perform tasks with a wide degree of creativity and latitude;
- Manage the retail and production location with complete top-down knowledge of both the business model and art of producing traditional Syrian decorated cakes, artisanal ice cream, pastries, and deserts;
- Locate specialty ingredients suppliers, negotiate and contract with suppliers to ensure timely production of traditional Syrian ice cream, decorated cakes, and deserts;
- Create menus and determine menu items, analyze recipes, determine food, labor, and overhead costs; and
- Rely on experience and judgment to plan and accomplish goals.

The petitioner submitted an organizational chart depicting the beneficiary as the director of business, supervising a business manager, a food coordinator, and a business operation employee. The next tier of employees includes a store manager and an accounting specialist, who in turn supervise a pastry chef, a chocolate specialist, a cook and two prep cooks. The lowest tier of employees includes two cashiers, two dishwashers and a baker. The petitioner stated on the Form I-129 that it currently has 10 employees. A total of seven (7) employees are identified by name on the chart, including the beneficiary, the business operation employee (Yamen Eltawil), the food coordinator, the business manager, the store manager, the accounting specialist and the pastry chef.

The petitioner's business plan states the following about the company's management and operations:

[The beneficiary], as the majority shareholder at 51% will be the president and CEO, making all managerial decisions. [REDACTED] as the 49% shareholder will be in charge of the business operations. Any assistant managers, food coordinators, accountants, and cooks will report to [the beneficiary] while the cashiers and dishwashers will report to the assistant managers.

The director issued a request for evidence ("RFE"), instructing the petitioner to submit, *inter alia*: (1) a more detailed specific description of the beneficiary's proposed duties in the U.S., including the percentage of time required to perform the proposed duties of the managerial or executive position; and (2) a copy of the proposed U.S. organizational chart, including job titles, duties, educational levels and proposed salaries.

In response to the RFE, the petitioner expands on the beneficiary's proposed job duties as follows:

[The beneficiary] will not have a fixed schedule but we project that he will work at least nine and a half hours a day, six days a week.

1. Direct and manage the activities of [REDACTED] including the production of authentic Syrian dishes, authentic Syrian artisanal ice cream ("booza"), cakes, sweets and pastries, through [REDACTED] Managers; managing the restaurant's financial resources; negotiating with vendors and suppliers: About five and a half hours/day.

* * *

2. Analyze [REDACTED] sales, performance, safety and quality control reports; formulate plans of action to reduce costs, improve quality of products and services; make decisions aimed at maximizing efficiency and products: About 2 hours/day.

* * *

3. Develop and increase [REDACTED] business: About 2 hours/day.

The petitioner included a lengthy description of the beneficiary's first listed duty above and short descriptions for the second and third duties.

The petitioner submitted a new organizational chart depicting the beneficiary as the CEO, supervising a business operations manager. The revised chart indicates that the business operations manager is the beneficiary's direct subordinate, and that he supervises an accountant, a chef, a food coordinator, and a pastry chef and ice cream maker. The chart depicts a cashier, two cooks, and a dishwasher reporting to the chef, and a chocolate specialist and baker reporting to the pastry chef. The individual previously identified as the store manager is depicted as "chef" and the previously identified business manager does not appear on the chart. The total number of positions is 12 as opposed to the 16 depicted on the initial chart.

The petitioner also submitted a brief list of duties for the positions of business operations manager, food coordinator, chef, pastry chef and ice cream maker, and accountant.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the petition.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation that allows 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.

Accordingly, 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. *See generally*, 8 C.F.R. § 214.2(i)(3)(v). 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 house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, 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).

On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in a primarily managerial or executive position. While the petitioner indicates that the beneficiary will exercise discretionary authority over the U.S. company, it has not provided sufficient information detailing the beneficiary's proposed duties at the U.S. company to demonstrate that these duties qualify him as a manager. Several of the duties described by the petitioner would generally fall under the definitions of managerial capacity; however, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties will 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. company will realistically develop to the point where it will 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. The record does not contain a business plan that includes staffing information, hiring plan, or other evidence that would indicate the timeframe for hiring the proposed staff. In fact, the petitioner never addresses this issue in the record. It is impossible to determine, based on the evidence submitted, which, if any, of the staff would be in place within one year to relieve the beneficiary from performing non-qualifying duties. Further, although the petitioner stated on Form I-129 that it has 10 employees and named six employees on its original organizational chart, there is no evidence that the company has already hired the individuals identified.

The AAO notes that the petitioner's submission of a vague job description for the beneficiary, the inconsistent organizational chart, and the lack of a business plan that includes staffing and financial information or other evidence that would indicate the timeframe for hiring the proposed staff, falls significantly short of establishing that the company will be able to support a primarily managerial or executive position within a twelve-month period. The regulations require the petitioner to present a credible picture of where the company will stand in exactly one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14I&NDec. 190 (Reg. Comm'r. 1972)). Absent a detailed description of the beneficiary's job duties, and absent a consistent description of the petitioner's organizational structure and a business plan supporting the proposed structure, the petitioner has not established that the beneficiary will be employed in the United States in a managerial or executive capacity within one year of the approval of the petition. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. CONCLUSION

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

ORDER: The appeal is dismissed.