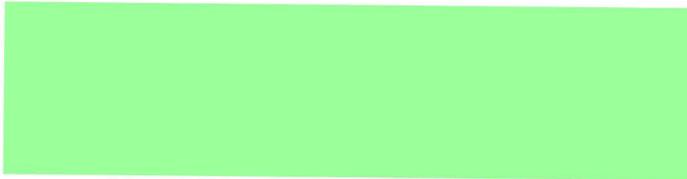


(b)(6)

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



U.S. Citizenship
and Immigration
Services

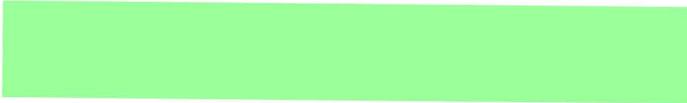


DATE: **MAY 29 2013**

Office: VERMONT SERVICE CENTER

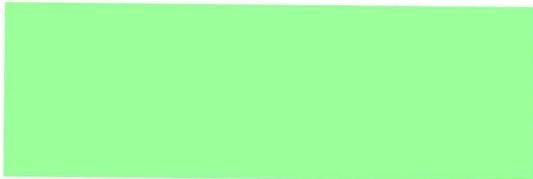
FILE: 

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:

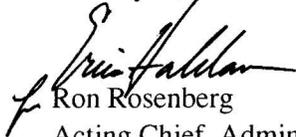


INSTRUCTIONS:

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 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 Georgia limited liability company established in 2007, claims to operate a specialty vegetarian restaurant. It claims to be a subsidiary of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as its "Sweets and Savories Product/Service Operations Manager."

The director denied the petition, concluding that the petitioner failed to establish that: (1) petitioner and the foreign entity have a qualifying relationship; (2) the foreign entity had employed the beneficiary abroad in a qualifying managerial or executive position; and (3) the petitioner will employ the beneficiary in a qualifying managerial or executive position.

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, the petitioner asserts that it provided sufficient evidence of the company's qualifying relationship with the foreign entity as well as evidence of the employment of the beneficiary in a primarily managerial or executive capacity. In support of this contention, the petitioner submits a brief.

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.

II. The Issues on Appeal

A. Qualifying Relationship

The first issue addressed by the director is whether the petitioner established that it has a qualifying relationship exists with the beneficiary's overseas employer in India.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulation defines the term "qualifying organization" as 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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (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, or
- (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

Facts and Procedural History

In this matter, the petitioner claimed on the L Supplement to the Form I-129 petition that it is the wholly-owned subsidiary of [REDACTED]. In support of this contention, the petitioner submitted a copy of its certificate of organization as a Georgia limited liability company dated June 19, 2007, as well as a copy of member certificate number 1, dated January 1, 2008, which indicated that [REDACTED] owns 100,000 units of the petitioner.

However, the petitioner also submitted a copy of its IRS Form 1065, U.S. Return of Partnership Income, for 2008. This return indicated that, contrary to the statement made on the Form I-129 petition and supported by the member certificate, the petitioner was owned by six partners as follows:

[REDACTED]	25%
[REDACTED]	10%
[REDACTED]	20%
[REDACTED]	10%
[REDACTED]	20%
[REDACTED]	15%

The director issued an request for evidence (RFE) on April 1, 2010, in which he requested, *inter alia*, clarification with regard to the actual ownership of the petitioner.

In a response dated May 12, 2010, the petitioner addressed the director's request. The petitioner provided a letter from [REDACTED] who is identified as the Director and Deputy Managing Director, Worldwide Operations, for [REDACTED]. He stated:

[REDACTED] each own twenty thousand shares of the business while [REDACTED] twenty-five thousand shares, [REDACTED] has fifteen thousand shares and [REDACTED] have ten thousand shares each. I confirm that all decisions made at oversea [sic] branches must have my approval before they are implemented.

In support of this contention, the petitioner submitted six membership certificates, as follows:

Name	Units	Membership Certificate #
[REDACTED]	20,000	1
[REDACTED]	20,000	1
[REDACTED]	15,000	2
[REDACTED]	10,000	3
[REDACTED]	10,000	4
[REDACTED]	25,000	5

It is noted that all certificates are dated January 1, 2008.

The director denied the petition on May 20, 2010, finding that the evidence submitted did not establish that the petitioner has a qualifying relationship with the Indian entity. In denying the petition, the director emphasized that the membership certificates submitted in response to the RFE conflict with the petitioner's initial evidence and its claim that it is wholly owned by [REDACTED]. The director observed that the petitioner, without explanation, submitted three different membership certificates "No. 1" bearing the same date.

On appeal, the petitioner states:

We were shocked when we received your denial notice which made reference to inconsistent membership certificates thereby not showing the proper qualifying relationship. We state here that our parent company made transfer in 2006 of more than \$1,000,000.00 for majority ownership of this business. We attach the bank records showing this transfer late 2006. The proper transfer was done in 2009. We also attach our account and auditors statement confirming the transfers. In addition, I as Officer of this corporation was not aware of the wrong membership certificates that you mentioned. I have given the law office of [REDACTED] the true certificate to show that our parent company holds 75% of ownership in our corporation.

In support of the appeal, the petitioner submits: a copy of its membership certificate No. 07 which indicates that the company issued 75,000 membership units to [REDACTED] on January 1, 2009; copies of November and December 2006 bank statements for a company called [REDACTED] a letter from an accountant indicating that three of the petitioner's members surrendered their membership in the company on January 1, 2009 in favor of [REDACTED] resulting in the issuance of the new certificate to [REDACTED] on that date; and, an affidavit from the petitioner's director indicating that the company was undertaking an internal inquiry to find the source of the "irrelevant and falsified" documents previously provided to its attorney. In addition, counsel submits a letter in which he states that "we were unaware that the certificates that were submitted to us by the then employees of the corporation were not the actual membership certificates."

Analysis

Upon review, the petitioner has not established that it has a qualifying relationship with the claimed foreign parent company.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

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 is unable to determine the elements of ownership and control.

Here, although the petitioner submitted copies of membership certificates, the petitioner failed to submit additional corporate documentation such as the petitioner's operating agreement and minutes of membership and management meetings. Further, in response to the director's request that the petitioner submit additional evidence to clarify discrepancies found in its initial evidence, the petitioner introduced new discrepancies into the record without any accompanying explanation. 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).

The petitioner's failure to submit the requested corporate documentation is particularly relevant here, since there are numerous discrepancies in the record that have not been resolved. First, in support of the petition, the petitioner claimed that it was the wholly-owned subsidiary of [REDACTED]. In support of this contention, the petitioner submitted membership certificate number 1, dated January 1, 2008, demonstrating that [REDACTED] owned 100,000 units of the petitioner.

Since the petitioner's partnership tax return stated otherwise, the director requested clarification regarding the true ownership of the petitioner. In response, the petitioner provided a statement regarding the ownership of the petitioner, indicating that it has six members. In support of this contention, the petitioner submitted six membership certificates, numbered 1 through 5, issued to the names of the six claimed partners to corroborate its statements. These documents, however, fail to clarify the contradictory evidence in the record. Further the petitioner offered no explanation for its initial statement that it is a wholly-owned subsidiary of [REDACTED].

First, the petitioner's IRS Form 1065 U.S. Partnership Tax Return for 2008, dated February 1, 2009, lists the following six partners of the petitioner:

	25%
	10%
	20%
	10%
	20%
	15%

In response to the RFE, the petitioner provides a different list of partners of the petitioner, which omits any mention of [REDACTED] and instead replaces this company with [REDACTED]. For comparison purposes, the AAO lists these partners in the same format printed above:

	25%
	10%
	20%
	10%
	20%
	15%

The petitioner replaced [REDACTED] without explanation, which raises significant questions regarding the legitimacy of the petitioner's claims. Furthermore, there is a significant discrepancy in the membership certificates. As noted above, the petitioner initially submitted membership certificate number 1, dated January 1, 2008, in the name of [REDACTED]. This certificate indicated that [REDACTED] held 100,000 units of the petitioner. In response to the RFE, which challenged the validity of the certificate based on the partnership tax return, the petitioner submitted additional membership certificates in an attempt to overcome the basis for the director's objection in the RFE. In response to the RFE, the petitioner submitted two membership certificates bearing the number 1 and dated January 1, 2008, indicating that [REDACTED] each held 20,000 units of the petitioner. There is no explanation with regard to the fate of the original certificate issued to [REDACTED] for 100,000 units, and the petitioner simply stated in response to the RFE that the foreign entity actually owns 20,000 units, contrary to its previous claim that [REDACTED] is its sole owner. 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).

As stated above, ownership is a critical element of this visa classification. Absent supporting evidence such as minutes of relevant membership or management meetings, or other legal documents governing the acquisition of the ownership interest, the significant discrepancies in the membership certificates cannot be overlooked. The record contains three membership certificates bearing the number 1 and dated January 1, 2008. There are no minutes from relevant membership meetings to examine as a way to clarify these inconsistencies, because the petitioner failed and/or refused to submit such evidence.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine 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). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the petitioner's and beneficiary's eligibility is not credible. For this reason alone, the petition must be denied.

Even had the noted discrepancies been resolved, the record as currently constituted does not establish a qualifying relationship between the petitioner and the claimed foreign parent. The petitioner initially claimed to be a wholly-owned subsidiary of [REDACTED] then submitted contradictory evidence demonstrating that it is owned by six partners comprised of both individuals and corporations. To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control as affiliates. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982).

In response to the RFE, the petitioner claimed that the U.S. entity is owned by one individual and five companies. On appeal, however, the petitioner again submits a new membership certificate (number 7), dated January 1, 2009 and issued to [REDACTED] for 75,000 units. A letter from the petitioner's accountant dated July 16, 2010 states that [REDACTED] surrendered their units on January 1, 2009. Accordingly, the petitioner contends that since these units totaled 55,000 collectively between the three surrendering partners, and since [REDACTED] previously held 20,000 shares, the record now contains evidence that it is the majority owner of the petitioner with 75,000 units as evidenced by membership certificate number 7.

Once again, these statements will not suffice. The petition in this matter was filed on March 18, 2010. If the above statements are correct, then effective January 1, 2009, nearly one year prior to the filing of the instant petition, [REDACTED] was the majority owner of the petitioner with 75,000 units, and [REDACTED] was the minority owner with 20,000 units. However, for the reasons discussed above, the AAO rejects this contention based on the grave inconsistencies in the record.

On the Form I-129 petition, signed by the petitioner under penalty of perjury, the petitioner claimed that [REDACTED] was the sole, 100% owner of the petitioner. After numerous discrepancies were noted by USCIS, the petitioner attempted to materially change its claims with regard to its foreign corporate ownership in an attempt to have the petition approved. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). More importantly in this instance, the petitioner now alters its claim regarding its parent company, claiming that, contrary to its original contention, [REDACTED] and not [REDACTED] as originally stated, is its parent company.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the erroneous certificates were due to an unexplained error does not qualify as independent and objective evidence. 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. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Although the petitioner submits new documentary evidence on appeal, it must be noted that this documentation is not probative evidence of a qualifying relationship between the petitioner and the claimed foreign parent. Specifically, the petitioner submits a copy of a business checking account statement for [REDACTED] for the period from December 1, 2006 through December 31, 2006. Although this

statement reflects numerous wire transfer deposits were made into this account during the statement period, it is unclear how a bank statement for [REDACTED] supports a finding that the petitioner and the claimed foreign parent are qualifying organizations for purposes of this appeal. The AAO notes that in the appeal brief dated July 15, 2010, the petitioner states, "[O]ur parent company made transfer in 2006 of more than \$1,000,000.00 for majority ownership of this business." It further states that, while the bank statement referred to herein reflects this transfer, the "proper transfer was finally done in 2009." The petitioner makes no attempt to explain the relationship, if any, between the petitioner and [REDACTED] the company named on the bank statement. Moreover, there is no additional evidence establishing the originator of these transfers and the consideration furnished in return for said deposits.

In addition, the petitioner's CEO, [REDACTED] also submits an affidavit dated July 16, 2010 in which he states that "it was brought to our attention that certain irrelevant and falsified documents were provided to [REDACTED] our Immigration Attorneys." Although the intent of [REDACTED] affidavit is unclear, it appears that he is acknowledging that the previously-submitted corporate documents were falsified, and the ones submitted on appeal are in fact legitimate and correct. However, neither the petitioner nor counsel provide a definitive statement regarding the true nature of the petitioner's ownership. Instead, the petitioner continues to alter its claims regarding the ownership structure of the company in accordance with the documents currently available. 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. at 591.

In this matter, the petitioner repeatedly alters its claims regarding its ownership structure in response to the findings of USCIS in an attempt to conform the petition to the regulatory requirements. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). In this matter, the petitioner has failed to establish that a qualifying relationship existed at the time of filing. Instead of submitting independent, objective documentary evidence establishing the ownership of the petitioner at the time of filing in March 2010, the petitioner submits a multitude of conflicting membership certificates and contradictory claims regarding the owners of the company, along with bank statements pertaining to an apparently unrelated corporate entity.

Based on the foregoing discussion, the petitioner failed to establish that a qualifying relationship existed between the U.S. and foreign organization at the time of filing. For this reason the petition must be denied.

B. Managerial or Executive Capacity

The AAO will now jointly address the issues of whether the beneficiary had been employed abroad and will be employed in the United States in a primarily managerial or executive capacity.

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.

In a letter dated April 11, 2012, the petitioner stated that the foreign entity is "a multi-location, hi-technology restaurant" offering specialty vegetarian food. Regarding the nature of the beneficiary's employment, the petitioner stated that the beneficiary has "participated in formulating major corporate decisions" the foreign entity has "taken" over the years. Furthermore, it states that as a manager with substantial authority, the beneficiary "has been able to implement important goals without any hitch or delay for smooth flow of business between the US and Indian companies."

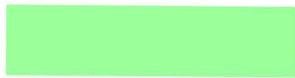
Regarding the proffered position in the United States, which it formally titled as "Sweets and Savories Product/Service Operations Manager," the petitioner stated that the beneficiary's duties would be as follows:

Customize strategic business initiatives such as new item launches or strategies to ensure executional excellence at the customer/market level.

Plan services designed to provide clearer, more effective and focused strategic and tactical business operations.

Examine and study potential for expansion into new business areas. Identify company's requirements to expand into new markets.

Conduct cost comparisons with the competition in the food industry and develop and optional project margin. Advise on promotional strategies to targeted both American and ethnic markets. Provide continuing consultation to the company in implementing and improving



upon business strategies in the different markets. Provide continuing study and information on the feasibility of reaching, implementing and improving business in diverse populations in Southeast United States.

Prepare presentations to corporate consumer business prospects, markets and competitor activities for key client services and business development to support efforts to win new business.

Conduct cost comparisons with competitors in the food industry and develop an optimal project margin.

Work with the marketing and communications personnel, design training and development programs that will result in reaching a wider market than the Indian population in the U.S., improved management, communication and productivity skills.

Continuously develop services designed to more effectively manage cost, quality and services resulting in improved customer service and/or continuous improvement.

Work with management to introduce new/improved products/services to cater not just the Asian population already familiar with the quality of our products and services but to the broader American publics. This is crucial to the business growth.

The petitioner summarized the beneficiary's duties as follows:

Planning, study the potential for expansion of the business and devise ways to expand the business, provide clearer, more effective and focused strategic and tactical business operations, study competition and make recommendations; etc. 70%

Profitability and feasibility analysis, pricing, promotional efforts, cost management. 30%

The petitioner further stated that while employed abroad, the beneficiary performed duties similar to those listed above except that "he worked to spread the petitioner's products to both North and South Indians and other nationalities in India." The petitioner stated he also worked to expand business to Kuala Lumpur.

In the RFE issued on April 1, 2010, the director found that the evidence was insufficient to establish that the beneficiary had been employed and would continue to be employed in a primarily managerial or executive capacity. The director requested additional evidence regarding the beneficiary's position abroad and in the U.S., and specifically requested evidence such as more definitive information regarding the nature of the beneficiary's duties and time spent devoted to each; documentation identifying each co-worker/subordinate employee by name and position title; and an overview of the duties each employee performed. In addition, the director requested a breakdown of the percentage of time each employee devoted to his or her stated duties, including one for the beneficiary.

In response, the petitioner submitted organizational charts for both the foreign entity and the petitioner, which provided new details regarding the staffing of the U.S. entity and the organizational hierarchy of both the foreign entity and petitioner. Specifically, the foreign organizational chart indicated that the beneficiary

oversaw an "assistant executive" and a "market analyst." A lengthy employee list for the foreign entity indicates that the beneficiary "supervises production staffs and prepares all sweet varieties, i.e., laddu, jangiri & milk sweets also savouries varieties." The duties of the "assistant executive sweets" are identified as "market expansion & cost," while the "market analyst" job description states "compare market."

Regarding the petitioner, the organizational chart provided did not list the beneficiary in the organizational hierarchy nor was the beneficiary's job title listed. The petitioner provided a brief overview of the duties of the U.S. personnel, including chefs, wait staff, the floor manager, the food service delivery/banquet manager, the branch manager, and the cleaners. However, this evidence was minimal and failed to shed light on the beneficiary's proposed position within the petitioner's organizational hierarchy. Furthermore, despite listing fourteen staff members by name on the organizational chart (not including the board of directors), the AAO notes that the petitioner's quarterly tax return, submitted for the third quarter of 2008, listed only seven employees

Regarding the beneficiary, the petitioner essentially stated that his key role in the company was conducting cost comparisons.

The director concluded that the evidence failed to establish that the beneficiary had been employed abroad or would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, the petitioner contends that the director's finding was erroneous, and claims that sufficient evidence of the beneficiary's duties abroad was submitted to establish his eligibility under these criteria. The petitioner restates the previously-stated duties of the beneficiary in support of the appeal.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary had been employed abroad in a primarily managerial or executive capacity.

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 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 company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, 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.

In the instant matter, the petitioner repeatedly described the beneficiary's position abroad in very broad terms, noting his various marketing duties and tasks related to the expansion of the petitioner's business and cost comparisons. These duties are general, and also encompass duties not typically considered managerial in nature. Marketing related tasks, specifically conducting market research and cost comparisons, are tasks generally associated with the ultimate provision of the petitioner's goods and services. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Although the petitioner provided a breakdown of how the beneficiary's time was allocated among his various responsibilities (i.e., 70% to studying potential ways to expand the business and 30% to marketing tasks such as cost management, feasibility analysis, and pricing), these descriptions were even more vague, indicating that the beneficiary would devote the majority of his time to non-qualifying duties. 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 failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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). Based on the statements provided, it appears that the beneficiary was primarily performing marketing duties as opposed to managing the company or supervising staff.

Regarding the beneficiary's supervisory role within the foreign entity, the organizational chart provides extremely limited information regarding the two employees listed as subordinate to the beneficiary. There is no substantive information regarding their duties, their level of authority in the company, or whether such positions are professional in nature. Therefore, based on the lack of detail regarding his role in the foreign entity, the AAO is likewise precluded from finding that he was employed abroad in a primarily managerial or executive capacity. The petitioner has failed to demonstrate that the beneficiary was supervising professional or supervisory employees.

As stated above, when examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the company's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates abroad at the time of filing were supervisors, managers, or professionals.¹ Moreover, the

¹ Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." 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).

organizational chart for the U.S. entity does not identify the beneficiary within this organizational hierarchy, thereby precluding the AAO from determining whether the beneficiary supervises managerial, supervisory, or professional employees. The petitioner, therefore, has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. This failure, accompanied with the lack of specific detail regarding the beneficiary's proposed duties in the United States, warrant denial of the petition for failing to establish that the beneficiary will be employed in a qualifying capacity. 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.

Finally, the minimal evidence submitted in response to the RFE introduced a discrepancy regarding the nature of the beneficiary's duties while employed abroad. While the petitioner attributes responsibility for marketing and business expansion duties to the beneficiary, the foreign entity's employee list indicates that the beneficiary and several other employees with the same or similar "executive production" job titles are responsible for overseeing production staff and for preparing sweet and savory dishes. This information suggests that the beneficiary oversees kitchen staff and is directly involved in the production of the petitioner's products. 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.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary had been employed abroad and would be employed in the United States in a primarily managerial or executive capacity. For this additional reason, the petition must be denied.

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.

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the work of the beneficiary's subordinates, since no detail regarding the nature of their positions was provided.