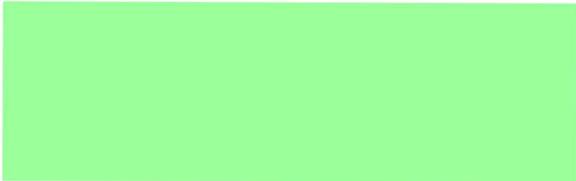




U.S. Citizenship
and Immigration
Services

(b)(6)

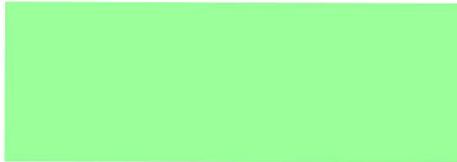


DATE: **SEP 18 2014** OFFICE: VERMONT SERVICE CENTER FILE:

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 the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to employ the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation established in October 2003, states that it engages in the export of industrial electrical supplies. The petitioner claims to be an affiliate of [REDACTED] located in Venezuela. The petitioner seeks to employ the beneficiary as its general manager for a period of one year.

The director denied the petition on five alternate grounds, concluding that the petitioner failed to establish that (1) it has been and will continue to conduct business in the United States in accordance with the regulations; (2) the beneficiary will be employed in a primarily managerial or executive capacity in the United States; (3) the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity; (4) the foreign entity is doing business abroad in accordance with the regulations; and (5) it acquired sufficient physical premises to conduct its business in the United States. The director further determined that the petitioner has not supported its claim that it is a "new office" as defined in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner contends that the U.S. company and foreign entity are currently doing business, the beneficiary was employed abroad in an executive position, and the petitioner has acquired sufficient physical premises to conduct its business. The petitioner submits a brief and duplicate copies of previously submitted evidence in support of the appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. THE ISSUES ON APPEAL

A. New Office Qualifications and Doing Business

The first and second issues addressed by the director are whether the U.S. company is a "new office" and whether the petitioner established that it has been and will continue to conduct business in the United States as defined in and in accordance with the regulations. *See generally* 8 C.F.R. § 214.2(l)(1)(ii).

The term "doing business" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(H) as follows:

Doing business means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner filed the Form I-129 on August 27, 2013 and responded "No" at page 22, section 1, #12, where asked "Is the beneficiary coming to the United States to open a new office?" The petitioner stated that "the beneficiary will come to the US to further develop an already existing business. However, until now this business has not been developed." In its letter in support of the petition, the petitioner commented that it was incorporated in 2003 and "has been performing without any employees and making marginal earnings" through the export of industrial electrical supplies to Venezuela.

The petitioner is a Florida corporation established in October [REDACTED] it indicates that it engages in the export of industrial electrical supplies. The petitioner's initial supporting evidence included: a copy of its State of Florida certificate of incorporation indicating that the U.S. company was established on October 8, [REDACTED] its Articles of Incorporation; its lease agreement with [REDACTED] for premises located at [REDACTED] from August 1, 2013 to August 1, 2014; photos of the leased premises; an organizational chart for the U.S. company; its IRS Forms 1120, U.S. Corporation Income Tax Return, for 2009, 2010, and 2011; a letter from [REDACTED] dated August 15, 2013, stating that the petitioner has been its client since 2008; and a letter from [REDACTED] dated August 16, 2013, stating that the petitioner has been its customer since October 2005.

The petitioner submitted an organizational chart for the U.S. company, depicting the beneficiary as general manager, supervising an administrator, a sales local/export position, and a "shopping" position.

The petitioner's IRS Form 1120 for 2009 indicates that the petitioner had gross receipts or sales of \$48,786 and a net income of \$3,224. The Form 1120 for 2010 indicates that the petitioner had gross receipts or sales

of \$61,227 and a net income of \$4,032. The Form 1120 for 2011 indicates that the petitioner had gross receipts or sales of \$60,752 and net income of \$5,645. Each of the Forms 1120 indicates that the petitioner did not pay any salaries and wages or costs of labor in 2009, 2010, and 2011, although it did report rent expenses.

On September 6, 2013, the director issued a request for additional evidence ("RFE") advising the petitioner of the existing discrepancy in that it claims to be an office with no employees, but has filed corporate U.S. tax returns in 2009, 2010, and 2011. The director instructed the petitioner to submit evidence that it is doing business in the United States.

In response to the RFE, counsel for the petitioner addressed the U.S. company's status as a new office as follows:

Although the US company . . . has been active in the US since for several years [*sic*] and it has in good-faith filed its taxes it does not have any employees. The company thus far has been serving as a tool whereby it imports goods from the US to Venezuela. . . . At this moment the US company solely service to export to the Venezuelan Foreign National Company as could be seen from the invoices hereto provided and the bill of lading.

Counsel noted that the petitioner has "in good faith asked the Service to treat this company as a new business since it has yet to be developed since it has yet to be developed and its activity is limited and without employees."

The petitioner submitted copies of six invoices it billed and shipped to the foreign entity as follows:

- Invoice 1198, dated September 19, 2012;
- Invoice 1202, dated February 5, 2013;
- Invoice 1203, dated April 16, 2013;
- Invoice 0001204, dated September 2, 2013;
- Invoice 0001205, dated September 12, 2013; and
- Invoice 1197, dated September 19, 2013.

The petitioner also submitted several recent invoices from third party vendors to the petitioner dated August and September 2013. The petitioner submitted a letter dated October 10, 2013, signed by [REDACTED] stating that the petitioning U.S. company has been active for the last three years but does not have any employees because it is just being used to import parts to the Venezuelan company.

The director denied the petition on October 29, 2013, concluding, in part, that the petitioner did not establish that it qualifies as a new office. The director emphasized that the petitioner did not indicate on the Form I-129 that the beneficiary would be opening a new office and that it provided evidence that it had been doing some business in the years preceding the filing of the petition. Therefore, the director concluded that the petitioning U.S. company cannot be treated as a new office and treated the petitioner as an existing business. The director also denied the petition, in part, based on a finding that the petitioner failed to establish that the U.S. company has been and will continue to conduct sufficient business to support the beneficiary's position and those of other employees to be hired or who are currently working for them. In denying the petition, the

director found that the invoices and commercial reference letters were insufficient to establish that the petitioning U.S. company is currently doing business.

On appeal, counsel for the petitioner states that it requested to be treated as a new office because it had no employees and only through the beneficiary's presence in the U.S. will the business actually start to grow and employ others. Counsel further states that in the alternative, it submitted evidence to show that it is doing business in the United States but the director also finds that the evidence is insufficient. Therefore, counsel states that the petitioner is in a losing position either way.

In the instant matter, a review of the totality of the record supports the director's finding that the petitioner has not established that it qualifies as a new office. Here, the petitioner has submitted invoices and letters from third party companies attesting to its business since, at least, 2005. The petitioner has shown gross receipts and sales in 2009, 2010, and 2011 upwards of \$45,000. The fact that it does not have any employees does not negate that it has been doing business, filing taxes, and establishing business relationships with other companies in the United States.

The evidence in the record establishes that the petitioning U.S. company is engaged in the regular, systematic and continuous provision of goods and/or services.

The petitioner need only establish that its business is regular, systematic and continuous. The record shows that the petitioner is engaged in the provision of goods and services by purchasing and shipping products from third party vendors to the foreign entity. In the RFE, the director questioned the petitioner's request for status as a new office and clearly indicated that it is not a new office as the evidence suggests that it has been conducting business for at least one year. In its decision, the director not only found that the petitioner is not a new office, but also that the petitioner has not been doing business in the United States.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Based on the evidence in the record, the petitioner has not supported its claim that it is a "new office" as defined in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F). Here, the submitted evidence as it relates to doing

business in the United States, is relevant, probative, and credible. The AAO concludes that the petitioning U.S. entity is doing business in the United States.

B. Employment in an Executive or Managerial Capacity in the United States

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

On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

The beneficiary will come to the US to further develop an already existing business. However, until now this business has not been developed. The Beneficiary's main function will be to come to the US as a general manager and based on the already formed and based revenues that the US business has continue to develop the business with plans to hire further employees and make creat [*sic*] more clients.

In its initial letter of support, the petitioner described the beneficiary's duties and staffing plan in the United States as follows:

[The beneficiary] will serve as the General Manager for the US company His duties will include managing the organization and supervise the day to day operations of the business as well as focusing his efforts on growing the business in the US. . . . [The beneficiary] envisions that the business will in a short period of time have to employ an administrator and sales person. He predicts that upon his arrival to the US these positions will be filled immediately in order to form an initial team that will allow the business to start stretching into other countries.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary at the top tier as general manager, supervising an administrator, a "sales local/export" position, and a "shopping" position. The organizational chart did not include the names of any current employees, other than the beneficiary.

The petitioner did not submit any additional information regarding the beneficiary's proposed position or duties in the United States.

In the RFE, the director advised the petitioner that it failed to sufficiently describe the staffing of the new operation. The director noted that the petitioner failed to submit a business plan and concluded that an organizational chart is insufficient to establish that it has a plan for the expansion of the business. The director instructed the petitioner to submit, *inter alia*, evidence describing its staffing plan for the proposed expansion, including position descriptions and job duties for all of its employees.

In response to the RFE, counsel for the petitioner stated the following about the petitioner's staff at the U.S. company:

[The beneficiary] envisions growing the US company to the point where it is servicing most of South America and where it is employing at least 4 workers including himself. He envisions himself as the General Director . . . and hiring an assistant manager, administrator and sales person in the near future.

The petitioner submitted a new organizational chart for the U.S. company depicting the beneficiary at the top tier as general manager, supervising an assistant manager, an administrator, and a sales person. The organizational chart did not include the names of any current employees, other than the beneficiary. The petitioner also submitted a letter dated October 10, 2013, signed by [REDACTED] stating that the beneficiary will hire an assistant, an administrator, and a sales person.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director noted that the petitioner submitted only an organizational chart for the U.S. company, and no other evidence to show the wages, educational background needs and job duties for its employees, including the beneficiary. The director found that the petitioner failed to show that the beneficiary's primary duties in the United States will be executive or managerial in nature.

On appeal, neither counsel nor the petitioner acknowledges this reason for denial of the petition. As such, neither counsel nor the petitioner provides any additional evidence in reference to the beneficiary's position and job duties in the United States.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the petitioner characterized the beneficiary's role as general manager and briefly described his duties in very vague and broad terms, simply noting that he will manage the organization, supervise the day to day operations of the business, and focus his efforts on growing the business in the United States. This brief description of the beneficiary's duties is not sufficient to establish that the beneficiary will primarily perform duties that are managerial or executive in nature. While these tasks are undoubtedly necessary in order to operate the business, the petitioner did not include any additional details or specific tasks to be carried out by the beneficiary, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. It appears that the beneficiary will exercise discretionary authority over the U.S. company as its general manager; however, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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. *Id.* 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)).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If 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. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Moreover, although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, we evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner indicated that it will hire three additional employees, subordinate to the beneficiary, within one year, an assistant manager, an administrator, and a sales person. However, the petitioner is not eligible as a "new office" and as such, future hiring plans cannot be considered as 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). Further, the petitioner did not provide an actual position description or list of job duties for the beneficiary's proposed subordinates. As such, the petitioner has not established that any of the beneficiary's proposed subordinates require a bachelor's degree, such that they could be classified as professionals, nor has it shown that the subordinates will perform duties that would qualify them as supervisors or managers. Thus, the petitioner has not shown that the beneficiary's proposed subordinate employees would be supervisors, professionals, or managers, as required by section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has failed to submit evidence that the beneficiary's subordinate employees would relieve him from performing non-qualifying operational duties, as it has not provided position descriptions for any proposed staff.

The petitioner has not established, in the alternative, that the beneficiary would be employed as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner does not claim that the beneficiary qualifies as a function manager.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. See Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of 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. 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.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the record does not establish that the beneficiary will be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

We note 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 section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). The petitioner claims that it will hire three additional employees when the beneficiary arrives in the United States and assumes his role at the U.S. company. However, 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).

Based upon a thorough review of the record in this matter and the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed.

C. Employment Abroad in a Managerial or Executive Capacity

The fourth issue addressed by the director is whether the petitioner has established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner stated the following:

Beneficiary as [sic] functioned as Executive Director/Owner of the company abroad for the past 19 years. His duties include but are not limited to developing and leading general sales strategies, providing communication with overseas supplier, developing and tracking purchase orders to suppliers, implementing and executing internal policies and procedures, Supervising [sic] daily operation and reviewing required reports, supervising operations in the functional areas, supervising the employees and their functions, supervising facilities condition, leading personnel meetings and team developing activities.

In its letter of support, the petitioner described the beneficiary's duties at the foreign entity as follows:

His duties and responsibilities while at [the foreign entity] as a General Director include but are not limited to developing and leading general sales strategies; providing communication with overseas suppliers; developing and tracking purchase orders to suppliers; developing and leading lighting projects as well as advising customers; supervising organization's cash flow; implementing and executing internal policies and procedures; supervising daily operations and generating required reports; supervising operations in the functional areas; providing to the organization and employees material to perform daily duties; ensuring and managing the best customer service for customers; controlling and supervising quotes, purchases and

suppliers' payments; supervising facilities conditions; scheduling time and days off to employees under organizations' policies and core values; leading personnel meetings.

The petitioner submitted an organizational chart for the foreign entity, depicting the beneficiary as general manager on the top tier of the chart. The chart shows that the general manager supervises an assistant manager, an administrator, and a sales manager. The administrator supervises an administrative assistant and a messenger, and the sales manager supervises a sales executive and a technical assistant.

The petitioner went on to provide a job description for the following positions: CEO/Executive Director (General Manager), Sales Manager, Sales Executive, Administrative Assistant, Manager (Administrator), and Executive Assistant. The job description for the CEO/Executive Director is identical to the petitioner's description of the beneficiary's duties at the foreign entity.

The petitioner submitted a letter from the foreign entity, dated August 6, 2013, certifying that the beneficiary has been employed by the foreign organization since September 19, 1994 as general director. The petitioner also submitted the foreign entity's payroll records from July 2012 to July 2013, demonstrating that the beneficiary was employed by the foreign entity during that time.

In the RFE, the director noted that the foreign entity's employment verification letter stated that the beneficiary receives a sale commission as part of his salary and advised the petitioner that this would imply that the beneficiary is also doing the same work as the employees and not working as an executive or manager. The director instructed the petitioner to submit, *inter alia*, evidence that the beneficiary's position at the foreign entity is managerial or executive in nature.

In response to the RFE, the petitioner submitted the same organizational chart for the foreign entity and a letter dated October 10, 2013, signed by [REDACTED] describing the beneficiary's position abroad as follows:

While serving as General Manager at [the foreign entity] [the beneficiary] spends all of his time exercising managerial duties including but not limited to the following:

- Organize preparation of company development plan, annual work plan and work summary, command, urge and check various works done by departments of the company. (15% /week).
- Strictly execute various regulations, systems and administration measures, organize preparation of various management system, management measures and various operation procedures, and improve the post duties of various departments. (15% /week).
- Organize and take part in bidding for projects, sign contract of projects of significance, urge and check performance of contract and construction (15% /week).
- Regularly organize regular work meeting of heads of each department, summarize, study the productions, operation and management of the company in current period. (10% /week).
- Determine structure, staff, post of each department of the company, decide important structural change and personnel arrangement; appoint and remove management at level of heads of each department and above and examine their performance. (10% /week).

- Organize business and skills training of staff of the company, improve professional quality and work performance of the staff, educate staff on sense of safety and service, preach on safe and civilized production. (15% /week).
- Examine use of fund of the company, expenditure and financial budget; examine plan for purchase of various productive materials of the company. (10% /week).
- Timely understand and master the new policy and industrial dynamics of architecture, pay attention to scientific management, ensure safe work, constantly improve the economic benefit and social benefit of the company and enhance the reputation of the company. (10% /week).

[The beneficiary] currently has authoritative control over all employees working for [the foreign entity]. He oversees all of our employees and has complete discretionary power over his duties and responds only to Board of Directors.

The petitioner also submitted 10 invoices issued by the foreign entity to third parties, ranging from August 1, 2013 to October 27, 2013, each listing the beneficiary as salesperson/vendor.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. In denying the petition, the director noted that the petitioner submitted an organizational chart for the foreign entity and a letter from [redacted] assistant manager at the foreign entity. The director found that, based on the position description for the beneficiary's position at the foreign entity, the petitioner did not submit sufficient evidence to show that the beneficiary's duties are primarily executive or managerial rather than the day-to-day tasks of operating the business.

On appeal, counsel for the petitioner simply states that the beneficiary "organizes and manages every function of the [foreign entity], makes sole executive decisions for the entity and all employees report and answer to him." Counsel further states that this evidence has been provided to the director and submits a duplicate copy of the petitioner's response to the RFE.

Upon review, and for the reasons stated herein, the petitioner has not established that that the beneficiary was employed in a qualifying position abroad for the required one year in the past three years prior to filing.

The petitioner first characterized the beneficiary's role as executive director and general director and briefly described his duties in very broad terms, noting that he develops and leads general sales strategies, provides communication with overseas suppliers, develops and tracks purchase orders to suppliers, advises customers, supervises cash flow, implements and executes internal policies and procedures, supervises daily operations, generates required reports, supervises operations in the functional areas, provides the organization and employees material to perform daily duties, ensures and manages the best customer service for customers, controls and supervises quotes, purchases and suppliers' payments, supervises facilities conditions, and schedules time and days off for employees under organizations' policies and core values. The initial description indicated that the beneficiary performs some general managerial tasks and some non-qualifying operational tasks at the foreign entity.

The petitioner also provided a brief and equally vague list of job duties for each of the beneficiary's subordinates at the foreign entity and, in response to the RFE, an additional list of duties for the beneficiary's position abroad, including an allocation of percentages of time the beneficiary would spend on each duty. This additional list of duties for the beneficiary includes several tasks, such as organize preparation of company development plan, annual work plan and work summary, timely understand and master the new policy and industrial dynamics of architecture, pay attention to scientific management, ensure safe work, constantly improve the economic benefit and social benefit of the company, and enhance the reputation of the company, taking up approximately 25% of his time, that are not sufficiently defined to demonstrate what the beneficiary does on a routine basis or that he performs any qualifying duties. The list also includes several duties that appear to be supervisory, taking up 35% of his time, but as discussed in detail below, the beneficiary has not been shown to supervise professional, managerial, or supervisory employees at the foreign entity, such that these duties could be considered qualifying duties. The remaining 40% of the beneficiary's time appears to be devoted to very specific tasks involved in providing a service of the business. The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*. Again, 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).

Furthermore, as the director noted, the foreign entity's certification letter indicated that the beneficiary received commissions in addition to his salary and the invoices submitted show that he is directly involved in sales transactions to some extent. It is unclear from the list of duties submitted for the beneficiary's position in response to the RFE, where these duties fall in terms of the beneficiary's time devoted to qualifying and non-qualifying duties. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this matter, the petitioner failed to clearly identify what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner listed the beneficiary's duties as including both managerial and operational tasks, and the evidence demonstrates that there are additional sales tasks performed by the beneficiary, but it failed to properly quantify the time the beneficiary would spend on them. This failure of documentation is important because several of the beneficiary's proposed daily tasks, as noted above, did not fall directly under traditional managerial duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in a managerial capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Again, we note that the statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). As indicated above, although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act. 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).

Here, the job duties provided by the petitioner for each of the beneficiary's subordinates at the foreign entity demonstrate that the positions themselves do not require a professional degree. The beneficiary's direct subordinates at the foreign entity listed on the organizational chart include an assistant manager, an administrator, and a sales manager. The briefly described job duties for the subordinate positions do not support a finding that these positions are professional, managerial, or supervisory positions. Accordingly, the record does not demonstrate that any of the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. We observe further, that the petitioner has not indicated that the beneficiary's duties abroad were primarily supervisory duties.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." Again, we note that the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation; thus as observed above, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). Here, the petitioner did not indicate that the beneficiary qualifies as a function manager at the foreign entity. The petitioner did not articulate the beneficiary's duties at the foreign entity as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate that he manages an essential function of the foreign entity.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. See section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial. As discussed herein, the petitioner's description of the beneficiary's duties abroad and the allocation of time spent performing the duties fails to establish that such duties are primarily managerial in nature.

We here emphasize that the statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of 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. 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.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the petitioner failed to demonstrate that the beneficiary's duties abroad primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the beneficiary's employment abroad fail to demonstrate that the beneficiary focuses the majority of his time on executive duties rather than the day-to-day operations of the business.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

D. Foreign Entity Doing Business

The fifth issue addressed by the director is whether the petitioner established that the foreign entity is doing business as defined at 8 C.F.R. § 214.2(l)(1)(ii)(H).

The petitioner filed the Form I-129 on August 27, 2013. The petitioner is a Florida corporation established in October 2003; it indicates that it engages in the export of industrial electrical supplies. The petitioner's initial supporting evidence in reference to the foreign entity included: (1) an organizational chart; (2) job descriptions for each employee listed on the organizational chart; (3) a document, dated August 16, 2013, titled "List of customers nationwide (Venezuela)," listing 15 different companies; (4) a letter, dated August 6, 2013 and signed by [REDACTED] certifying the beneficiary's employment at the foreign entity from September 19, 1994 to the present; (5) payroll records from July 2012 to July 2013; (6) bank statements from [REDACTED] for June, July, and August 2013;¹ (7) other foreign entity documents that were not translated from Spanish to English; and (8) photos of the foreign entity's office space.

In the RFE, the director instructed the petitioner to submit evidence that the foreign entity is currently doing business abroad.

In response to the RFE, the petitioner submitted: (1) a translation of the foreign entity's Commercial Registry of the State of [REDACTED] registering the company on September 16, 1995; (2) a translation of the foreign entity's stockholder meeting minutes, dated July 9, 2007; (3) a translation of the foreign entity's stockholder meeting minutes, dated June 15, 2013; (4) a letter from [REDACTED] dated September 19, 2013, certifying that it has had commercial relations with the foreign entity since 1992; (5) a letter from [REDACTED] dated September 19, 2013, certifying that it has had commercial relations with the foreign entity since 2012; (6) a partial translation of the foreign entity's commercial lease agreement, commencing April 1, 2010 for a period of five years; (7) 10 invoices issued by the foreign entity to third parties, ranging from August 1, 2013 to October 27, 2013; (8) 11 invoices issued by

¹ We note that the bank statements do not list the name of the foreign entity as the account holder, but do list an account number.

third party companies to the foreign entity, ranging from April 25, 2013 to September 19, 2013; and (9) 15 invoices for utilities and taxes paid by the foreign entity, ranging from June 21, 2013 to October 3, 2013.

The director denied the petition concluding, in part, that the petitioner failed to establish that the foreign entity is engaged in the regular, systematic, and continuous provision of goods and services. In denying the petition, the director found that the letters from third party companies referencing their business with the foreign entity were recent and failed to provide any details of the commercial activity. The director also found that the invoices are all dated between June 2013 and September 2013, and thus not sufficient evidence to show that the foreign entity has been conducting business for the past year and will continue to conduct business while the beneficiary is in the U.S.

On appeal, counsel for the petitioner asserts that the foreign entity has been doing business since the 1990's and submits additional invoices issued by the foreign entity to third party companies, dated May 18, 2001, September 10, 2001, August 18, 2006, August 10, 2007, August 4, 2009, December 8, 2010, and October 7, 2013.

Upon review, the evidence in the record is persuasive and establishes that the foreign entity is engaged in the regular, systematic and continuous provision of goods and/or services.

The petitioner and foreign entity need only establish that its business is regular, systematic and continuous. The record shows that the foreign entity is engaged in the provision of goods and services by providing electrical products. In the RFE, the director questioned the foreign entity's current business status and the petitioner responded with evidence establishing that the foreign entity was doing business as of the date of filing the petition. In the denial, the director determined that the evidence presented was insufficient and thus concluded that the foreign entity was not doing business for the past year and would not continue to do business while the beneficiary is in the United States.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence is relevant, probative, and credible. The AAO concludes that the foreign entity

is currently doing business. The director's decision will be withdrawn with respect to this issue.

E. Physical Premises

The sixth issue briefly addressed by the director is whether the petitioner acquired and maintains sufficient physical premises to conduct its business in the United States.

On the Form I-129, the petitioner listed its business address as [REDACTED]. In support of the petition, the petitioner submitted its lease agreement with [REDACTED] for premises located at [REDACTED] from August 1, 2013 to August 1, 2014; and photos of the leased premises. The photos of the leased premises include:

- The outside of the building with one storefront door and one commercial garage door;
- The outside of an industrial/commercial building with multiple storefront doors and accompanying commercial garage doors;
- An interior warehouse space with multiple boxes on shelves and dollies; and
- Three office work spaces with desks and chairs, one photo shows a woman working on a computer and a second photo shows a man looking at papers.

The lease agreement specifically states, at Part I Section 6, that "the premises shall be occupied by no more than 2 persons." At Part I Section 7, the lease agreement specifically states that "the tenant shall use the premises solely for residential purposes." Further, although the lease is for premises in Florida, it contains references to the "Virginia Residential Landlord and Tenant Act."

The director denied the petition concluding, in part, that the petitioner failed to establish that it secured sufficient physical premises to house the business. In denying the petition, the director found that the lease agreement presented states that the premises are to be occupied by only two persons and that the premises are solely to be used for residential purposes. The director further found that the photos show a storage unit and office space, but fail to clearly show the exact location and size of the premises.

On appeal, counsel for the petitioner states that it disagrees with the director in his determination that the current lease does not support the number of employees the beneficiary currently has. Counsel states that a lease "is something that expires and as the company grows and more employees are hired, as is planned by [the beneficiary], then more space could be rented out or they could simply move to a bigger place."

Upon review, the AAO finds that the petitioner has not established that it has acquired sufficient physical premises to conduct its business.

As a preliminary matter, we note that the petitioner has not filed a petition for a "new office" and therefore is not subject to the physical premises evidentiary requirement at 8 C.F.R. § 214.2(l)(3)(v)(A). However, we observe that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commences doing business so that it will support a managerial or executive position within one year. See 52 FR 5738, 5740 (February 26, 1987). A petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence

for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic, and continuous manner. See 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

The lease submitted by the petitioner clearly states that the premises are to be used solely for residential purposes and may only be occupied by two persons. Further, although the leased property is located in Florida, the lease contains references to "Section 55-248.22 of the Code of Virginia" and the "Virginia Residential Landlord and Tenant Act." On appeal, counsel for the petitioner focuses on the number of occupants listed on the lease and states that the petitioner may lease new premises or amend the current lease to include additional employees. Counsel fails to address the section of the lease that very clearly states that the premises are to be used solely for residential purposes.

The photos of the leased premises provided by the beneficiary clearly show office space and warehouse space in a commercial/industrial building. However, the photos do not appear to match the premises described in the lease, as the lease states that the premises are to be used solely for residential purposes but the photos are of a commercial/industrial building. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Based on the inconsistencies detailed above, the AAO agrees with the director's determination that such inconsistencies cast significant doubt upon the legitimacy of the petitioner's lease agreement, its business, and the validity of the employment offered to the beneficiary. Accordingly, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner stated on the Form I-129 that it is an affiliate of the foreign entity based on the beneficiary's ownership of 100% of the shares of the foreign entity and 70% of the shares of the U.S. company. Throughout the record, the petitioner claims that the beneficiary owns 70% of the petitioning U.S. company; however, the record does not contain any primary evidence of the petitioning U.S. company's actual ownership. In support of the petition, the petitioner submitted its Articles of Incorporation indicating that the U.S. company is authorized to issue 100 shares of common stock with a one dollar par value.

The petitioner submitted copies of its 2009, 2010, and 2011 IRS Forms 1120. Each of the Forms 1120 at Schedule K, which includes questions related to the petitioner's ownership and control, are marked "no" at the question which asks, "[a]t the end of the tax year: **b.** [d]id any individual or estate own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled

to vote?" This, in combination with the lack of evidence as to the actual ownership of the U.S. company, raises doubts as to the validity in the petitioner's claim that the beneficiary owns 70% of the ownership interest of the petitioning U.S. company. 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. 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)).

Due to the deficiencies and inconsistencies detailed above, the petitioner has not met its burden to corroborate its claimed qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.