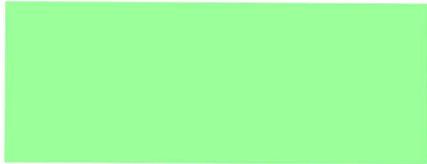




U.S. Citizenship
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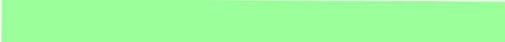


DATE: **SEP 08 2014**

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 a Form I-129, Petition for a Nonimmigrant Worker, seeking to qualify 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 Delaware corporation established in September 2012, states that it will be engaged in the wholesale distribution and retail sale of health and beauty products and pharmaceuticals. The petitioner claims to be a wholly owned subsidiary of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as the director of business development and marketing in its new office in the United States for a period of one year.

The director denied the petition on multiple grounds. The director concluded that the petitioner had not established that it has a qualifying relationship with the foreign entity. Further, the director found that the petitioner did not demonstrate that the beneficiary was employed in a managerial or executive capacity with the foreign entity for one year out of the three years prior to the filing of the petition. The director also concluded that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States within one year. Finally, the director found that the petitioner failed to demonstrate that it has secured sufficient physical premises to house its proposed new office in the United States.

On appeal, counsel contends, with respect to each basis for denial, that the director disregarded probative evidence sufficient to establish the beneficiary's eligibility for the benefit sought.

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. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES)

The first issue to be addressed is whether the petitioner has established that it will employ the beneficiary in a qualifying managerial or executive capacity within one year of the approval of the petition.

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.

1. Facts

The petitioner filed the Form I-129 on December 26, 2012. A letter submitted in support of the petition indicated that the beneficiary was offered the position of director of business development and marketing. The petitioner stated that the beneficiary will lead efforts to establish a new subsidiary company in the United States and that she will report to the petitioner's chief executive officer. The petitioner explained the beneficiary's proposed role as follows:

The Director of Business Development (here after, the director) is responsible for assembling, mentoring and training an effective and productive sales and marketing team. The director will be responsible for web based and on the ground prospecting activities on a regional basis to develop an active pipeline of sales opportunities for both business-to-business and business-to-consumer chains. The Director is responsible for developing and implementing the marketing and sales tactics needed to achieve the company's

business revenue targets. The Director will be called upon to take the lead in establishing new facility operations that expand the scope of business. The director is responsible for hiring, training, and managing the sales team.

The petitioner stated that the beneficiary will supervise "from one to 4 sales and marketing managers." Further, the petitioner elaborated on some of the beneficiary's key duties, including overseeing and monitoring IT professionals and web developers to create a web based program, representing the company at trade shows, creating new business relationships, meeting with clients to inform them of the company's suite of products, planning and directing the company's product development policies and initiatives, reviewing and analyzing proposals and allocating funds as needed, developing and implementing methods for monitoring projects, developing sales strategies, developing a supply chain through the execution of contracts, and recruiting sales and marketing managers.

The petitioner submitted a business plan detailing the foreign entity's goal of establishing a subsidiary company in the United States. It stated that the petitioner "is expected to provide wholesale distribution and retail sales of health products, pharmaceutical products, beauty supplies, personal care, packaged food stuffs, and salon supplies throughout the New York Metropolitan and Tri-State region." The petitioner projected that approximately 75% of its sales will be completed through its website. The petitioner stated that they "expect full success and viability of the business within 3 to 5 years with a credible chance of indefinite long-term profitability." The petitioner also estimated that it will obtain "regulatory conformity for prescription products starting in the second quarter of 2014." The business plan included a sales forecast estimating that the petitioner will achieve over \$8 million in sales in 2013 and over \$14 million in sales in 2014.

The petitioner stated in the business plan that the foreign entity has invested \$484,000 to start-up the new business and projected its start-up costs to be \$393,000 during the first year. The projection also indicated that the petitioner had \$300,000 in working capital, including \$110,000 from bank loans, \$95,000 from vendor credit lines, and \$45,000 in private loans. The petitioner articulated that a potential weakness was its "access to financial resources," noting that "[the petitioner] will face problems of accessing credit related to having a credit history and credit references." The petitioner specified that its goal was "to have fully self-contained office spaces and non-shared minimal warehousing by the end of 2013." The petitioner stated on one page of its business plan that it would sell its products through its website [REDACTED] but elsewhere in the business plan stated that its e-commerce website is [REDACTED]

The business plan also included a proposed organizational structure, asserting that the company planned on staffing marketing management, IT administration, website development and e-commerce marketing departments to be overseen by the beneficiary. The chart further indicated that the company will hire a director of human resources and a director of business operations who will oversee inventory management, shipping and logistics, and customer service departments. In total, an organizational budget table indicated that the company planned on hiring nine employees during the first year and paying them a projected \$229,000 in salaries and wages. These projected employees include two owners, a website manager, an assistant, three website marketing employees, and two administrative employees. In the next pages of the business plan, the petitioner specified that the company will have the following positions: (1) [REDACTED] Chief Executive Officer, (2) a president and chief financial officer, (3) the beneficiary as director of

business and marketing, (4) a director of human resources, (5) an operational budget analyst, (6) an information technology team leader, (7) a customer services representative in ordering, (8) an inventory manager, and (9) a shipping and logistics manager.

Following an initial review of the evidence, the director issued a request for evidence (RFE), stating that the evidence submitted by the petitioner was not sufficient to establish that the beneficiary will be employed in an executive or managerial capacity after one year. As such, the director requested that the petitioner submit a breakdown of the number of hours the beneficiary will devote to each of her duties on a weekly basis. Further, the director asked that the petitioner specify the number of supervisors the beneficiary will oversee and the duties of these subordinates. The director requested that the petitioner provide a list of the company's projected hires, their duties, and a breakdown of the number of hours they will devote to each of their tasks.

In addition, the director concluded that the initial evidence was not sufficient to establish the foreign entity's investment in the petitioner. Therefore, the director asked that the petitioner submit evidence establishing the size of this investment and the petitioner's ability to remunerate the beneficiary and commence business, including evidence of wire transfers, bank deposits, bank statements, or other such relevant evidence.

In response, the petitioner submitted an additional support letter further detailing the beneficiary's anticipated duties over the course of the first year of operations. The petitioner specified that the beneficiary would perform the following duties by the end of her first year as director of business development and marketing:

- Evaluate marketing strategy based on actual business development and performance vis-à-vis initial objectives. Prepare an updated market research analysis based on establishment of objectives, market characteristics, cost and markup factors, supply and demand, sales forecast. Assess business development, expenditures, profit-loss projections, return-on-investments, and prepare a year-end report, including review of expenditures and recommendations. 14 hours, (35%)
- Continue leading business development and marketing, including long-term brand establishment campaigns and attendance at trade shows and marketing events. Work with the Marketing Manager, E-Commerce Marketing Specialist, Customer Service Manager, advertisers, developers, to market products and establish company brand. Direct continued client acquisition, both business and retail clients. 10 hours, (25%)
- Lead continued market research, including research of new health care products, product enhancements, and product redesign, as necessary. 8 hours, (20%)
- Direct hiring, training, supervision and evaluation of operations and marketing personnel. Hire a Customer Service Manager. 4 hours, (10%)
- Overall business day-to-day supervision, including staff supervision, web-based/I.T. development, e-commerce; compliance; review of purchase orders; review/approval of operations and marketing expenses; inventory forecast; products/stock organization to facilitate inventory receipt and order fulfillment; manage day-to-day client inquiries and issues. Communicate/consult with parent company in India as

necessary to keep in line with overall business strategy/goals and report of progress.
4 hours, (10%)

The petitioner asserted that the beneficiary will spend approximately 70% of her time on qualifying managerial and executive duties and 30% on non-qualifying operational duties. The petitioner also outlined the beneficiary's proposed duties for the first three quarters of the company's initial year of operation, indicating that she will be responsible for hiring a business operations manager during the second quarter, a purchasing manager in the third quarter and a customer service manager in the final quarter.

The petitioner specified that the business operations manager will prepare business operations guidelines, oversee their implementation, and ensure compliance with the petitioner's organizational policies. It stated that the purchasing manager will review and approve invoices and prepare purchasing reports for the beneficiary, and that the customer service manager will direct the daily ordering process and manage client communications and complaints. The petitioner further stated that it planned on hiring an e-commerce marketing specialist and a market research analyst in late 2013 or early 2014. In sum, the petitioner asserted that the beneficiary will supervise six managers and supervisors and two non-managerial employees. The petitioner stated that it currently employed a marketing manager, an inventory manager, and a shipping and logistics manager and provided payroll records for these employees for two weeks during April 2013. The petitioner indicated that the beneficiary will be responsible for all hiring, firing, and promotion decisions, the development and design of the company's marketing strategy, the creation and implementation of the company's business development strategy, and resource planning and allocation, including recommending additional funding to the company's CEO.

In an additional response letter, counsel further explained the foreign entity's initial investment in the petitioner. Counsel specified that the petitioner had received funding from the parent company in the following amounts and from the following sources: (1) \$38,133.20 wired from the parent company; (2) \$26,900 loaned from [REDACTED]; (3) \$11,000 loaned from the individual identified as the petitioner's marketing manager; (4) \$85,000 in business credit with [REDACTED] and (5) \$20,000 in business credit from [REDACTED]. The petitioner submitted bank records indicating that the foreign entity wired \$38,133.20 on April 10, 2013 and that [REDACTED] had credited the company the amount of \$26,900. However, the bank record further showed several credits and debits from [REDACTED] during late 2012 and early 2013. The petitioner provided a loan agreement it entered into with the marketing manager on October 12, 2012 indicating that he had loaned the company \$11,000. Documentation relevant to the company's business credit account with [REDACTED] reflected a balance of \$108,376.66 as of March 4, 2013 and indicated that it was in the name of [REDACTED] an unidentified party. The petitioner further stated that the foreign entity had earned approximately \$168,620 in revenue during 2012. The petitioner submitted an operating agreement between it and the foreign entity dated September 15, 2012 stating in Article 3.4 that the "[foreign entity] will provide necessary seed not limited to 60,000 dollars but to exceed 500,000 U.S. dollars annually."

The petitioner asserted that it had earned \$403,823 in revenue during its initial three months of operations in 2012 and submitted a 2012 IRS Form 1120 U.S. Corporation Income Tax Return confirming this revenue and the payment of \$11,538 in salaries and wages during that year. In addition, the petitioner submitted approximately ten invoices from vendors from January through April 2013 reflecting its purchase of beauty products, such as hair dryers and shampoo. The petitioner further asserted that it planned on selling a

proprietary weight loss product name [REDACTED] that will be "manufactured in the United States in an FDA-registered laboratory."

The director ultimately denied the petition, concluding that the petitioner had not established that it will support the beneficiary in a qualifying executive or managerial capacity within one year. The director stated that the evidence indicated that the beneficiary's position requires two years of professional pharmaceutical experience, but concluded that the petitioner had not established her employment in such a capacity abroad for the required two years. In addition, the director pointed to the fact that the petitioner had not obtained licenses for the sale of pharmaceuticals in the United States. The director also noted discrepancies in the stated amounts of investment on the part of the foreign entity.

On appeal, counsel contends that the petitioner has received all required capital from the foreign entity and asserts that it has submitted sufficient supporting documentation to demonstrate these contributions. Counsel points to the foreign entity's finances and asserts the petitioner will be financially supported during the first year. Counsel states that the petitioner's failure to obtain licenses to sell pharmaceuticals will not prevent the petitioner from launching its operations, as it will not sell products requiring such licenses during its initial year. Counsel asserts that the petitioner has submitted a very descriptive duty description for the beneficiary and provided ample supporting evidence that the petitioner will be sufficiently operational after the first year to support the beneficiary in a qualifying managerial or executive capacity.

2. Analysis

Upon review of the record, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity after one year.

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 one year. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). 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, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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 petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual

duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

Although the petitioner has submitted a lengthy duty description for the beneficiary, various discrepancies on the record leave question as to whether the petitioner will develop sufficiently to support the beneficiary in a qualifying managerial or executive capacity after one year. For instance, the submitted business plan projects that the company will hire nine employees during the first year, including two owners, a website manager, an assistant, three website marketing employees, and two administrative employees, and pay them a projected \$229,000 in salaries and wages. However, in the next pages of the business plan, the petitioner specified an almost entirely different projected staffing plan that included: (1) a CEO, (2) a president and chief financial officer, (3) the beneficiary as director of business and marketing, (4) a director of human resources, (5) an operational budget analyst, (6) an information technology team leader, (7) a customer services representative in ordering, (8) an inventory manager, and (9) a shipping and logistics manager.

Furthermore, the petitioner's hiring plans do not include plans to immediately hire and engage IT professionals to launch a website, despite the petitioner's claim that its sales will be achieved primarily through web-based sales. Indeed, the beneficiary's duties indicate that she will oversee IT professionals during the first quarter of her employment, but the petitioner's business plan cites no immediate plans to hire these employees or otherwise engage IT professionals to launch a website. In response to the RFE, the petitioner indicating that it planned on hiring a business operations manager, a purchasing manager, and a service manager. 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. 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, 591-92 (BIA 1988).

Further, the petitioner's business plan noted that the owner of the foreign entity "has invested \$200,000 of debt funds to develop the business," but elsewhere states in the plan that the initial investment in the petitioner from the foreign entity will be \$300,000. In addition, an operating agreement between the petitioner and the foreign entity indicates that the foreign entity will provide substantial financial support to the new office during the first year, but the petitioner has demonstrated that the foreign entity has been able to wire \$38,133.20 to date. In addition, the petitioner stated that 75% of the company's sales are web-based, and will be completed through its website "www.starotc.com", but also stated that its e-commerce website is "www.loveotc.com." There is no evidence that the petitioner owns either of these websites.

In sum, the lack of supporting evidence and unresolved discrepancies in to the petitioner's business and hiring plans for the initial year of operations leave question that it will grow to the point where it can support the beneficiary in a qualifying managerial or executive capacity within the required timeframe. In fact, the petitioner states directly in its business plan that they "expect full success and viability of the business within 3 to 5 years." The petitioner has admitted it has limited access to funding and credit, and the evidence submitted substantiates these challenges and a lack of financial support from the foreign entity. Although the petitioner has demonstrated that it has hired three operational employees subordinate to the

beneficiary, a managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). Here, given the issues and unresolved discrepancies discussed, the petitioner has not established by a preponderance of the evidence that it will support a qualifying managerial or executive position within one year. Accordingly, the appeal will be dismissed.

B. MANGERIAL OR EXECUTIVE CAPACITY (ABROAD)

The next issue to be addressed is whether the petitioner has established that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign entity for at least one of the three years prior to the filing of the petition.

1. Facts and Procedural History

In a support letter submitted along with the petition, the foreign entity stated that the beneficiary was employed as its territory sales manager from July 1, 2010 to March 17, 2012. In this letter, the foreign entity's chief financial officer, [REDACTED], explained the beneficiary's role as follows:

[The beneficiary] was responsible for the company's sales goals and sales strategy. She was engaged in the territorial deployment of the sales teams throughout India. Her responsibilities included the following duties:

- Developing and distributing product information
- Supervising two Area Managers (Northern and Southern Areas)
- Supervising second level Regional and District Managers
- Directs and closes high profile sales contracts
- Developing and generating new sales leads.
- Reports directly to the CEO
- Co-Chairs the marketing strategy committee
- Develops regional promotional strategies

The petitioner also provided the beneficiary's resume, which described the beneficiary's duties abroad as follows:

- Analyze current morbidity markets and prescribing patterns, from the specialist and the primary care perspective.
- Devise territories, sales FTEs levels and optimum structure
- Recruit and hire sales manager team, sales training manager, sales support
- Build strong relationship with commercial and wholesale Marketing and Market Access organizations
- Build a world class oncology sales force
- Develop and implementing regional and national marketing and sales plans
- Giving product demonstrations

- Assisting with development of sales and marketing strategies using demographics and product analysis and forecasting
- Assessing and qualifying clinic needs
- Developing new business through maintenance and on-going communication with distributors and manufacturing representatives
- Supervising and managing Regional Managers
- Developing and communicating activity reports based on sales results
- Resolve customer complaints by investigating problems and implementing solutions,
- Manage territory expenses within budgeted parameters,
- Direct the sales programs for pharmaceutical, vaccines, point-of-care diagnostics and critical care patient monitoring devices.
- Plan territory to include travel to current clinics and prospective clinics.
- Represent senior management and sales team at periodic regional and sales trade shows.
- Be fully informed technical reference and consultant to our veterinarian partners.
- Meet and exceed territory sales goals set by the company by setting up call cycle, action plan and forecasting territory growth.

The petitioner submitted an organizational chart relevant to the foreign entity indicating that the beneficiary supervised [REDACTED] Area Manager-North and [REDACTED] Area Manager-South. In turn, Mr. [REDACTED] was shown to oversee [REDACTED] Regional Manager and [REDACTED] District Manager and Mr. [REDACTED] supervised [REDACTED] Regional Manager and [REDACTED] District Manager.

In the RFE, the director stated that the evidence submitted by the petitioner was insufficient to establish that the beneficiary acted in a qualifying managerial or executive capacity with the foreign entity for at least one year. As such, the director requested that the petitioner submit: (1) payroll records to demonstrate the beneficiary's employment abroad; and (2) a letter from the foreign entity indicating the beneficiary's title along with a complete description of the beneficiary's duties and managerial decisions. The director further asked that the petitioner specify the number of subordinate supervisors the beneficiary oversaw abroad, including their titles and job duties. In addition, the director requested that the petitioner submit evidence substantiating the foreign entity's business operations abroad, such as tax documentation, financial statements, purchase orders, invoices and/or contracts.

In response, the petitioner provided a letter from the foreign entity further describing the beneficiary's previous position. The letter stated that "[the beneficiary] developed and presented business sales and marketing plans to bring together the market potential of remotely located clinics," and that she "developed and implemented [a] marketing strategy and that resulted in growing the business by more than 25%." The foreign entity reiterated that the beneficiary oversaw two area managers, who each supervised a subordinate regional manager and a district manager. The foreign entity stated that "both Area Managers supervised by [the beneficiary] held [*sic*] Bachelor of Pharmacy degrees." In addition, the foreign entity described the beneficiary's duties abroad as follows:

- Developed business plans and sales strategy to ensure attainment of company goals and profitability. Prepared quarterly sales report to the CEO. Prepared annual

evaluation report of sales activities, including sales staff performance to the CEO. 25% of work

- Prepared action plans by individual as well as by team for effective search of sales leads and prospects. 10% of work
- Initiated and coordinated development of action plans to penetrate new markets. 10% of work
- Conducted one-on-one review with all Account Executives and Sales Staff to build more effective communications strategy, understand training and development needs and to provide insight for the improvement of the overall sales and activity performance. 10% of work
- Provided timely, accurate and competitive pricing on all completed prospect applications submitted for pricing and approval while striving to maintain maximum profit margin. 15% of work
- Reviewed and assisted Sales Team in preparation of proposals and presentations. 10% of work
- Developed and implemented sales and marketing company policy that adheres to [the foreign entity's] overall organizational policies, goals, business ethics code. Ensured that policies are communicated and implemented within the team. 10% of work
- Recruited, hired, and evaluated the Sales Team. 10% of work

The petitioner specified that the beneficiary devoted 80% of her time to executive and managerial duties and "very minimal time" performing non-qualifying duties.

The petitioner provided job duty descriptions for the beneficiary's asserted subordinates abroad. The petitioner indicated that the two area managers were primarily responsible for managing selling activities in their respective regions, preparing reports to the beneficiary, and leading their subordinate regional and district managers. The petitioner stated that the beneficiary's two subordinate regional managers were primarily engaged in meeting with potential customers, providing quotations, negotiating the terms of agreements, closing sales, and gathering market and customer information. Lastly, the petitioner explained that the district managers were primarily responsible for delivering assigned sales targets, aligning sales field activities to strategic initiatives, partnering with operations for data input and analysis, and ensuring the sales staff is trained.

In addition, the petitioner submitted wage documentation relevant to the beneficiary and her asserted subordinates abroad. The petitioner provided Indian tax documentation for 2012-2013 indicating that the beneficiary earned 459,600 rupees during that year and 165,600 rupees during 2011-2012. However, internal payroll documentation from the foreign entity showed that the beneficiary earned 459,600 rupees during 2011-2012. The petitioner also submitted internal payroll documentation relevant to five employees during 2011-12 and nine employees for 2012-2013, which were both dated March 31, 2012. The documentation reflected that the payment of the following amounts to the foreign entity's employees during 2012-2013: (1) [REDACTED] Area Manager- South (225,000 rupees); (2) [REDACTED], Area Manager- North (225,000 rupees); (3) [REDACTED] Shipping and Receiving (165,000 rupees); (4) [REDACTED] Regional Manager (185,000 rupees); (5) [REDACTED] Inventory Manager (175,000 rupees); (6) [REDACTED] District Manager (195,000 rupees); (7) [REDACTED] Regional Manager (185,000 rupees); (8) [REDACTED] District Manager (195,000 rupees); and (9) [REDACTED],

Warehouse Manager (225,000 rupees). Although the 2012-13 payroll documentation listed all of the beneficiary's asserted foreign subordinates, the payroll reports from 2011-12 included none of these employees. In sum, the foreign entity's internal payroll documentation reflected the payment of 1,775,000 rupees to nine employees. The organizational chart submitted for the foreign entity indicated that the company had thirteen employees, not including the beneficiary or the CEO of the company.

In denying the petition, the director concluded that the petitioner had not provided sufficient detail regarding the duties of the beneficiary and her subordinates abroad. The director concluded that there was no substantive evidence that the beneficiary acted in a managerial or executive capacity abroad.

On appeal, counsel contends that the petitioner has submitted substantial evidence of the beneficiary's foreign employment, including the requested duty description, a support letter from the foreign entity and supporting payroll documentation. Counsel asserts that the director erroneously disregarded the submitted evidence relevant to the beneficiary's foreign employment.

2. Analysis

Upon review of the record, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity with the foreign entity.

When examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* 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 prove 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).

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The duties offered by the petitioner, such as developing sales plans and strategies to ensure profitability; preparing, initiating and coordinating action plans; and developing and implementing sales and marketing company policies are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The duties and the evidence of record generally include no specific examples or documentation to substantiate the beneficiary's proposed qualifying duties. For instance, the petitioner does not provide detail or supporting documentation regarding actual strategies, action plans, or sales and marketing plans that were implemented by the beneficiary during her approximately nineteen months of employment with the foreign entity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Overall, the petitioner has failed to provide a sufficiently detailed explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Indeed, to the extent the petitioner provides detail regarding the beneficiary's foreign job responsibilities, these duties reflect the performance of non-qualifying operational duties consistent with a sales

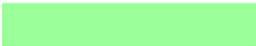
representative, such as generating pricing on all completed prospect applications and assisting in the creation of proposals and presentations.

Beyond the required description of the job duties, United States Citizenship and Immigration Service (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 complete understanding of a beneficiary's actual duties and role in a business.

Here, due to inconsistencies in the submitted evidence, the petitioner has not established that the beneficiary was responsible for the supervision of subordinate managers and supervisors as claimed. The petitioner provided foreign employer payroll documentation indicating the full-time employment of the beneficiary's two managerial subordinates, the area managers, and seven other employees, including the subordinate district and regional sales managers. The aggregate annual salaries of the beneficiary's subordinates during 2012-2013 is stated to be 1,775,000 rupees. However, the foreign entity's audited financial statement during that same year indicates that the company paid only 360,000 rupees in salaries and wages. Further, foreign entity payroll documentation indicated that the beneficiary earned 459,600 rupees during 2011-2012, but the petitioner also provided Indian tax documentation showing that she earned only 156,600 rupees during that year. Likewise, submitted payroll documentation from 2012-13 lists all the beneficiary's asserted foreign subordinates, but payroll reports from 2011-12 included none of these employees. This discrepancy is critical, as the beneficiary left the foreign company in March 2012, just before the beginning of the 2012-13 fiscal year. The petitioner did not submit evidence that the beneficiary's claimed foreign subordinates actually worked for the company during the beneficiary's 19 months of employment, nor did it provide an organizational chart reflecting the foreign entity's staffing levels during the relevant period.

The petitioner has made inconsistent assertions as to the number of employees employed by the foreign entity. For instance, it provided an organizational chart reflecting fourteen employees, but also submitted an executive business plan indicating that the foreign entity had only seven employees as of June 2012. The petitioner failed to explain this apparent discrepancy in the number of employees. 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. at 591-92.

In addition, inconsistencies in the foreign entity's payroll documents leave question as to whether the company employed sufficient employees to relieve the beneficiary from performing non-managerial duties within the foreign entity's sales department. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). The job duties of the beneficiary's subordinate district managers indicate that they are responsible for training "sales staff," but the submitted organizational charts do not reflect these subordinate positions. Although the petitioner asserts that the beneficiary's two subordinate area managers hold "pharmacy degrees," it has submitted no evidence to support this assertion to corroborated that such degrees are required for these positions. 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)).

Therefore, in sum, the petitioner has submitted a vague duty description for the beneficiary and has not provided consistent probative evidence to establish she supervised subordinate managers, supervisors or professionals. Further, due to the inconsistencies noted regarding the foreign entity's staffing levels, the petitioner has not established that the beneficiary was relieved from performing non-qualifying duties associated with her assigned area of sales responsibility. As such, the petitioner has not established that the beneficiary was employed by the foreign entity in a managerial or executive capacity. For this additional reason, the appeal must be dismissed.

C. QUALIFYING RELATIONSHIP

The third issue to address is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

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

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

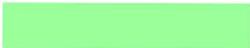
- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

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

* * *

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



* * *

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity . . . [.]

1. Facts

In the Form I-129, the petitioner asserted that it is a wholly owned subsidiary of the beneficiary's former employer, [REDACTED] and indicated that the foreign entity is 100% owned by [REDACTED]. In support of this assertion, the petitioner submitted incorporation documentation confirming that it was authorized to issue 10,000 shares and a share certificate indicating the issuance of 10,000 shares to [REDACTED] on December 6, 2012. With respect to ownership in the foreign entity, the petitioner submitted a "Certificate of Registration under Gujarat Value Added Tax Act" indicating the registration of [REDACTED] in January 2010. The petitioner did not submit evidence to establish the ownership of the foreign entity.

In the RFE, the director concluded that the petitioner had not submitted sufficient evidence to demonstrate the ownership of the foreign entity. As such, the director requested that the petitioner submit evidence to demonstrate its ownership, including: (1) any relevant Form 10K filed with the Securities and Exchange Commission; (2) a detailed list of owners, including their percentages of ownership; (3) meeting minutes; (4) articles of incorporation and/or bylaws; (5) stock purchase agreements; (6) stock certificates; (7) a stock ledger; and/or (8) articles of organization, partnership agreements, or sole proprietorship documentation indicating ownership in the entity, to the extent applicable. Further, the director asked that the petitioner submit evidence to demonstrate that the foreign entity is doing business.

In response, counsel reiterated that the petitioner is a wholly owned subsidiary of the foreign entity. The petitioner pointed to the submitted share certificate and indicated that it had issued all 10,000 of its shares to the foreign entity. Further, the petitioner provided a "Subsidiary Operating Agreement" executed between it and the foreign entity on September 15, 2012 stating that the foreign entity was the sole stockholder of the petitioner and that its owners had the power, as set forth in Article 3.1, to appoint the managers of the petitioner. The petitioner further provided a 2012 Form 1120 U.S. Corporation Income Tax Return, which did not disclose any foreign ownership in the company as required in Schedule K, Section 7.

The petitioner submitted the foreign entity's Memorandum of Association indicating that the company's shares were owned by the following parties: (1) [REDACTED] (5,000 shares); (2) [REDACTED] (2,000 shares); (3) [REDACTED] (1,500 shares); and (4) [REDACTED] (1,500 shares). The petitioner provided share certificates to support this ownership in the foreign entity dated January 12, 2013. A certificate of incorporation filed with the Registrar of Gujarat specified that the foreign entity was incorporated on January 4, 2013.

In addition, the petitioner submitted documentation to confirm that the foreign entity was doing business, such as a letter confirming the issuance of a license to sell drugs and cosmetics in India dated October 29, 2009, several invoices, screenshots of the foreign entity's website, and audited financials from 2012 indicating that the company earned 7,950,000 rupees during that year.

In denying the petition for a lack of qualifying relationship, the director emphasized material discrepancies in the evidence submitted by the petitioner. For instance, the director noted that the submitted evidence indicates that the foreign entity was incorporated after the filing of the petition. The director stated that the petitioner initially asserted that the foreign entity was 100% owned by Mr. [REDACTED] but now asserted that the foreign entity was owned and controlled by four shareholders.

On appeal, counsel contends that the foreign entity formerly existed as a sole proprietorship doing business as "[REDACTED]" but was incorporated in India as "[REDACTED]" in January 2013, thereby explaining the apparent discrepancies in foreign ownership and the date of incorporation. Counsel asserts that the foreign entity has been operating since 2009 and that before 2013 it operated as a sole proprietorship 100% owned by Mr. [REDACTED]. Counsel states that ownership in the foreign entity is of little consequence in this matter since the petitioner is shown to be 100% owned by the foreign entity, regardless of that entity's current or former ownership.

2. Analysis

Upon review of the submitted evidence, the petitioner has not demonstrated that it has a qualifying relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, there are inconsistencies in the evidence submitted to establish the petitioner's ownership. For instance, the petitioner submitted a share certificate no. "00" indicating that "[REDACTED]" owns all 10,000 of its shares. However, the petitioner also submits an IRS Form 1120 that does not disclose any foreign ownership. 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).

With respect to the foreign entity, there is sufficient evidence to establish that [REDACTED] was conducting business as a sole proprietorship owned by Mr. [REDACTED] during the beneficiary's period of overseas employment. However, it is not clear from the evidence submitted that the claimed ownership

interest the foreign entity held in the petitioner transferred to the private limited company formed in January 2013 or that the two foreign entities can be considered the same entity.

Further, it is unclear why the petitioner identified its parent company and the beneficiary's foreign employer as "[REDACTED]" on the Form I-129 filed in December 2012 if that company was not incorporated until January 2013. This ambiguity is of particular importance since the beneficiary is not asserted to have worked for the newly formed foreign entity, but only for the claimed sole proprietorship owned by Mr. [REDACTED]. 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)).

Again, 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. 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. at 591-92.

Due to the unresolved inconsistencies in the record addressed above, the petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the appeal must be dismissed.

D. PHYSICAL PREMISES

The last issue to address is whether the petitioner established that it secured sufficient physical premises to house the new office in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

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. Further, consistent with this requirement, the regulations directly state that the petitioner must demonstrate that it has secured sufficient premises to house the new operation and thereby immediately commence doing business. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In support of the petition, the petitioner submitted a sublease agreement with [REDACTED] dated September 2, 2012 for 900 square feet of storage space in [REDACTED] NJ. The lease stated that the "Tenant shall use the Demised Premises for storage space, and for no other purpose." In response to the director's RFE, the petitioner provided a commercial lease agreement dated January 1, 2013 executed with [REDACTED] indicating that the petitioner had entered into a one year lease for 2,100 square feet of office and warehouse space in [REDACTED] NJ. The petitioner submitted photographs of this office and warehouse space.

In denying the petition based upon the petitioner's failure to establish that it had secured sufficient premises, the director noted that the petitioner had failed to explain why it had changed from the storage unit space to the larger and more appropriate office and warehouse space.

On appeal, counsel states that the petitioner explained the change in its office space, indicating that the move was consistent with its expansion.

Upon review of the evidence, the petitioner has established that it has secured sufficient premises to house the new office. The petitioner has submitted evidence that it commenced business operations prior to the filing of the petition and the record contains documentation of business conducted from the location specified in the initial lease agreement. The director's decision will be withdrawn with respect to this single issue.

III. CONCLUSION

Notwithstanding the aforementioned withdrawal of the director's determination that the petitioner did not secure sufficient physical premises, the appeal will be dismissed for the other stated reasons set forth above, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.