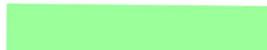




U.S. Citizenship
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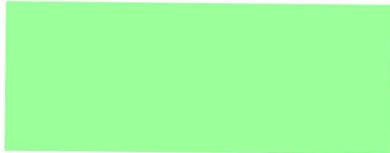


DATE: NOV 28 2014 OFFICE: VERMONT SERVICE CENTER FILE: 

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 this nonimmigrant petition 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 New Jersey limited liability company, states that it engages in the ownership and operation of retail stores. The petitioner claims to be a subsidiary of [REDACTED], located in India. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for one year.

The director denied the petition on two alternate grounds, concluding that the petitioner failed to establish that (1) it had acquired sufficient physical premises to house its new office, and (2) the beneficiary will be employed in a managerial or an executive capacity within one year of petition approval.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the petitioner is a "new office," and as such, it is not required to already be "doing business" in the United States, i.e. already have acquired convenience stores for the beneficiary to manage. The petitioner also asserts that the beneficiary "will supervise other professional and managerial employees, establishes goals and policies for the U.S. investment, and exercises wide latitude in discretionary decision-making under the direction of directors and shareholders of the Parent Company." Counsel submits a brief in support of the appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

II. THE ISSUES ON APPEAL

A. Physical Premises

The first issue to be addressed is whether the petitioner established that it has secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 2, 2013, and therefore must establish that it satisfied the requirements at 8 C.F.R. § 214.2(l)(3)(v)(A) as of this date. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

On the Form I-129, where asked to list the actual physical address where the beneficiary will work, the petitioner listed the work location as [REDACTED] The

petitioner submitted a copy of its lease at the listed address for office suite 216. The lease spans a term of 12 months on a month to month basis, commencing August 1, 2013 and ending July 31, 2014.

Throughout the record, the petitioner described its business goals for the first year of operations as follows:

As stated in the petition, the initial purpose of this petition will be to "transfer [the beneficiary] to the United States to establish a support team of legal, accounting and real estate professionals as well as vendors and to locate and purchase at least 2 stores and hire and train managers and staff to run these stores during the first year. . . .

* * *

As noted in the petition, the Petitioner expects to acquire at least 2 stores and hire managers and staff to run the businesses within the first year after his arrival and prior to filing for extension of his L-1 status.

The director issued a request for evidence ("RFE") on December 10, 2013, advising the petitioner that the description of the office space fails to indicate that that it could house additional managerial professionals for the beneficiary to supervise. The director also noted that, although the petitioner claims it will acquire two convenience stores for the beneficiary to manage during its first year of operations, it did not submit any evidence that it had already done so. The director requested that the petitioner submit, in part, a complete copy of its lease, indicating the total square footage of the premises, a statement defining the work site, and color photos of the premises.

In response to the RFE, the petitioner submitted a letter stating that the leased space is sufficient for the beneficiary to perform his initial duties of establishing the U.S. subsidiary office. The petitioner further noted that the lease is on a month to month basis, thus allowing the petitioner to either "move to a larger office space at the same location (as explained in the letter from [redacted], locate and secure a larger facility to accommodate a larger staff, or to relocate the office to one of the store facilities if there is adequate office space."

The petitioner submitted a second copy of the same lease agreement, along with photos of the leased premises and a letter from [redacted], signed by [redacted] Director of Business Services, dated January 10, 2014. The letter from [redacted] describes the petitioner's leased premises as follows:

This is to confirm that as of August 1, 2013, [redacted] rented office space, unit number [redacted] to [the petitioner].

This space includes 74 sq. ft. of office space plus a 300 sq. ft. conference room as needed, reception services, telephone answering services, the use of common areas including break room with facilities and the company name listed on the directory and office entrance.

In addition, secretarial services including: transcribing, copying, faxing, postage as well as Internet services are available as needed for additional costs.

provides small businesses with a range of office solutions from an interim small office space which can be expanded as the business grows to a 7-room office.

The petitioner submitted the following photographs of its leased premises:

- A photo of a door with a small plaque on the wall listing the U.S. petitioning company's name;
- A close-up photo of the plaque on the wall listing the U.S. petitioning company's name;
- A photo of what appears to be a conference room with a table and chairs and two televisions;
- A photo of partitioned office space that appears to be in heavy use with two desks occupied by what appear to be female employees; and
- A photo of a bare office with a single desk, chair, and table that do not appear to be in use.

The director denied the petition on February 4, 2014 concluding, in part, that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director found that the petitioner's lease did not sufficiently establish that it had purchased multiple convenience stores for the beneficiary to manage, nor did the description of the office space indicate that it could house additional managerial professionals for the beneficiary to supervise. The director noted that the letter from stated that the office space can be expanded in the future; however, the director found that, at the time of filing the petition, the petitioner failed to demonstrate that it had made any serious attempt to purchase, negotiate, or identify any convenience stores to house additional managers and staff subordinate to the beneficiary.

On appeal, counsel for the petitioner contends that the director is requiring that the petitioner already be "doing business" and have already acquired the convenience stores in order to qualify for the benefit sought as a "new office." Counsel states that this is not a requirement in the regulations and that the petitioner need only acquire sufficient physical premises to conduct business during its first year of operations. Counsel further states that the beneficiary will be the sole employee housed at the leased premises as the future employees will be employed at the corresponding convenience store they are hired to work at. Therefore, the leased premises are sufficient for the petitioner's intended business.

Upon review, the evidence in the record fails to establish that the petitioner secured sufficient physical premises to house the new office prior to filing the petition.

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(I)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval.

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 regulatory requirements. In the instant matter, the petitioner states that it will engage in the ownership and operation of retail stores. However, the petitioner has not demonstrated that it has acquired, purchased, or even researched any prospective convenience stores in order to commence operations and conduct its business. As such, it is impossible to determine, based on the lack of evidence submitted, that the petitioner has acquired sufficient physical premises to commence operations as soon as the beneficiary arrives in the United States. The regulations require the petitioner to present a credible picture of its intended business and where the company will stand in one year in order to support of its claim that the company will grow to a point where it can support a managerial or executive position. 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)).

Based on the deficiencies detailed above, the petitioner has not established that sufficient physical premises to house the new office have been secured. Accordingly, the appeal will be dismissed.

B. Employment in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a managerial or an executive capacity within one year of commencing operations.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

On the Form I-129, the petitioner stated that the beneficiary will be employed as the president of its new office with zero current employees. In its letter of support, the petitioner described the beneficiary's proposed position in the United States as follows:

Our plan is to transfer [the beneficiary] to the United States to establish a support team of legal, accounting and real estate professionals as well as vendors and to locate and purchase at least 2 stores and hire and train managers and staff to run these stores during the first year. Within 3 years, our goal is to own 5 stores and 10 stores within 5 years. [The beneficiary] will also conduct research to determine if [redacted] will be marketable in the United States and locate distributors and retailers throughout the country.

[The beneficiary] will be responsible for the overall business operations of [the petitioner]. He will conduct research and due diligence to locate promising areas initially within the State of New Jersey, locate and negotiate contracts with vendors and suppliers to supply the stores, locate and purchase convenience stores and possibly other small retail businesses. He will plan and arrange for renovating and upgrading as required and hire and train store managers and staff. During the first year of business [the beneficiary] will perform both managerial duties and other duties necessary to establish and build the business to the point where subordinate managers and assistants are hired.

The petitioner did not submit any additional information on the beneficiary's proposed duties, the duties of any proposed subordinates, its proposed organizational chart, or its business plan.

The director issued a request for additional evidence ("RFE") on December 10, 2013, advising the petitioner that it failed to submit sufficient evidence to demonstrate that it will support an executive or managerial position within one year of petition approval. The director noted that the petitioner failed to submit a business plan or a description of subordinate employees that would be supervised or managed by the beneficiary and who would relieve the beneficiary from performing the non-qualifying duties associated with the daily operations of convenience stores. The director observed that the petitioner stated it would acquire two convenience stores within its first year of operations, but failed to establish how supervising two convenience stores would qualify as working in a managerial or executive capacity as defined in the regulations. The

director instructed the petitioner to submit information regarding the proposed nature of the new office, describing the scope of the entity, its organizational structure, and its financial goals.

In response to the RFE, counsel for the petitioner described its business goals for the first year of operations as follows:

As stated in the petition, the initial purpose of this petition will be to "transfer [the beneficiary] to the United States to establish a support team of legal, accounting and real estate professionals as well as vendors and to locate and purchase at least 2 stores and hire and train managers and staff to run these stores during the first year. . . .

* * *

As noted in the petition, the Petitioner expects to acquire at least 2 stores and hire managers and staff to run the businesses within the first year after his arrival and prior to filing for extension of his L-1 status.

The petitioner goes on to describe the beneficiary's proposed position in the United States as follows:

However, the goals of the Petitioner are clearly set out in the Supporting Statement as follows, the Beneficiary will:

1. Establish a support team of legal, accounting and real estate professionals as well as vendors;
2. To locate and purchase at least 2 stores and hire and train managers and staff to run these stores during the first year;
3. Within 3 years, our goal is to own 5 stores and 10 stores within 5 years;
4. [The beneficiary] will also conduct research to determine if [redacted] will be marketable in the United States and locate distributors and retailers throughout the country;
5. [The beneficiary] will be responsible for the overall business operations of [the petitioner];
6. He will conduct research and due diligence to locate promising areas initially within the State of New Jersey;
7. Locate and negotiate contracts with vendors and suppliers to supply the stores;
8. Locate and purchase convenience stores and possibly other small retail businesses;
9. He will plan and arrange for renovating and upgrading as required and hire and train store managers and staff;
10. During the first year of business [the beneficiary] will perform both managerial duties and other duties necessary to establish and build the business to the point where subordinate managers and assistants are hired.

As employees are hired and trained within the first year . . . he will then, under the direction of the Directors of the Parent company . . . primarily be responsible for planning, directing and establishing the goals, objectives and policies of the entire [petitioner] business organization for North America. He will be responsible for growing [the petitioner's]

business in North America; hiring U.S. employees as needed; coordinating and overseeing all business matters through subordinate managers and employees; negotiating major contracts; and planning and directing the objectives of the company to attain the stated goals of the Board of Directors.

The petitioner did not submit any additional information on the beneficiary's proposed duties, the duties of any proposed subordinates, its proposed organizational chart, or its business plan.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a managerial or an executive capacity within one year of commencing operations. In denying the petition, the director found that the petitioner provided a vague and generalized plan to purchase multiple convenience stores in the United States but did not provide any evidence of researching of potential properties, negotiations for properties, or the purchase of commercial properties. The director further found that the petitioner did not provide a business plan or a description of subordinate employees that would be supervised or managed by the beneficiary, nor did it articulate how the beneficiary would be sufficiently insulated from performing non-managerial or non-executive duties. Furthermore, the director found that the petitioner failed to establish how supervising two convenience stores would qualify the beneficiary as employed in a managerial or executive capacity as defined in the regulations.

On appeal, counsel for the petitioner simply states the following in reference to the beneficiary's proposed position in the United States:

In must be noted that the petitioner submitted . . . evidence . . . including a copy of minutes of the meeting of the board of directors where the beneficiary is authorized to invest \$500,000 in this intended business venture . . .

The examiner made no reference to a major responsibility of the beneficiary during his first year in L-1 status stated in the original petition and response: "[The beneficiary] will also conduct research to determine if [redacted] will be marketable in the United States and locate distributors and retailers throughout the country."

* * *

The beneficiary will be responsible for much more than supervising 2 store managers. His duties are listed in detail in the petition and in the RFE response but largely ignored. The business plan for this subsidiary relating to acquiring retail stores is 2 stores within the first year, 5 within 3 years and 10 within 5 years. Each of these stores will have its own manager who will supervise his or her own staff. The day-to-day duties and responsibilities of these stores will be retail sales. The beneficiary will not be directly involved in retail sales but will be locating these stores, conducting research and due diligence, deciding and negotiating the terms of the acquisitions. He will hire and train the managers in the company's goals and management and administrative policies and will oversee the hiring of workers for the stores. He will also plan, research and locate distributors and representatives to market the parent company's products in the United States. However, he will not be involved in direct sales but will hire or contract with and train these distributors and representatives in the company's

products, policies and practices. He will then oversee and guide these businesses, set goals, approve contracts and sales processes. . . . Nowhere in this petition has it been stated or implied that the beneficiary will be involved in the day-to-day duties of these business [sic] other than planning, overseeing and managing them. . . . The beneficiary will not produce a product or provide a service but will plan and implement the establishment and growth of this expansion project as directed by the directors of the parent company.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a bona fide executive or managerial capacity within one year of the beginning of operations for the United States business entity.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that, "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the startup of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

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.*

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

in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including 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 AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational 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 or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 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").

The petitioner provided several statements briefly describing the beneficiary's duties, such as establish a support team of legal, accounting, and real estate professionals; locate and purchase two stores; hire and train managers and staff to run the two stores during the first year; conduct research to determine if [REDACTED] will be marketable in the United States and locate distributors and retailers throughout the country; be responsible for the overall business operations; conduct research and due diligence to locate promising areas initially within the State of New Jersey; locate and negotiate contracts with vendors and suppliers to supply the stores; locate and purchase convenience stores and possibly other small retail businesses; plan and arrange for renovating and upgrading as required; and establish and build the business to the point where subordinate managers and assistants are hired.

On appeal, counsel for the petitioner specifically stated that the beneficiary will not be involved in the day-to-day operations of retail sales of the convenience stores. The petitioner stated that the beneficiary "will not be involved in direct sales but will hire or contract with and train these distributors and representatives in the company's products, policies and practices . . . [and] oversee and guide these businesses, set goals, approve contracts and sales processes." The petitioner further stated that the beneficiary "will plan and implement the establishment and growth of this expansion project as directed by the directors of the parent company." The petitioner did not provide any additional information regarding the beneficiary's proposed duties, the proposed organizational structure, a specific timeline for hiring subordinate employees, or the duties of the subordinate employees to demonstrate that they will relieve the beneficiary from performing non-qualifying operational duties. Such a vague representation of what the beneficiary will be doing is not sufficient to demonstrate that his day-to-day duties are primarily managerial or executive in nature. The petitioner further explained that once the employees are hired and trained within the first year, the beneficiary's duties will change to include planning, directing and establishing the goals, objectives and policies of the entire U.S. business organization for North America; be responsible for growing business in North America; hire U.S. employees as needed; coordinate and oversee all business matters through subordinate managers and employees; negotiate major contracts; and plan and direct the objectives of the company to attain the stated goals of the Board of Directors. Some of these duties merely paraphrase the statutory definition of managerial capacity and

executive capacity. See sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Additionally, the petitioner lists the beneficiary's duties as including managerial, administrative, and 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 identified tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If the petitioner claims that the beneficiary will be employed as a personnel manager, the petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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). Here, the petitioner did not indicate that the beneficiary performs as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary spends on duties that would clearly demonstrate that he manages an essential function of the U.S. company.

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, 8 U.S.C. § 1101(a)(44)(B). 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.* The beneficiary in this matter has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will focus on the broad goals and policies of the organization rather than day-to-day operations. In fact, the petitioner has not established that the beneficiary will have sufficient subordinate employees to relieve him from performing non-qualifying duties.

The AAO further notes that 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). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner made a vague reference to the beneficiary hiring a legal professional, accounting professional, and real estate professional within the first year of operations, and presumably prior to acquiring the planned convenience stores. However, the petitioner's failure to submit an organizational chart or describe its proposed organizational structure within the first year of operations and beyond, raises concern as to how it will be able to support an employee in a managerial or executive position within one year of commencing operations. Furthermore, the petitioner has not indicated that it will employ any other staff to perform administrative/clerical 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)).

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

Given the deficiencies detailed above, the evidence on record does not support a determination that the beneficiary will be employed in a bona fide managerial or executive position within one year of the beginning of operations for the U.S. business entity. Accordingly, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner failed to submit sufficient evidence as to its ownership, which raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). When considering the totality of the evidence presented, the petitioner has not sufficiently demonstrated that it is a subsidiary of the foreign entity.

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[.]

* * *

- (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.

Although the petitioner submitted its operating agreement, dated November 5, 2013, showing at schedule A that the foreign entity has 90.9% membership interest and [REDACTED] has 9.1% membership interest, it failed to submit all issued member certificates or a ledger to indicate what membership interests have been distributed. The petitioner submitted member certificate #2, issued to [REDACTED] for 10 units on November 5, 2013, and member certificate #3, issued to the foreign entity for 100 units on November 5, 2013. The petitioner failed to submit member certificate #1 or even acknowledge having issued it, to whom, and for how many units. In the instant matter, the petitioner claims that the foreign entity and [REDACTED] are its sole members. However, the deficient evidence casts doubt on the evidence presented.

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).

Due to the deficiencies detailed above, the petitioner has not met its burden to establish that the petitioner is a subsidiary of the foreign entity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). 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, 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.

ORDER: The appeal is dismissed.