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

(b)(6)

DATE: AUG 27 2014 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 appeal will be dismissed.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify 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 Texas limited liability company established in October 2012, states that it will provide consulting services to the oil and gas industry. The petitioner claims to be a subsidiary of [redacted] located in [redacted] Nigeria. The petitioner seeks to employ the beneficiary as the chief executive officer 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 asserts that the petitioner provided sufficient evidence to establish that the U.S. company and the foreign entity are affiliates as they are owned by the same group of individuals and controlled by the same person. 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 of 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. ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the United States and foreign entities 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).

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

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

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

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

* * *

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

(L) *Affiliate* means

(*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.

A. Facts

The petitioner stated on the Form I-129 that it is a subsidiary of [redacted] located in [redacted] Nigeria. Where asked to explain the company stock ownership and managerial control of each company, the petitioner stated "[the foreign entity] 100%."

In support of the petition, the petitioner submitted the foreign entity's original certificate of registration, dated October 1, 1975, by the name of [redacted] and a certificate of registration of business name for [redacted] dated March 5, 2010.

With respect to the formation and ownership of the new U.S. company, the petitioner submitted: (1) a copy of its membership certificate number one, dated December 21, 2012, issued to [redacted] for "one percent/unit" of the company; (2) its certificate of formation, dated October 31, 2012, stating that [redacted] is the petitioner's managing member; and (3)a "Consent of Member in Lieu of an Organizational Meeting," dated October 31, 2012, specifically resolving that [redacted] owns a 100% membership interest in the U.S. company.

The petitioner also submitted its "Company Agreement", adopted October 31, 2012 and signed December 21, 2012, specifically stating the following in reference to its ownership and control:

> Section 3.1 . . . Members, their respective addresses, their initial Capital Contributions to the Company, and their respective Percentage Interest in the Company are set forth on Exhibit A, attached and made part of this Agreement.
>
> * * *
>
> Section 3.4 . . . The Membership Interest of the Company may be divided into Shares, each Share to represent the amount of capital contributed as the Members unanimously determine.
>
> Section 3.5 . . . The shares of a Member or the Member's Percentage Interest in the Company may be represented by a Certificate of Membership

The petitioner, however, failed to submit the aforementioned "Exhibit A" listing all of the members and percentage of interest owned, of the U.S. company.

The petitioner also submitted the foreign entity's "Partnership Board Resolution for the Establishment of a Subsidiary in the United State of America to Carry on Business in the Oil and Gas Sector," dated September 6, 2012. The resolution establishes that a subsidiary firm, the petitioning U.S. company, will be formed in the United States, the beneficiary is appointed as the CEO of the subsidiary firm, the beneficiary is authorized to set up the subsidiary, and the foreign entity will be financially responsible for the subsidiary firm until it earns sufficient income to support itself.

The director issued a request for evidence ("RFE") on May 29, 2013, instructing the petitioner to submit additional evidence of the petitioner's qualifying relationship with the foreign entity. Specifically, the director requested evidence of ownership and control of the foreign and U.S. entities.

In response to the RFE, the petitioner submitted a letter from Acting Secretary of the Partnership Board of the foreign entity, dated June 14, 2013. The letter lists the names of the partners of the foreign entity and explains its current ownership and control as follows:

Names	Percentage of Ownership
1.	51%
2.	10%
3.	10%
4.	10%
5.	10%
6.	4%
7.	3%
8.	2%

* * *

> Under Nigerian Law, limited liability partnerships as between non-corporate entities are not permitted. Consequently, the liability of partners at this firm is unlimited. . . . There is therefore no requirement for the partnership agreement to be in writing. . . . and the partnership has been conducted based on mutual understanding since then as envisaged under the Partnership Act of 1890 and in accordance with the Common law.

The letter goes on to state the following regarding the ownership and control of the petitioning U.S. company:

> Please note that [the petitioner] is owned by all the partners/owners of this firm listed above and managed by Mr. but there does exist a block voting agreement in favour of Mr. giving him control over [the petitioner].

The petitioner submitted an "Agreement," dated December 21, 2012, between and as interest holders of the petitioner, and as proxy agent. The agreement specifically states that each of the listed interest holders hold "1 unit/share" of the petitioner and agree to the following terms:

> 1. It is the interest of the voting group members that together they always retain control of the LLC. Their interest will always be voted together, and in this manner the undersigned members intend to avoid even being out of control of the LLC.
> 2. The voting group members deem it to be in the best interest of the LLC and of all the members thereof that this agreement be made.
>
> * * *
>
> The voting group members shall instruct the Proxy Agent how to vote on all issues at all meetings of the LLC as a single block or unit. If the voting group members are unable to agree on how to instruct the Proxy Agent, then the interest represented shall not be voted and no business shall be transacted.

The petitioner submitted a letter explaining its current ownership and control. The letter states that the petitioner is owned by all of the partners/owners of the foreign entity and explains that the beneficiary was the only person in the United States at the time of setting up the company, which is why the member certificate and consent in lieu of meeting only state the beneficiary's name and identify him as having 100% ownership. The letter goes on to state that a second consent in lieu of meeting, dated December 21, 2012, resolves that the beneficiary surrendered his share/unit to the company and new shares/units were issued to all the partners/owners of the foreign entity so that all of the partners/owners of the foreign entity also hold equal shares of one unit each, representing a 12.5% ownership interest each. The letter then refers to the voting block agreement and states that have a voting bock agreement "giving Mr. a controlling stake in the company in addition to his controlling stake in the foreign entity."

The petitioner submitted a copy of the back of its membership certificate number one indicating that it was surrendered by on December 21, 2012, the same date it was issued. The petitioner also submitted copies of its member certificates numbered two through nine. Each certificate is dated December

21, 2012 and is issued for one unit of the company. Certificate number two was issued to certificate number three was issued to certificate number four was issued to certificate number five was issued to certificate number six was issued to certificate number seven was issued to certificate number eight was issued to and certificate number nine was issued to the beneficiary.

The petitioner also submitted a "Consent of Member in Lieu of an Organisational Meeting," dated December 21, 2012, specifically resolving that membership certificate number one, issued earlier that day to the beneficiary, is surrendered and that the petitioner admits the following persons as members of the company:

Name	Percentage of Ownership	Number of Units Held
1.	12.5%	1 unit
2.	12.5%	1 unit
3.	12.5%	1 unit
4. r	12.5%	1 unit
5.	12.5%	1 unit
6.	12.5%	1 unit
7.	12.5%	1 unit
8.	12.5%	1 unit
Total	100%	8 units

The director denied the petition on August 23, 2013, concluding that the petitioner failed to establish that it had a qualifying relationship with a foreign entity, noting the inconsistencies contained in the record. In denying the petition, the director found that the petitioner failed to submit corroborating evidence to establish that controls the foreign entity, and merely presented a letter stating that as fact. The director further found that while the evidence of ownership for the U.S. company does demonstrate that ownership lies with a similar group of individuals, the petitioner has not established that control of either of both entities lies with any single person or group of persons. The director observed that the proxy agent agreement establishes that control of the U.S. company lies with the voting block; however, that control does not rest with any one individual named in the block.

On appeal, counsel for the petitioner contends that each entity is owned by the same group of individuals and both are controlled by the same person, In support of the petition, the petitioner submitted an additional letter in reference to the "Voting Block Agreement of December 21, 2012 side Letter," dated August 30, 2013, amending the voting agreement by the partners of the U.S. company as follows:

1. We refer to the Voting block Agreement dated December 21st, 2012 . . . .

* * *

5. For the purposes of clarity and for the avoidance of doubt, the Voting Group Members hereby AGREE and DECLARE as follows:

   (a) The block voting group's interest SHALL always be voted as instructed by and for the benefit of to the intent and with the effect that shall at all times have a majority and/or controlling interest over the affairs of [the petitioner] AND to avoid ever being out of control of the [petitioner] AND the Proxy Agent SHALL be instructed accordingly and act at all times as required by in order to give full effect to this clause 5(a) of this side letter[.]

The petitioner submits a letter from the signed by Director, Information, dated September 18, 2013, stating that the current partners of the foreign entity are: (Ms). The letter further states that is the principal partner of the firm and has majority ownership and control of the firm.

The petitioner also provides a letter from the , signed by Chairman, dated September 18, 2013, stating that the current partners of the foreign entity are: The letter further states that is the principal partner of the firm and has majority ownership and control of the firm.

The petitioner submits a letter from dated October 9, 2013, stating that the company is the external auditor of the London (UK) liaison office of the foreign entity, which trades under the name of in the UK. In the letter, the company confirms that the current ownership interests of the foreign entity are: 51%, 10%, (10%), 10%, 10% 4%, 3%, and 2%.

Finally, the petitioner submits a series of "admissions" and "resignations" of ownership interests in the foreign entity to show the above representation of ownership interests.

B. Analysis

Upon review, the AAO concurs with the director's determination that the petitioner failed to establish that it has a qualifying relationship with a 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. 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.

Despite indicating on the Form I-129 that it is a subsidiary of the foreign entity, it appears that the petitioner claims an affiliate relationship between the U.S. and foreign entities based on similar ownership of membership interests and control of both entities. The petitioner has submitted sufficient evidence to establish that Mr. is the majority owner of the foreign entity and controls that entity. However, the petitioner has failed to submit probative documentary evidence of its ownership or control.

Here, the petitioner attempts to demonstrate its ownership with member certificates, a "Company Agreement," a voting block proxy agent agreement, and a consent in lieu of organizational meeting. The petitioner's claims regarding its ownership have evolved over the course of this proceeding. At the time of filing on May 20, 2013, all of the submitted evidence supported a finding that the beneficiary is the sole member of the petitioning limited liability company. First, the minutes from the organizational meeting held on October 31, 2012 indicated that the beneficiary owned 100% membership interests in the U.S. company. It submitted a single membership certificate, dated December 21, 2012, which was issued to the beneficiary. The petitioner's "Company Agreement," also dated December 21, 2012, stated that the members of the U.S. company and their respective percentage interests are set forth in exhibit A, but the petitioner failed to submit said exhibit A document.

In response to the RFE, the petitioner submitted a copy of the back of a member certificate indicating that the beneficiary surrendered membership certificate number one on the same day it was issued. The petitioner also submitted member certificates two through nine, also dated December 21, 2012, to the eight individuals listed above, each for "one percent/unit" of the company, totaling 12.5% controlling interests each. The petitioner explains that the beneficiary was the sole individual in the United States at the time the new company was formed and therefore listed as owning a 100% majority interest in the company on the initial share certificate and consent in lieu of meeting. However, the petitioner has not explained why it submitted membership certificate number one as initial evidence in support of this petition if it was in fact surrendered on the day it was issued and eight additional certificates were issued on that same date, months before the petition was filed.

It remains unclear as to why the petitioner would issue the beneficiary member certificate number one on December 21, 2012 because he was the only member in the United States, and then hold a meeting the same day in which the beneficiary surrendered the certificate and authorized the issuance of eight certificates to all eight claimed foreign members, seven of which were presumably still outside the United States. At the time of filing the instant petition, the petitioner claimed one ownership structure and in response to the RFE, the petitioner claimed a different ownership structure to establish a qualifying relationship with the foreign entity. 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). 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). 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).

The petitioner then submitted an "Agreement," dated December 21, 2012, between each holding one unit, or 12.5%, ownership interest in the U.S. company, and as proxy agent. The agreement specifically stated that each of the listed members were interested in always retaining control of the petitioner and that their interests will always be voted together. The agreement further stated that "if the voting group members are unable to agree on how to instruct the Proxy Agent, then the interest represented shall not be voted and no business shall be transacted."

As observed by the director, the voting block agreement does not grant any one individual control over the U.S. company, rather, it merely states that all members share equal ownership and among those, a group of four out of eight members agree to always vote in unity or not at all in order to maintain control of the U.S. company. On appeal, the petitioner submits an amendment to the voting block proxy agent agreement, dated August 30, 2013, which indicates that the voting block always votes as instructed by and for the benefit of who owns a controlling interest in the foreign entity, intending that he shall, at all times, have a majority and/or controlling interest over the affairs of the U.S. company.

In the instant matter, the petitioner is attempting to establish that controls the foreign entity through his majority interest ownership of 51% and the U.S. company through the amended voting block proxy agent agreement stating that four of the eight members will always vote in his interest in order for him to retain control of the U.S. company. However, the original agreement, established prior to filing the petition, did not specifically grant control over the petitioner, it merely stated that four owners with a collective 50% ownership interest in the company would vote the same or not at all. It wasn't until after the denial of the petition, on appeal, that the petitioner amended the agreement to specifically state that 50% of the owners of the U.S. company would vote as instructed by Again, 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). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Based on the foregoing, the evidence on record does not support the petitioner's claim that the U.S. and foreign entities are both owned and controlled by the same individual or group of individuals. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L). As such, the petitioner has not met its burden to establish that the U.S. and foreign entities have a qualifying relationship. Accordingly, the appeal will be dismissed.

III. MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary will be employed in the United States in a managerial or executive capacity as defined at section 101(a)(44) of the Act.

On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated:

> The CEO will ultimately be responsible for the hiring, initial training of core employees including a corporate Accountant, Marketing executive and Human Resources Manager. The CEO will implement the business plan and strategies for profitable and successful conduct of the corporation's business through leadership and promotion of optimal team performance.

In support of the petition, the petitioner submitted a letter describing the beneficiary's proposed duties exactly as stated on the Form I-129.

The petitioner submitted an organizational chart for the U.S. company showing the president at the top of the chart, supervising an "international liaison and communication expert and/or marketing executive," a human resources manager, and an accountant for the corporation. The human resources manager, in turn, supervises an administrative assistant/secretary. The organizational chart did not include the names of any current employees or proposed employees occupying the listed positions.

The petitioner submitted a copy of its business plan, dated November 30, 2012, describing its staffing plan as follows:

> The Corporation's staff strength will initially be limited to four people. These would consist of US employees, recruited in the US, except for the president of the Corporation who would be the Partner transferred from the Overseas firm. The staffing positions are:-
>
> 1. The President of the Corporation who will be responsible for the overall daily management of the business and supervision of all members of staff. . . .
> 2. A Marketing Executive/Account Managers . . . .
> 3. Also a Human Resources Manager with experience in the oil and gas industry . . . .
> 4. An Entrepreneurial Oil and Gas Accountant will be required. . . .
> 5. Finally, an Administrative Assistant and Secretary.

The business plan provided a very brief, one or two sentence, description of job responsibilities for each of the listed positions subordinate to the beneficiary. The business plan also specifically stated that each of the subordinate positions require a bachelor's degree and at least three years of experience in the oil and gas industry.

The petitioner submitted a document titled, "Job Description of the President of the Corporation," for the U.S. company. This document contains a list of 27 "main duties in management and administration" for the beneficiary. Some of the listed duties are as follows:

> 1. To undertake the overall management of all members of staff and the business operations of the corporation in the [U.S.] and comply with all lawful instructions issued by the overseas firm – [the foreign entity].

2. To comply faithfully in all respects with the impositions of [the foreign entity] and all resolutions, directions or requests from anybody or group exercising delegated authority of the partners of [the foreign entity].
3. To encourage and promote the image and ethos of the Corporation.

* * *

6. To advise and supervise any member of staff of the Corporation.
7. To contribute towards training both in respect of staff of the Corporation and own self development.
8. To undertake staff appraisals.

* * *

11. To undertake overall management responsibility including receiving Assessment Reports from members of Staff, implementing all lawful directives of the overseas firm – [the foreign entity] as appropriate and providing yearly Reports to the Partnership Board of [the foreign entity].

* * *

19. To develop leadership skills and the ability to optimize team performance.

* * *

22. To market the corporation's client's services.
23. To assist in the development of new service opportunities for the corporation and its customers.

The petitioner then submitted a second organizational chart for the U.S. company showing the president at the top of the chart, supervising a "marketing executive," a human resources manager, and an accountant for the corporation. The human resources manager, in turn, supervises an administrative assistant/secretary.

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing operations in the United States.

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. 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(l)(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.*

On review, the petitioner's brief description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a qualifying managerial or executive position. While the petitioner provided a lengthy list of the beneficiary's proposed responsibilities, the majority of the duties described therein are overly broad and general and thus provide little insight into what the beneficiary will actually do on a day-to-day basis by the end of the first-year of operations. For example, the petitioner states that the beneficiary will "undertake the overall management of . . . the business operations," "encourage and promote the image of the corporation," "undertake overall management responsibility," "devise and implement the busness plan," "maintain high standards in the processing of client's work," "develop leadership skills," "develop systems and procedures," and "undertake regular reviews of business development." The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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.*

Furthermore, although the petitioner's business plan included a very brief description of the proposed subordinate staff's duties, and specifically stated that the positions require a bachelor's degree, it was insufficient to establish that the proposed subordinate positions are professional, managerial, or supervisory positions. Furthermore, the petitioner has not established that the proposed subordinate staff will relieve the beneficiary from performing non-qualifying operational and administrative 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)).

Overall, the position description alone is insufficient to establish that the beneficiary's duties will be primarily in a managerial or an 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. The petitioner is required to describe the nature of the office, the anticipated scope of the entity, its proposed organizational structure and its financial goals. *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. In its business plan, the petitioner indicated that the nature of its business is client centered consulting and conducting business advisory services in the oil and gas industry. However, the petitioner failed to establish who will provide these services, which are the core of its business. The petitioner indicated that it will hire a marketing executive, a human resource manager, an accountant, and an administrative assistant to support the beneficiary as the president of its company. As there is no other staff to perform the core tasks related to its business, it is reasonable to expect that the beneficiary will be providing the actual consulting services of the business. 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).

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").

Based on the evidentiary deficiencies addressed above, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of the approval of the new office 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.