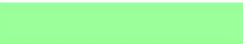


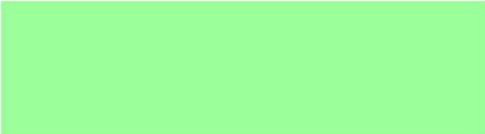
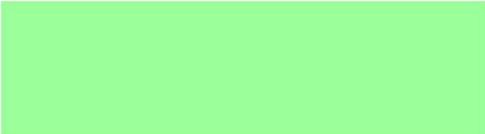


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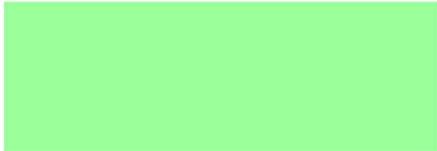


DATE: **OCT 02 2014** Office: CALIFORNIA SERVICE CENTER FILE: 

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 California Service Center director denied the nonimmigrant visa petition. The petitioner subsequently filed a combined motion to reopen and reconsider. The director granted the motion to reopen based on the new evidence submitted by the petitioner, but affirmed her denial of the petition. The director then certified the decision to the Administrative Appeals Office (AAO) for review. 8 C.F.R. § 103.4(a)(1). Following a de novo review of the matter, the AAO will affirm the denial of the petition.

The petitioner filed a Petition for a Nonimmigrant Worker (Form I-129) seeking to extend the beneficiary's status 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 California corporation established in [REDACTED] operates a fast food restaurant. The petitioner states that it is an affiliate of [REDACTED] located in Greece. The beneficiary was previously granted one year in L-1A status in order to open a new office as the petitioner's president, and the petitioner now seeks to extend his status for a period of three years. *See* 8 C.F.R. § 214.2(l)(14)(ii).<sup>1</sup>

#### 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.

When a new business is established and commences operations, the regulations recognize that the designated manager or executive responsible for setting up operations may be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. *See* 8 C.F.R. § 214.2(l)(3)(v); *see also* 52 Fed. Reg. 5738, 5740 (Feb. 26, 1987). In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

As in the present matter, after one year, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a "new office" petition must submit the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

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<sup>1</sup> Consistent with 8 C.F.R. § 214.2(l)(15)(ii), an extension of stay may only be authorized in increments of up to two years.

- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;

- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

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

## II. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES)

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity in the United States.

### A. Facts and Procedural History

The petitioner filed the Form I-129 on September 4, 2013. The petitioner indicated that it operates a fast food restaurant doing business as [REDACTED]. The petitioner asserted that it earned approximately \$250,000 in revenue in 2012, and the Form I-129 indicated that it has eight employees. The petitioner submitted a menu for its restaurant which indicates that it is open for business from 7:00 a.m. to 8:30 p.m. daily.

In a letter submitted in support of the Form I-129, the petitioner stated that the beneficiary, as president, “will continue to perform senior level managerial duties with executive type decision making authority.” The petitioner asserted that the beneficiary’s responsibilities will include “overall management of the company, strategic planning and marketing, sales contract management, recruitment of managerial personnel, and managerial reporting [to the foreign entity].” The petitioner further described the beneficiary’s duties as follows:

- Oversee the establishment and day-to-day operations. - 25%
- Directing the organization and department managers in marketing, finance, and human resources - 10%
- Consider the competition, market and local trends in the U.S. to improve product and services - 10%
- Determine company policies and establish business goals, including formulating company policies for products, pricing, distribution, promotion, finance and human sources, and make corporate decision [*sic*] to adjust policies - 5%
- Review marketing and financial reports to ensure objectives are achieved - 15%
- Consider competitors advantages and disadvantages - 5%
- Discretionary decision-making includes final negotiations of contract terms with vendors and any other related companies - 5%
- Analyze operations to evaluate company performance and to determine areas of cost reduction and program improvement - 5%

- Direct financial and budget activities to fund operations and increase efficiency- 5%
- Make decisions to adjust company business orientation and operation - 10%
- Report to the majority shareholder concerning performance of the U.S. affiliate and business opportunities in the United States, and receive and implement information and instructions from the affiliate company. - 5%

The petitioner further submitted an organizational chart reflecting seven employees, including the beneficiary. The chart indicated that the beneficiary supervises a general manager who also acts in the capacity of service manager overseeing three servers. In addition, the chart reflects that the general manager supervises the kitchen department lead, further shown to oversee one cook.

As evidence of wages paid to employees, the petitioner submitted California Form DE-9, Quarterly Wage and Withholding Reports for the last three quarters of 2012 and the first quarter of 2013. The reports reflected that the petitioner employed a maximum of ten employees during the second quarter of 2012 and paid total wages of \$27,177.90. The most recent wage reports provided in support of the petition, relevant to the first quarter of 2013, indicated that the petitioner had six employees and paid total wages of \$14,938.50. The petitioner's business plan prepared in 2012 reflects that the petitioner projected \$175,000 in salary expenses for 2013.

Following an initial review of the evidence, the director issued a request for evidence (RFE). The director stated that the evidence submitted indicated that the petitioner has only one full-time employee and that it appeared that the beneficiary is a first-line supervisor of non-professional employees. As such, the director requested that the petitioner submit: (1) a detailed statement listing the number of employees and their positions; (2) California quarterly wage reports for the second quarter of 2013, including the names of the employees, wages paid, and the number of weeks worked; and (3) a more detailed organizational chart including not only the names and positions of the employees, but a summary of their duties and salaries.

In response, counsel for the petitioner explained that the petitioner employs six workers, including two subordinate managers reporting to the beneficiary, the aforementioned service manager and kitchen manager. Counsel for the petitioner stated that the beneficiary "oversees the kitchen and service department managers and exercises broad discretion over [redacted] and the entire investment enterprise of [the petitioner]." Counsel for the petitioner noted that the beneficiary does not directly supervise the cooks and servers and explained that the company "seeks to invest in additional food/service establishments or business ventures in the near future," led by the beneficiary. The petitioner resubmitted the same duty description for the beneficiary that was provided at the time of filing.

The petitioner provided a California Form DE-9 for the second quarter of 2013 indicating a total of \$14,938.50 in wages paid to six employees, including the general manager/service manager (\$3,447); the kitchen manager (\$1,884); a server (\$926.50); a second server (\$4,063); a third server (\$1,152); and the cook (\$1,463).

The petitioner re-submitted the same organizational chart provided at the time of filing and included duty descriptions for each position. The description provided for the service manager indicated that this employee carries out the objectives and plans set by the beneficiary, manages the service team, assists in budgetary matters, controls inventory and staffing levels, and ensures compliance with food and operational safety policies. The description stated that she earns \$9.00 per hour, but that her “salary will raise when she fully takes over the GM position.” The duty description for the kitchen manager stated that he is responsible for overseeing the kitchen operations and staff, including staffing, scheduling, sanitation, and inventory, and indicates that he earns \$10.00 per hour. The description explained that he assigns tasks to “the line cook, preparation cook or Dishwashers.” Finally, the descriptions for the cook and server indicate that they perform duties inherent to these operational positions. The petitioner explained that the cook earns a wage of \$9.50 per hour and the servers earn \$8.00 to \$8.50 per hour.

The director denied the petition on December 20, 2013, concluding that the petitioner did not establish that it will employ the beneficiary in a primarily managerial or executive capacity. In denying the petition, the director pointed to the company’s lack of full-time employees and concluded that its organizational structure was insufficient to support a managerial or executive position. Based on the evidence submitted, the director determined that the beneficiary would more likely than not act as a first-line supervisor of non-professional employees.

In the subsequent motion to reopen and reconsider, counsel stated that the director abused her discretion by applying a more stringent burden of proof than the preponderance of the evidence. Counsel contended that the petitioner provided a description of the beneficiary’s duties demonstrating that he primarily performs qualifying executive or managerial duties. Further, counsel acknowledged that the beneficiary performs some non-managerial duties, but asserted that this should not disqualify the beneficiary from qualifying as a manager since these duties do not constitute a majority of his time. Counsel stated that the director erroneously denied the petition based solely on the petitioner’s number of employees without considering the reasonable needs in light of the overall purpose and stage of development of the company.

In support of these assertions, counsel submitted United States Department of Labor (DOL) O\*NET and Occupational Outlook Handbook position descriptions for general and operations managers and chief executives, and noted the similarity of these duties to those listed for the beneficiary. Counsel also asserted that Internal Revenue Service (IRS) standards dictate that an employee working thirty hours per week qualifies as a full-time employee, contrary to the conclusion of the director, thereby supporting a finding that the petitioner employs multiple full-time employees.

Lastly, counsel referenced a press release issued by former Secretary of the Department of Homeland Security Janet Napolitano titled “Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation,” dated August 2, 2011, and stated that this memorandum indicates an initiative on the part of USCIS to promote startup enterprises and job creation applicable to the current matter. See Press Release, United States Department of Homeland Secretary, “Secretary Napolitano Announces Initiatives to Promote Startup Enterprises

and Spur Job Creation” (August 2, 2011), available at <http://www.dhs.gov/news/2011/08/02/secretary-napolitano-announces-initiatives-promote-startup-enterprises-and-spur-job> (last accessed Sept. 29, 2014).

Further, counsel provided a 2012 IRS Form 1120 U.S. Corporation Income Tax Return indicating that the petitioner earned \$249,935 in revenue and paid \$69,333 in wages and salaries during 2012. Counsel also re-submitted the same organizational chart for the petitioner previously provided on the record.

On March 10, 2014, the director granted the motion to reopen, but affirmed the denial of the petition. In denying the petition, the director again noted that the evidence indicated that the petitioner had one full-time employee and did not establish how the subordinate employees will relieve the beneficiary from primarily performing non-managerial and non-executive duties outside the scope of section 101(a)(44) of the Act.

On June 4, 2014, following the director’s grant of the motion to reopen and affirmation of her decision, she certified the case to this office for review. *See* 8 C.F.R. § 103.4(a)(5). Therefore, this office will provide a *de novo* review of this matter following the director’s certification. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

## B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

### 1. Description of the Job Duties

When examining the executive or managerial capacity of the beneficiary, the AAO looks first to the petitioner’s description of the job duties. The regulations require a detailed position description. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the definitions of executive and managerial capacity 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 establish that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages or directs 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)(44) of the Act. By statute, eligibility for this classification requires that the duties of a position be “primarily” of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(C) requires that the petitioner submit a statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition. Reciting the beneficiary’s vague job responsibilities or

broadly-cast business objectives is not sufficient. The duties offered by the petitioner are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities within the context of the petitioner's restaurant business. The duties, and the evidence of record generally, include no specific examples or documentation to substantiate the beneficiary's claimed duties. These vague and overly broad duties include: overseeing the establishment and day-to-day operations, directing the organization, determining company policies, establishing business goals, making corporate decisions, analyzing operations to evaluate company performance, and directing financial and budget activities.

The petitioner has failed to provide specifics and supporting documentation to corroborate the beneficiary's performance of his stated duties, including specific day-to-day operations he manages, policies and goals he established, marketing and financial reports created by the organization that he considered, contracts he negotiated, or specific decisions he made. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Upon further review, several of the beneficiary's duties paraphrase the regulatory definitions of managerial and executive capacity. 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. *Id.* at 1108; *see also Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Further, although the petitioner asserts that the beneficiary will spend a significant portion of his time expanding the company and pursuing other ventures, it has not provided supporting evidence to substantiate this claim or demonstrated that these activities are likely to occupy a majority of the beneficiary's time. In support of the claim, the petitioner submitted a five-year business plan indicating that the company anticipates operating from a single location, providing no timeline or plans for expansion. Overall, despite submitting a lengthy list of responsibilities, the petitioner has failed to provide sufficient detail or explanation of the beneficiary's proposed activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.*

In addition, counsel notes that the director concluded that the beneficiary's involvement in the day-to-day operations of the company is fatal to his classification as a qualifying manager or executive. Counsel asserts that this conclusion "runs afoul of the opinions of sister agencies" and references Department of Labor (DOL) O\*Net duty descriptions for the positions of operations manager and chief executive officer.

First, it is not clear from the assertion of counsel how the referenced DOL duty descriptions articulate that operations managers or chief executives are engaged in operational duties. Regardless, this is not under dispute, as USCIS recognizes that a beneficiary may perform non-qualifying duties, provided that he or she primarily performs managerial or executive duties. As

noted, eligibility for this classification requires, by statute, that the duties of a position be “primarily” of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act. As such, while the job descriptions from the DOL provide some insight into what duties may be generally ascribable to persons occupying similar positions in a corporate hierarchy, they do not take the place of a specific description of the beneficiary’s actual day-to-day duties within the context of the petitioner’s organization. Here, an analysis as to whether the beneficiary is primarily performing qualifying tasks is limited by the vague and unsubstantiated nature of the beneficiary’s stated duties. Again, the beneficiary’s actual job duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103, 1108.

## 2. Executive Job Duties

Furthermore, counsel specifically contended on motion that the petitioner has established by a preponderance of the evidence that the beneficiary acts in a qualifying executive capacity. The statutory definition of the term “executive capacity” focuses on a person’s elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person’s authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. *Id.* at (i) and (ii). 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.* at (iii) and (iv).

Inherent to the definition, the organization must have a subordinate level of managerial 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. *See* 52 Fed. Reg. 5738, 5739 (February 26, 1987) (“[N]either the title of a position nor the ownership of a business are, by themselves, indicators of managerial or executive capacity.”).

The petitioner has not submitted sufficient evidence to demonstrate that the beneficiary acts primarily in a qualifying executive capacity. The petitioner has submitted a vague duty description for the beneficiary that fails to detail and substantiate the beneficiary’s primary performance of executive-level duties. Further, based on the submitted wage documentation, the petitioner has not established that its subordinate staff work sufficient hours to relieve the beneficiary from significant involvement in the day-to-day operation of the restaurant, such that it is reasonable to conclude that he is not primarily focused on the broad goals and policies of the organization or the direction of its management. While the beneficiary may exercise the appropriate level of decision-making authority over the restaurant’s operation as the petitioner’s president and chief executive officer, the record does not support a finding that the beneficiary’s actual duties are primarily executive in nature. In addition, it is not sufficient to vaguely compare a beneficiary against a general Department of Labor description of an executive.

### 3. Totality of the Record

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to a comprehensive understanding of a beneficiary's actual duties and role in a business.

The petitioner asserts that the beneficiary qualifies as a manager through his supervision of subordinate managers who relieve him from performing non-qualifying operational and first-line supervisory duties. 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. 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 a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner indicates that the beneficiary supervises a kitchen department manager and a general manager/service department manager who relieve him from first-line supervision of the cook and servers that perform the operational and administrative tasks necessary for the operation of the restaurant. The director calculated that these two supervisory employees work an average of 16 hours per week and 32 hours per week, respectively. While the petitioner objected to the categorization of the service department manager as a part-time employee, it did not otherwise claim that the work hours cited in the director's decision were incorrect. The evidence shows that the petitioner's cook works 13 hours per week and that its three servers work a total of 61 hours per week. The petitioner correctly asserts that it is not required to establish that the company is staffed with full-time employees. However, because the petitioner operates a retail business with long-operating hours, the total number of hours worked by its employees is relevant in determining how work is allocated within the company and whether the employees are available to relieve the beneficiary from performing non-qualifying operational, administrative, and first-line supervisory duties.

The petitioner submitted a menu indicating that the restaurant is open daily for a total of 94.5 hours per week. It has two kitchen staff working a total of 29 hours per week. The kitchen manager's job description shows that he oversees multiple shifts of workers, including line cooks, prep cooks and dishwashers; however, this description is inconsistent with the petitioner's actual staffing levels. 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). It is unclear who prepares food during the 65 hours during which the kitchen manager and cook are not scheduled to work each week.

Similarly, the petitioner has servers available for only approximately two-thirds of its operating hours. Given the nature of the business, the petitioner's operating levels, and its staffing levels at the time of filing, the two subordinate managers would reasonably need to perform the duties of a cook and a server in order to keep the restaurant minimally staffed. Even if this was the case, the petitioner has not established that it has sufficient subordinate staff to keep one employee in the kitchen and one employee at the counter during all operating hours.

The petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization can support an executive or managerial employee who is relieved from performing primarily non-qualifying tasks. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Overall, the record indicates that the beneficiary's subordinates, and more likely than not the beneficiary himself, would need to perform the actual day-to-day tasks of operating the restaurant in order for it to remain open for business. As such, the petitioner has not provided evidence that the beneficiary qualifies as a personnel manager.

#### 4. Reasonable Needs of a Startup Enterprise

Counsel contends that the director inappropriately denied the petition based solely on the petitioner's number of employees and the size of the business. Counsel's assertion is not persuasive. Counsel accurately states 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.

To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be “primarily” employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act. The evidentiary requirements for the extension of a “new office” petition require USCIS to examine the organizational structure and staffing levels of the petitioner.<sup>2</sup> See 8 C.F.R. § 214.2(l)(14)(ii)(D). If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Further, 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).

As previously discussed, the petitioner has not established that the beneficiary and his subordinate staff satisfy the reasonable needs of a fast food restaurant open for more than 90 hours per week. Indeed, the reasonable needs of such an operation call into question whether the beneficiary is primarily performing managerial or executive duties. On review, the evidence suggests that the petitioner has downsized its staffing levels during the first year of operations rather than expanding to the point where subordinate supervisors and hourly employees are now available to relieve the beneficiary from performing non-qualifying tasks.<sup>3</sup> The evidence does not demonstrate that the petitioner has grown sufficiently after one year to support the beneficiary in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(D).

Finally, with respect to the petitioner’s status as a startup business, counsel references a press release issued by the Department of Homeland Security on August 2, 2011, titled “Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation.” See DHS

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<sup>2</sup> Following the enactment of section 101(a)(44)(C) of the Act in 1990, the Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted the reference to “size and staffing levels” at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), which sets out the evidentiary requirements for initial new office petitions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office’s staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

<sup>3</sup> The evidence indicates that the petitioner’s staff has decreased in size during its initial year of business; it is paying less in salary now than when in commenced operations. For instance, the California Form DE-9 for the second quarter of 2012 indicates that the petitioner employed nine to ten employees and that it paid a total of \$27,177.90 in wages during the quarter. The most recent Form DE-9 from the second quarter of 2013 reflects that the petitioner employed only five workers and paid \$12,935 in wages.

Press Release, *supra* at pp. 6-7. Counsel indicates that this press release articulates a basis for USCIS to favor the approval of the current petition.

We do not dispute that DHS intends to promote startup enterprises and job creation, specifically noting that the agency has long encouraged such activities. *See, e.g.* 52 Fed. Reg. at 5739 (“It is Service policy to encourage creation of jobs for United States workers and, with these revisions to regulations for L classification, the Service is attempting to facilitate the movement of international personnel and to clarify and simplify requirements for classification and admission.”) The INS specifically drafted the “new office” regulations to encourage “small business investment” and to allow foreign companies to transfer personnel to “start-up operations.” *Id.* at 5740. While the Secretary’s statement may serve to bolster this objective, the petitioner must still satisfy the new office extension requirements enumerated at 8 C.F.R. § 214.2(l)(14)(ii). The petitioner does not cite to any other regulations, precedent decisions, or policy statements that would obviate this conclusion. USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof. *See* section 291 of the Act, 8 U.S.C. § 1361.

As discussed herein, the preponderance of the evidence indicates that the petitioner has not submitted a sufficiently detailed duty description necessary to demonstrate the beneficiary’s actual day-to-day tasks and has provided evidence of an organizational structure insufficient to primarily relieve the beneficiary from performing non-qualifying operational duties. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (discussing the preponderance of the evidence standard). As such, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity. For this reason, the director’s denial of the petition will be affirmed.

### III. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the foreign entity.

On the Form I-129, the petitioner averred that it is an “affiliate” of the beneficiary’s foreign employer in Greece. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L) (defining “affiliate”). The U.S. petitioner asserted that it is 70% owned by [REDACTED] and 30% owned by the beneficiary. The petitioner submitted share certificates reflecting that [REDACTED] owned 1,225 of its outstanding shares and that the beneficiary held 525 shares. In addition, the petitioner provided a stock transfer ledger supporting the issuance of these shares in April 2012 and company minutes indicating that [REDACTED] paid \$122,500 for his shares and the beneficiary \$52,500.

Likewise, the petitioner indicated in a support letter that the foreign entity was owned by the same individuals with the same percentage ownership. With respect to the foreign entity, the petitioner submitted the foreign entity’s minutes from June 30, 2013, indicating that [REDACTED] held 21,000 shares in the foreign entity and the beneficiary held 9,000 shares. The petitioner also provided a tax document from Greece titled “Certificate for Amendment in Works of an Entity,”

dated June 24, 2012, stating that the foreign entity is 50% owned by [REDACTED] and 50% owned by the beneficiary.

On motion, the petitioner submitted a 2012 U.S. Corporation Income Tax Return (IRS Form 1120) reflecting in Schedule G that the beneficiary owns 100% of the U.S. petitioner's stock, contrary to the petitioner's initial claims.

The petitioner has not demonstrated that it has a qualifying "affiliate" relationship with the foreign entity. The petitioner has presented contradictory evidence relevant to its ownership and ownership in the foreign entity. Although the petitioner asserts that it is 70% owned and controlled by [REDACTED] the IRS Form 1120 submitted on appeal indicates that it is 100% owned by the beneficiary. In addition, the petitioner has provided tax documentation from Greece dating from 2012 reflecting that the foreign entity is owned in equal parts by [REDACTED] and the beneficiary, contrary to its assertions that the foreign entity is 70% owned by [REDACTED]

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). Given the unresolved discrepancies above, the petitioner has not supported its asserted ownership in the petitioner and the foreign entity, and therefore, it has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the petition will be denied.

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).

#### IV. CONCLUSION

The petition will be dismissed 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The director's decision dated March 10, 2014 is affirmed. The petition is denied.