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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 2 7 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 Vermont Service Center Director 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 a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Florida limited liability company, established in February 2013, that operates a pizzeria. The petitioner states that it is an affiliate of the beneficiary's foreign employer, located in Venezuela. The petitioner seeks to employ the beneficiary as the general manager of its "new office" for a period of one year.

The director denied the petition, in part, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity, or that the U.S. entity would support a managerial or executive position within one year of commencing operations in the United States. The director denied the petition, in part, finding that the petitioner failed to establish that the petitioner and the foreign entity had a qualifying relationship. Specifically, the director determined that the petitioner had failed to establish that it controlled the U.S. entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director erred by applying a flawed analysis of the facts. A legal brief and documents were submitted in support of this 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.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. Employment in a Managerial or Executive Capacity in the United States

The first issue to be addressed is whether the petitioner established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States following one year as a new office.

A. Facts

On September 11, 2013, the petitioner filed Form I-129, Petition for a Nonimmigrant Worker, stating that the beneficiary would be employed as its general manager working full time on-site at the petitioner's pizzeria, located in Florida. The petitioner submitted a letter of support, stating that the business currently employed 13 individuals and the beneficiary would manage "the entire U.S. organization." The petitioner described the beneficiary's duties as follows:

- Manage the entire U.S. organization. Direct and coordinate activities and operation of the U.S. Company including developing the U.S. investment, executive and personnel actions, as well as expansion plans for opening additional locations - 10 hours per week.
- Oversee all financial aspects of the company and set strategic policies and objectives – 3 hours per week
- Plan, formulate and implement administrative and operational policies and procedures – 3 hours per week
- Prepare annual budgets and ensure that company revenues and expenditures fall within budgeted amounts – 2 hours per week
- Control the expenditures of company funds in an orderly procedure, and ensuring that payments are recorded correctly in the register within operational and administrative objectives – 2 hours per week
- Coordinate and direct the accounting and administration processes of the company for the purpose of maintaining homogenous and cohesive policies to guarantee financial success – 3 hours per week
- Ensure that the managerial procedures and policies of the company abide by all current laws and regulations – 3 hours per week
- Establish the procedures for implementing the payroll process and company benefits in compliance will all laws and regulations – 2 hours per week
- Analyze current regulations and their effect in the company's economic and financial policies – 2 hour per week
- Oversee the Accountant, Administrative Manager, and Restaurant Manager - 5 hours per week
- Supervise and exercise total direction over subordinate employees who perform the day-to-day work with authority to hire and fire the employees – 5 hours per week

The petitioner stated that the beneficiary will not be responsible for the day to day duties of the restaurant; he will "only be responsible for performing high-level managerial duties such as developing the U.S. investment, executive and personnel actions, and overseeing all financial aspects of the company and setting strategic policies and objectives, as well as expansion plans for opening additional locations." The petitioner further stated that "the beneficiary will supervise a multi-tiered management structure, and will exercise discretion over the day-to-day operations."

The petitioner stated that as general manager, the beneficiary will control the work of subordinate supervisors including an outsourced accountant, administrative manager, and restaurant manager. The petitioner's organizational chart depicted the administrative manager overseeing an administrative assistant but the position is currently vacant. The chart depicted the restaurant manager supervising an assistant manager who in turn would supervise a shift leader. Three cooks, five delivery drivers, and one cashier are subordinate to the shift leader.

The petitioner provided duty descriptions for each of its employees. For example, the restaurant manager was responsible for establishing marketing and sales policies and objectives, preparing sales reports,

monitoring budgets and payroll records and reviewing financial transactions; three hours were to be dedicated to scheduling staff hours and assigning duties, and eight hours to supervising and controlling subordinate employees. The assistant manager's duties included spending 20 hours per week with the restaurant manager conferring about the day-to-day restaurant operation and 10 hours observing and evaluating the workers and work procedures. The petitioner asserted that the administrative manager would spend 10 hours per week ensuring that all administrative procedures and policies were in compliance with laws and regulations. Another 10 hours would be spent coordinating and directing all administrative functions and operations including bank account management, accounting functions such as billing while 10 hours would be spent preparing and reviewing operational reports and schedules to ensure accuracy and efficiency. The petitioner submitted a copy of the administrative manager's bachelor's degree in business administration.

The petitioner provided a self-prepared payroll document for the period ending October 8, 2013 depicting 18 employees paid a bi-weekly total of USD $6,891.87. The document reflected the addition of five employees (one cashier, one cook, one shift leader and two delivery drivers) since the petition was initially filed. To demonstrate payment, the petitioner submitted a Form 941 for 2013: Employer's Quarterly Federal Tax Return for the second quarter of 2013 from April through June 2013 indicating that the petitioner then employed 14 people and paid a total of $15,424.17 for the quarter.

The petitioner entered into an agreement with to purchase assets used in the operation of ' ' located at the petitioner's new business location. The listed assets include furniture and equipment necessary for operating a pizzeria. The petitioner agreed to pay USD $233,900.00 to on the closing date of April 1, 2013.

The petitioner also provided a "License and Sales Agreement" that it entered into on March 14, 2013 with granting the licensee use of its "Proprietary Marks," manuals, recipes, and other proprietary and confidential information concerning the operation of " at the petitioner's current pizzeria location. The licensor imposed upon the petitioner many restrictions related to the license.

The licensor required a nonrefundable "license fee" "equal to $25,000.00." In addition, the licensor required payment of a royalty fee equal to five percent of gross revenue and a marketing fee equal to one percent of gross revenue for each calendar month. The agreement also required the petitioner to spend a minimum of two percent and a maximum of four percent of the prior month's gross revenue on local advertising and promotion.

The petitioner submitted a business plan that indicated the Pizzeria would be open seven days a week, 12 hours per day from Sunday through Wednesday and 13 hours per day Thursday through Saturday. The petitioner referred to its target market as those consumers living and working in the , Florida area. The petitioner's five year plan projected total sales of USD $442,000.00 in the first year, USD $695,000.00 in the second year, USD $729,750.00 in the third year, USD $766,237.50 in the fourth year and USD $804,549.38 in fifth year. The petitioner's first year payroll is projected to be USD $114,920.00, an increase to USD $180,700.00 in the second year and increases of approximately 5% for each year through the fifth year. Similarly, the petitioner's property rental cost projections are USD $40,000.00 reflecting rent beginning April 1, 2013 for the first year followed by $61,200.00 in the second year and increasing by a very slight amount in years three through five. Notwithstanding these

projections, the petitioner also submitted a second version of the projection table that estimates the first year projected sales of USD $566,086; payroll of USD $151,511.00, and rent of USD $60,002.00, among other changes.

The petitioner provided its unaudited income statement for the period January 1, 2013 through August 31, 2013 indicating sales of USD $363,808.70, payroll payments of USD $100,916.28, and rent payment of USD $40,001.60, and license fee of USD $8,624.12. The statement does not include payment for the assets purchased or monthly royalty fees. The petitioner submitted an unaudited balance sheet covering the same period listing assets of USD $225,000 worth of equipment and furniture, and a license fee worth USD $25,000.

To establish its short term business expansion plan, the petitioner provided a letter, dated September 16, 2013, prepared by on behalf of acknowledging the petitioner's interest in purchasing additional Licensing Agreements. Mr. stated that there was an opportunity to purchase an "Area Development Agreement" in County, Florida. The opportunity would require an agreement to open a minimum of five stores within the next five years, one per year. The letter also indicated an immediate purchase opportunity for a location in Florida.

In order to demonstrate the petitioner's intent to expand the company, the petitioner provided a copy of a one year agreement beginning on April 1, 2013 with (for what appears to be business office located at Florida. The lease agreement provides fully furnished office space in exchange for USD $700.00 per month. The petitioner included photographs of the generic office space.

On September 24, 2013, the director issued a request for evidence (RFE). The director instructed the petitioner to provide additional evidence to demonstrate that the beneficiary would be relieved from performing the day to day duties and tasks of its small scale pizza restaurant. The director requested that the petitioner provide additional evidence relating to the petitioner's employees and how the beneficiary would make decisions on daily operations of the activity or functions under his authority and if other employees would be directly supervised and how the beneficiary would function at a senior level within the organizational hierarchy.

In response to the RFE, the petitioner disputed the director's characterization of the petitioner's business as a small scale pizza restaurant, asserting that it projected sales of over USD $500,000.00 in 2013 and it had a short term goal of managing more than one restaurant location. The petitioner asserted that the beneficiary will be directly involved in the growth and expansion of the company but that, "regardless of this planned expansion, the current financial and employee structure of the business is sufficient to support the beneficiary's position." The petitioner claimed that its structure included professionals with college degrees, first line supervisors and day-to-day employees. The petitioner referred to its separately located leased office space where its staff including the general manager, administrative manager, restaurant manager, and the assistant manager could go to "concentrate on managerial and administrative work." The petitioner claimed that the administrative manager is a professional because his position required the performance of duties requiring a bachelor's degree. The petitioner also claimed:

> The administrative detail will be handled by the Administrative Manager and Administrative Assistant, and the General Manager will therefore only be responsible for performing high-level managerial duties such as developing the U.S. investment, executive and personnel actions, and overseeing all financial aspects of the company and setting strategic policies and objectives, as well as expansion plans for opening additional locations. The beneficiary will supervise a multi-tiered management structure, and will exercise discretion over the day-to-day operations.

In its RFE response, the petitioner provided an updated organizational chart adding the five employees, listing each employee's salary, and asserting that the assistant manager also had a bachelor's degree. According to the petitioner's new chart, the yearly total salary cost is USD $277,790.00.

On November 18, 2013, the director issued a second RFE acknowledging the petitioner's assertion that it qualified as a "new office" but instructed the petitioner to provide evidence to show that the petitioner not only owns but also controls the company.

In its RFE response dated November 26, 2013, the petitioner reiterated that is not a franchisee and that the petitioner maintains the right and authority to direct the management and operation of the business despite its licensing agreement with

The director determined that the petitioner provided insufficient evidence to establish that the beneficiary would be employed in a managerial or executive capacity. The director acknowledged that the petitioner owned the business and that the licensing agreement did not create a franchisor-franchisee relationship; however the director determined that the licensor had established significant control over the business, especially how the product is produced and sold and therefore, the petitioner had not established that it would have control over the U.S. entity.

On appeal, counsel asserts that the director erred in determining that the petitioner had not established that the beneficiary would be working as a bona fide manager for the United States petitioner. Counsel referred to a unpublished AAO opinion to stand for the finding "[t]he beneficiary's subordinate supervisory employees need not hold professional-level positions in order for him to qualify as a manager." Counsel asserts "the beneficiary will be spending a majority of his time on managerial duties, and that the beneficiary's subordinates will carry out the day-to-day duties of the Restaurant." Counsel asserts that based on the projected sales, menu, and dine-in/delivery options demonstrates that "this company structure necessitates a larger employee foundation then a regular small scale pizza restaurant." Counsel further asserts that the beneficiary be directly involved in growth of the business but "regardless of this planned expansion, the current financial and employee structure of the business is sufficient to support the business." Counsel asserts that the petitioner has ownership and control of the company.

B. Analysis

Upon review, counsel's assertions are not persuasive. The petitioner has failed to establish that it will employ the beneficiary in a 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(1)(3)(ii). The petitioner's description of the

job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted vague job descriptions that fail to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will "manage the entire U.S. organization. Direct and coordinate activities and operation of the U.S. Company including developing the U.S. investment, executive and personnel actions, as well as expansion plans for opening additional locations," and "[o]versee all financial aspects of the company and set strategic policies and objectives," and "plan, formulate and implement administrative and operational policies and procedures," "[c]oordinate and direct the accounting and administration processes of the company for the purpose of maintaining homogenous and cohesive policies to guarantee financial success," and "[a]nalyze current regulations and their affect in the company's economic and financial policies." However, the petitioner does not specifically identify the activities related to the business investment or expansion, nor does the petitioner explain the strategic policies and objectives related to the "financial aspects" of the business or demonstrate the company's administrative or operational policies and procedures planned, formulated and implemented on a weekly basis by the beneficiary. The petitioner failed to provide any insight into the beneficiary's weekly requirements related to analyzing the company's regulations or coordinating and directing the accounting processes, for example. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The beneficiary's job descriptions are not persuasive in establishing that the beneficiary will perform "primarily" qualifying duties. Many of the beneficiary's duties appear to be non-qualifying administrative or operational tasks, which cannot be characterized as managerial or executive duties. For example, the beneficiary's job description includes up to 17 hours of non-qualifying duties per week, such as implementing policies and procedures, preparing budgets, and ensuring payments are properly recorded. In addition to preparing budgets, the beneficiary must control company expenditures, coordinate and direct company accounting processes, establish procedures for implementing payroll processes, and analyze current regulations and how they affect the company's economic and financial policies. These general duties appear to be tasks necessary to running a small business but are not qualifying managerial or executive duties. Therefore, the petitioner has not established that the beneficiary will be "primarily" employed as a manager or an executive. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner claims that the beneficiary will directly supervise three people: the administrative manager, an outsourced accountant (currently vacant), and a restaurant manager who in turn would manage an assistant manager. The petitioner claims that both the administrative manager and the assistant manager are professionals based on their duty descriptions and their bachelor's degrees. Although the beneficiary is not required to supervise personnel, if the petitioner claims that the beneficiary's duties are managerial

because the beneficiary will be supervising employees, the petitioner must establish that the subordinate employee are supervisory, professional, or managerial. *See* section 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).

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employees. 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 required of the administrative manager or the assistant manager.

We note that the petitioner's subordinate mangers have assigned duties that appear to duplicate the beneficiary's responsibilities, in part, especially related to policy, procedures and financial matters. For example, the beneficiary appears to be heavily involved in the petitioner's financial matters, however the restaurant manager is responsible for monitoring budgets and payroll records and reviewing "financial transactions to ensure that expenditures are authorized and budgeted." In addition, the administrative manager is required to coordinate and direct all operations including bank account management and accounting functions, which include billing, accounts receivable, accounts payable, and cash flow management. Finally, the petitioner plans to outsource an accountant in the future. The petitioner has not provided sufficient evidence to establish why this pizza restaurant requires such robust financial oversight, again casting doubt upon the petitioner's proof. 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). Moreover, there are inconsistencies related to the subordinate manager's job descriptions. For example, although the assistant manager will devote 20 hours per week conferring with the restaurant manager regarding the restaurant operation, there is no such corresponding responsibility listed under the restaurant manager's responsibilities. 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).

We recognize that the petitioner intends to expand its operations and therefore may require the additional management structure; however , the petitioner has provided insufficient evidence to demonstrate that it will execute that plan. Aside from a letter indicating the additional pizza restaurant opportunities exist, nothing in the record demonstrates that the petitioner is actively pursuing those opportunities. Moreover, the petitioner referred exclusively to its target market of consumers living and working within the vicinity of its current pizza restaurant.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that we cannot deduce exactly what the beneficiary will do on a day-to-day basis. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial or executive capacity.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his subordinate employees, the nature of the petitioner'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 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 manager 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.

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. See generally, 8 C.F.R. § 214.2(l)(3)(v)(C).

Here, the beneficiary's duty description includes up to eleven hours of non-qualifying duties per week such as implementing policies and procedures, preparing budgets, and ensuring payments are properly recorded. In addition to preparing budgets, the beneficiary must control company expenditures, coordinate and direct company accounting processes, establish procedures for implementing payroll processes, analyze current regulations and how they affect the company's economic and financial policies, and oversee the accountant; currently a vacant position. Notwithstanding the beneficiary's significant role in company finances, the restaurant manager is also responsible for monitoring budgets and payroll records and reviewing "financial transactions to ensure that expenditures are authorized and budgeted." Moreover, the Administrative Manager is required to coordinate and direct all operations

including bank account management and accounting functions which include billing, accounts receivable, accounts payable, and cash flow management. Finally, the petitioner plans to outsource an accountant in the future. Despite the petitioner's stated intent to expand its operations, this business is a pizza restaurant that has operated on average for 87 hours a week with only three part time cooks. The duplication of duties suggests that the petitioner's business will not support the beneficiary's employment in a managerial or executive capacity within one year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

III. Control over the U.S petitioner

Based on review of the petitioner's licensing agreement with the director found that the petitioner did not maintain adequate control over its business due to excessive restrictions included in the licensing agreement. On appeal, counsel asserts, and we agree, that the evidence in the record establishes that the petitioner will maintain control of the company. A franchise agreement, like a license, typically requires that the franchisee comply with the franchiser's restrictions, without actual ownership and control of the franchised operation. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970) (finding that no qualifying relationship exists where the association between two companies was based on a license and royalty agreement that was subject to termination since the relationship was "purely contractual"). Here, the director found that the petitioner established a qualifying relationship with the foreign entity that is unrelated to the licensor and the licensing agreement. The director's decision on this issue will be withdrawn.

Beyond the decision of the director, there is no evidence of the United States investment or payment of for the asset purchase. *See* 8 C.F.R. § 214.2(l)(3)(v). For this additional reason, the appeal must be dismissed and the petition denied.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.