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



U.S. Citizenship
and Immigration
Services

DATE: FEB 03 2014 OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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 director dismissed the petitioner's two subsequent motions to reopen and reconsider. The petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO). The AAO determined that the director erroneously dismissed the petitioner's motion as untimely and remanded the matter to the director. The director reopened the matter, affirmed the denial of the petition and certified his decision to the AAO pursuant to 8 C.F.R. § 103.4(a)(1).

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an 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 corporation states that it operates a retail store management business. It claims to be an affiliate of [REDACTED] located in Mumbai, India. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States for a period of one year.¹

On January 22, 2008, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director initially dismissed the petitioner's motion to reopen and reconsider as late but late re-opened the matter after the AAO remanded the petition and instructed the director to consider the merits of the petitioner's timely-filed motion.

The director ultimately affirmed the denial of the petition in the reopened proceeding and certified his decision to the AAO on July 10, 2013. The director determined that the petitioner failed to establish that it was able to support a managerial or executive position at the time of filing in November 2007, or that it had grown to the point where it could support such a position.² The director advised the petitioner that it had 30 days to submit a brief or other written statement for consideration by the AAO. No additional documentation has been submitted and the record is now considered complete.

¹ The regulations at 8 C.F.R. § 214.2(l)(i)(ii)(F) define "new office" as an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year. The petitioner in this matter was established in 1994, and, according to counsel, "has been in the gas station and convenience store business since its inception, over 15 years ago." The petitioner provided evidence that it has been doing business in the United States for well over one year at the time the petition was filed. The petitioner does not qualify as a new office. The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² The director initially treated the petitioner as a "new office" and applied the evidentiary requirements at 8 C.F.R. § 214.2(l)(3)(v). In the decision dated July 10, 2013, the director acknowledged that the petitioner did not qualify as a new office at the time of filing.

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, Petition for a Nonimmigrant Worker, 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.

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.

II. FACTS AND PROCEDURAL HISTORY

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner filed the Form I-129 on November 15, 2007. The petitioner stated that it will operate a retail store management business with five projected employees and gross annual income of \$736,578. The petitioner stated on the Form I-129 that the company was established in 2007. However, the petitioner submitted its certificate of incorporation, articles of incorporation and by-laws indicating that the company was established in Georgia in 1994.

On the Form I-129 and in a supporting letter, the petitioner described the beneficiary's proposed duties as general manager as follows:

The alien will be mainly responsible for identifying the various gas stations and convenience stores in and around [REDACTED] for management and/or purchase by [the petitioner]. He will also be responsible for completing the due-diligence process for the selected property. Upon acquisition of the business, [the beneficiary] will

direct and coordinate activities within the organization to obtain optimum efficiency and economy of [the petitioner] in order to maximize profits. He will plan and develop organizational policies and goals, and implement these goals through the supervising of employees; direct and coordinate promotions to develop new markets to obtain a competitive position in the service station industry; analyze budgets to identify areas in which reductions can be made, and allocate operating budget; supervise and direct preparation of directives to subordinates in the outlining of policies, programs or organizational changes to be implemented; supervise personnel.

The petitioner indicated that it "intends to purchase and invest in gas station and convenience store businesses in Georgia." The petitioner indicated that, as of the date of filing, it had entered into agreements with two businesses, [REDACTED] to operate and manage their respective gas stations and convenience stores. The petitioner stated that the beneficiary would supervise a staff of five employees at each location including a store manager, two cashiers and two stocking clerks. The petitioner provided no names for any employees, no pay stubs and no tax documents.

The petitioner provided copies of both management agreements, in which the petitioner agreed to "wholly manage" each company's respective gas station/convenience store. Specifically, the petitioner agreed to manage a [REDACTED] station located at [REDACTED] for [REDACTED] and a [REDACTED] station located at [REDACTED] for [REDACTED]. Notably, both agreements were signed by the beneficiary in his capacity as the petitioner's "manager" on November 1, 2007. However, other evidence in the record indicates that the beneficiary did not acquire his claimed majority ownership of the petitioner until on or after November 13, 2007.

The management agreements were similar in content and both provided that the petitioner would assume full control for the management of the respective businesses. Among other things, the agreement stated that the petitioner will "operate the Business in a professional manner and shall perform all necessary tasks and do all things as required for the proper management, upkeep, and operation of the Business as customarily may be performed by a manager of a convenience/gas station similar to the Business." The petitioner was to receive \$2,000.00 per month in management fees from each business in exchange for its management services. The agreements further provide that the petitioner, as manager, would be responsible for "supervising, discharging and paying all employees" as well as purchasing supplies, collecting and depositing monies, paying utilities and maintenance costs, and maintaining all required licenses. The agreement further specifies that the petitioner would be paying employee wages and payroll taxes, sales taxes, etc.

The petitioner's August 16, 2007 business plan anticipated a growth of its business through additional management agreements and or the purchase of gas stations/convenience store in the future. The petitioner included pro forma financial projections that indicated expected sales of \$600,000 to over \$1 million for the years 2008 to 2011.

Finally, the petitioner submitted a lease agreement indicating that it leased 500 square feet of office space from [REDACTED] located at the same address as the [REDACTED] gas station, at a monthly cost of \$1,000.00. This agreement was also executed by the beneficiary in his capacity as the petitioner's "president" on November 1, 2007, prior to his claimed purchase of any ownership interest in the company.

On November 29, 2007 the director issued a request for evidence (RFE) instructing the petitioner to submit, among other things, a comprehensive description of the beneficiary's proposed duties and an indication of how the beneficiary's duties will be managerial or executive in nature.³

The petitioner responded to the RFE on January 4, 2008, with a letter that included the following description of the beneficiary's duties:

Operational Management (30% of time)

[The beneficiary] shall plan and develop organizational policies and goals, and hire general managers to implement these goals through the supervising of employees. [The beneficiary] shall ensure that realistic goals are set; ensure a strategic plan and business plan are set and monitored; become familiar with vendors for the merchandising of its store; and maintain a high level of expertise, professionalism, and resources to enhance the profitability. While [the beneficiary] monitors financial performance, because his primary goal is to ensure that [the petitioner] achieves a higher and increased level of profitability, it is the Store Managers who manage the stores to ensure enough liquidity in the company for additional investments, [The beneficiary] shall delegate the day-to-day management of operations to his Store Managers.

Finance and Accounting (20% of time)

[The beneficiary] is wholly in charge of researching the area for future ventures and determining the direction the company will take in this arena and establishing yearly budgeting and capital plans based on the research. The company that performs most of the finance and accounting services for [the petitioner] is currently Metro Accounting Services, Inc. The Store Managers coordinate and maintain processing of invoices; arrange for payroll services; and the generation of accounts payable checks; the compilation of financial data for monthly financial statements thereby monitoring financial performance to ensure that [the petitioner] becomes more profitable is all relegated to the Store Managers.

³ The director also requested evidence specific to the petitioner's claim that it is a "new office" established in 2007. In response, the petitioner clarified that it has been in existence since 1994 and indicated that it was requesting treatment as a new office because it was "recently acquired." As discussed, the petitioner does not qualify as a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F).

Marketing (20% of time)

[The beneficiary] shall investigate new business opportunities to ensure optimal operation and strategic market position; [the beneficiary] shall implement aggressive marketing programs with annual marketing plans updated every quarter; [the beneficiary] shall create sales strategies targeting all segments of the market; [the beneficiary] shall develop a plan for consumer trends and choices in the retail store.

Employment and Training (30% of time)

This area is under [the beneficiary's] authority. Part of the Business Plan involves the reinventing of [the petitioner]. This will require coordinating the employment of skilled and professional personnel for all departments. This is crucial for each new venture, since the companies identified by [the beneficiary] for purchase/management generally need to implement all new policies and procedures among the employees. It will be necessary to implement a yield management program; preventative maintenance program; quality service training for all staff positions within [the petitioner]; and to lead and motivate personnel. [The beneficiary] will be in charge of choosing the General Managers and ensuring that the major improvements in efficiency and policy are implemented by those Managers.

The petitioner's letter included the same organizational chart representing the staffing of [redacted] and [redacted] and once again did not identify any employees by name. The petitioner further stated "[t]he store managers will be responsible for the day-to-day operations and the store managers will supervise the non-managerial staff running the businesses." The petitioner provided no evidence of individuals hired to work for either the petitioning entity itself or the staff intended to work under the existing management agreements.

The petitioner also included copies of its Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2004 through 2006. The petitioner reported gross sales of at least \$1.2 million in each year, and experienced net losses in 2005 and 2006. The company's tax returns show that it owned and operated the [redacted] located at [redacted]. The status of the [redacted] is unclear as it was not mentioned by the petitioner in describing the company's current or proposed operations. The petitioner also submitted IRS Forms 1120S for [redacted] (2006) and [redacted] (2004).

On January 22, 2008, the director denied the petition concluding that the petitioner did not establish that the beneficiary would be relieved from performing non-qualifying duties. Specifically, the director noted that while the beneficiary was to supervise a five person staff at each of the two gas station business locations, the beneficiary would be the only employee of the petitioning entity. Thus, the director determined that the beneficiary would be solely responsible for all of the duties outlined in the management agreements and there would be no one to relieve him from performing non-qualifying duties.

On motion to reopen and reconsider the decision, the petitioner refuted the director's decision and asserted that the responsibility to manage the gas station/convenience stores in accordance with the agreements lies with the petitioner and not the beneficiary.

The petitioner offered an additional explanation of the beneficiary's duties as follows:

[The beneficiary's] main goal is to establish the business operation in the United States. He will use his considerable experience gained at [REDACTED] the Indian affiliate, in negotiations for potential business ventures. To this end, [the beneficiary] has established the company and secured an office premises. He has also designed a business plan. [The beneficiary] has initiated the execution of the business plan. He has negotiated management agreements with two business which allows [the petitioner] to independently control and manage each business. [The beneficiary] will also liaise with the Attorneys, the CPAs, and the bank officers on behalf of the US entity. The specific duties that [the beneficiary] will perform include directing and coordinating the Company's financial and budget activities in order to fund operations, maximize investments, and increase efficiency (**in conference with the bank officers and the CPA**); confer with partners abroad to discuss issues, coordinate funds transfer, and resolve problems; analyze operations to evaluate performance of a company to be purchased and its staff in determining if it meets [petitioner's] objectives, and to determine areas of potential cost reduction, program improvement, or policy change (**in conference with the partner in India**); directing, planning, and implementing policies, objectives, and activities of organizations or businesses in order to ensure continuing operations, to maximize returns on investments, and to increase productivity (**with help from the Store Manager and the partner in India**); preparing budgets for approval, including those for funding of new ventures (**in association with the CPA's office**); directing and coordinating activities of departments concerned with pricing, sales, and/or distribution of products (**with help from the Store Manager**); negotiate or approve contracts and agreements with suppliers, distributors, and other organizational entities (**he will negotiate the contracts himself with minimal assistance of the Store Manager**); review reports submitted by the Store Manager in order to approve or change (**he will be solely responsible for this**); appoint Store Manager, and assign or delegate responsibilities to them (**he will be solely responsible for this**); when the business grows to a certain level, [the beneficiary] will establish a Human Resource department and direct human resources activities, including the approval of human resource plans and activities, the selection of directors and other high-level staff, and establishment and organization of major departments.

(Emphasis in original.)

The petitioner highlighted the two existing management agreements noting that they "specifically demand that [the petitioner] **directly employ** all the required staff." According to the agreements, the petitioner will "earn \$2,000 per month over and above the cost of paying all employees and independent contractors whom are reasonably required in the proper management and operation of the business." In support of the claim, the petitioner provided affidavits from the gas station/convenience stores owner explaining that the petitioner would provide overall management services which would include employee hiring, firing, payroll and supervision.

The petitioner stated that it had several employees and would have several more within the following year. The petitioner indicated that the beneficiary had "already initiated the process for hiring the Store Managers who would work under his supervision and who would be responsible for the day-to-day, non-qualifying duties of the business." In support of that assertion the petitioner provided affidavits signed on February 15, 2008. [REDACTED] signed the first affidavit stating that he had been offered and had accepted a position as the [REDACTED] store manager and that he was waiting for notice of a start date. [REDACTED] signed an affidavit attesting to the same facts in regards to the store manager position at the [REDACTED]. The store managers would be required to "perform at the level of a General Manager." The petitioner provided no evidence establishing that these individuals were actually hired and paid by the petitioner.

The petitioner emphasized that [REDACTED] and [REDACTED] were expected to generate combined sales of \$8 million in 2008, and stated that, as a result, the petitioner would require 10 or more employees to manage its daily business operation. Counsel emphasized that "all managers and employees will be directly hired and controlled by Petitioner." Counsel indicated that the owners of these companies "will not be involved in the operation of their business any manner."

As noted herein, this motion was erroneously denied as untimely and eventually remanded to the director by the AAO in November 2011.

On May 16, 2012 the director issued a new RFE instructing the petitioner to submit further explanation of the beneficiary's proposed duties, as well as position descriptions for all current/proposed employees. The director also requested evidence to establish the petitioner's ongoing business activities, including recent bank statements and IRS tax documents for the years 2008 through 2012.

The petitioner's July 26, 2012 response repeats the beneficiary's previously provided duty description. Regarding the petitioner's ongoing business it stated that it is "currently managing" both convenience stores. It further stated:

It is important to note that [the petitioner] has not filed any returns during the pendency of the petition and motion periods. Pursuant to the management agreements with [REDACTED] those entities continued to file returns and employer's quarterly which we have enclosed for your review.

Regarding its own employees it states "[a]s is evident from the Form 941s for [REDACTED] and [REDACTED] we have hired several managers, cashiers and clerks." The petitioner indicated that it would eventually hire a district director, an office manager, a receptionist, a purchasing officer, a staff accountant, a bookkeeper/accounts payable clerk, ten store managers, 20 assistant store managers, 30 sales clerks, and ten helper/cashiers. The petitioner also provided an organizational chart reflecting these vacant positions and reiterated that the beneficiary would not be engaged in performing the petitioner's day-to-day operations.

The petitioner submitted extended and updated management agreements with both businesses. The petitioner also provided IRS Forms 1120S and Forms 941, Employer's Quarterly Federal Tax Return for both [REDACTED] to show that they have been in operation from 2008 through 2011. The petitioner did not provide copies of its own tax returns and it did not identify or highlight the payment of management fees by these businesses to the petitioner in 2007 or over the course of the last several years. Neither [REDACTED] reported payment of any management fees or similar expenses on its tax returns.

The AAO notes that in providing requested evidence of the petitioner's business, the petitioner provided photographs of the inside and outside of [REDACTED] service station but the photographs do not depict the 500 square feet allocated to the petitioning entity, pursuant to the lease agreement submitted at the time of filing. In the RFE response, the petitioner noted that its "business space is included in the management agreement and hence a separate lease [has] not been signed."

The director reviewed the response and determined that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. The director certified the matter to the AAO and the petitioner was given 30 days to submit a brief or other written statement for consideration. The petitioner has not submitted additional documentation in response to the notice of certification and the record is now considered complete.

III. ANALYSIS

Upon review, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The petitioner described the beneficiary's duties by assigning a percentage of time to four general categories of responsibility specifically; 1) operational management - 30%, 2) finance and accounting - 20%, 3) marketing - 20%, and 4) employment and training - 30%. The petitioner offered a general discussion of the overall goals to be achieved but did not provide specific tasks

within each of these categories to sufficiently demonstrate how the beneficiary would spend his day. For example, generalized expectations such as planning and developing organizational policies and goals, monitoring financial performance, researching the area for future ventures, and investigating new business opportunities are overly vague and could include both qualifying and 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).

Additionally, each broad area of responsibility attributed to the beneficiary contains duties which would be categorized as non-managerial, such as compiling monthly financial data and all of the assigned marketing duties. However, it is not possible to determine how much of the beneficiary's overall time will be spent engaged in non-qualifying duties. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner provided a supplemental duty description that included additional details but failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as preparing budgets for approval and negotiating or approving contracts and agreements with suppliers and distributors, do not fall directly under traditional managerial duties as defined in the statute. Based on the two duty descriptions provided, it is not possible to determine how much time the beneficiary would allocate to non-qualifying duties, and thus not possible to conclude that he would perform primarily managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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. Other factors considered include the petitioner'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.

The petitioner has submitted conflicting and unsupported explanations of the nature and scope of its business. At the time of filing, the petitioner represented itself as a new business that was prepared to immediately commence operations as a retail management company. The petitioner later acknowledged that the company was in fact established in 1994 and had been doing business in the gas station convenience/store sector for 14 years. The petitioner provided copies of tax returns for

the years 2004 through 2006 which indicated that the company had been operating a gas station in [REDACTED]. As noted above, the petitioner never acknowledged these existing operations and it is unknown whether the company continues to operate the gas station. Instead, the petitioner indicates that it has not been filing tax returns, pursuant to the terms of its management agreements with [REDACTED] which continue to file their own quarterly and annual returns.

The petitioner unequivocally stated that it is currently operating these businesses under the terms of the management agreement. At the same time, the petitioner has repeatedly stated that all employees working in the stores owned by [REDACTED] will be employees of the petitioner based on the terms of the same management agreements, which provide that the petitioner will be responsible for all expenses associated with the operation of the gas station business.

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). 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. *Id.* at 591.

In addition to the discrepancy regarding the payroll employer of the stores' employees, the petitioner has not explained why all IRS Forms 1120 submitted for years subsequent to 2006 have been for [REDACTED] only. The petitioner's own tax returns should reflect, at a minimum, that it has been receiving the management fees as stipulated in its agreement with the owner of these companies. Without the petitioner's tax returns or other reliable documentation, there is no objective evidence confirming that the management agreement is actually in force. In fact, the tax returns for [REDACTED] and [REDACTED] appear to reflect normal business expenses associated with the owner's management and operation of their respective businesses. The petitioner has not established with sufficient evidence that it actually managing or will manage these businesses as stated in the management agreements.

The petitioner also failed to submit copies of its recent bank statements in response to the director's RFE, although it stated that this evidence was included in its response. The most recent evidence of the petitioner's own finances and operations pre-dates the filing of the petition by nearly a year. 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)).

These discrepancies and omissions are critical, as the beneficiary's claimed managerial capacity relies heavily upon the petitioner's employment of subordinate store managers who would relieve the beneficiary from performing non-qualifying operational and first-line supervisory tasks. There

is no evidence that store managers had been hired by the petitioner at the time of filing or at any time since.

As noted earlier, the petitioner states it has been operational since 1994 and submitted evidence that it was operating a gas station and convenience store in [REDACTED] from 2004 to 2006. It cannot simultaneously claim that it is a new office. As such, the petitioner must establish that at the time the petition was filed it had sufficient employees to relieve the beneficiary from primarily performing non-qualifying duties. The petitioner failed to identify any current employees by name or to provide any evidence of wages paid to employees. While the petitioner indicated that it would hire staff in the future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

The tax returns provided for [REDACTED] indicate that these companies were already paying salaries and wages at the time the petition was filed. The petitioner did not indicate that any existing staff of the stores would work for the petitioner or continue to work in the stores for their respective employers, nor did it provide evidence of the composition of either store's current workforce. The petitioner subsequently submitted affidavits and assertions indicating that two store managers have been recently identified, offered employment and accepted those offers. However, this evidence does not establish that the petitioner was properly staffed when it filed this petition.

Therefore, as concluded by the director, the record shows that at the time the petition was filed the petitioner had two management agreements in place but had no employees other than the beneficiary to perform all of the duties required under those agreements. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988).

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006);

Systronics Corp. v. INS, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

As discussed, the petitioner failed to establish that it had employees in place at the time of filing to perform the non-managerial and non-executive operations of the company. Further, as discussed, the totality of the evidence in this matter raises questions regarding the actual nature and scope of the petitioner's operations.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner has not sustained that burden. Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

IV. QUALIFYING RELATIONSHIP

Although not addressed by the director, the record contains insufficient evidence of a qualifying relationship between the petitioner and its claimed Indian affiliate. 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).

On the Form I-129, the petitioner stated that it has an affiliate relationship with [REDACTED] located in India. The petitioner stated that the beneficiary owns a 60 percent interest in both companies while another individual, [REDACTED] owns the remaining 40 percent of both companies. The petitioner submitted a copy of the foreign entity's partnership deed and other evidence to corroborate its ownership.

With respect to the petitioner's ownership, the petitioner submitted a copy of a November 13, 2007 stock purchase agreement indicating that [REDACTED] owner of 1000 shares of the petitioner's common stock, agreed to sell all of his shares to the beneficiary and [REDACTED] in a 60/40 split in exchange for a total of \$2,000. The agreement further provided that the transfer had been noted on the company books and stock certificates had been issued in the respective buyers' names. The petitioner included some additional corporate documents supporting the sale and purchase of stock, including stock subscription agreements, but the petitioner did not submit stock certificates or a stock ledger to verify the issuance of stock to the beneficiary and Mr. [REDACTED]. According to the petitioner's articles of incorporation, the company is authorized to issue up to 10,000 shares of stock. Absent copies of the company's stock certificates and stock transfer ledger, the petitioner has not established the total number of shares issued to date, nor has it established that the 600 shares

claimed to be issued to the beneficiary give him a 60% ownership interest in the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Furthermore, there is a discrepancy in the record which contradicts the petitioner's claims regarding its ownership. Specifically, the petitioner's business plan summary, dated August 16, 2007, indicates that the company is equally owned and controlled by four individuals each having a 25% interest, namely, the beneficiary, [REDACTED]

[REDACTED] There are no documents in the record showing the transfer of stock from the four named shareholders above to [REDACTED] after August 2007 but prior to his alleged sale of stock to the beneficiary and [REDACTED] in November 2007. Again, the petition provided no stock ledger or stock certificates to trace ownership of stock in this company to overcome the inconsistencies noted in the record. 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

V. CONCLUSION

The petition will be denied for the above stated reasons, with each considered as an independent and alternate 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 burden has not been met. Accordingly, the director's decision will be affirmed and the petition will remain denied.

ORDER: The director's decision dated July 10, 2013 is affirmed. The petition is denied.