



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 18 2014** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

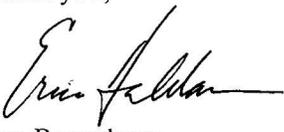
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The 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 classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a North Carolina limited liability company established in August 2013, states that it will be engaged in providing online training to Chinese medical professionals. The petitioner claims to be an affiliate of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as the president/chief executive officer (CEO) in its new office in the United States for a period of one year.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in a qualifying managerial or executive capacity within one year. Further, the director found that the petitioner failed to demonstrate that it has secured sufficient physical premises to house its new office in the United States.

On appeal, counsel contends that the director applied a stricter legal standard than the regulations require with respect to whether the beneficiary will be employed in a qualifying managerial or executive capacity within one year and whether it has secured sufficient premises to commence doing business in the United States.

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 September 27, 2013. In support of the petition, the petitioner provided a four-page business plan indicating that it intends to operate "in the field of Distance e-learning, with a focus on the Chinese medical industry." The petitioner stated that it "will deliver education and instruction through interactive learning environments and virtual communities," and that it will derive material from the U.S. medical industry for the benefit of doctors in China. Further, the petitioner explained that it "will also provide advertising opportunities to U.S. healthcare enterprises in order to promote products in China."

On page 3 of the business plan, the petitioner provided the following description of the beneficiary's proposed duties as president/CEO:

- Meet with executives from potential vendors to negotiate and finalize contracts. Percentage of time devoted to this duty: 40%
- Approve company's operational procedures, policies, and standards. The managers of the company's five divisions- the Publishing Division, the IT Division, the Course

Content Division, the Advertising Division and the Design Division – will bring proposals to [the beneficiary] regarding changes to policies and procedures, and [the beneficiary] will either approve or amend proposals. Percentage of time devoted to this duty: 10%

- Assignment of projects to division managers. Based on the outcome of meetings and negotiations with client vendors, [the beneficiary] will assign projects to each division of the company. [The beneficiary] design the essential policies and goals of each project, and the division managers, in turn, will create the specific details of the project's procedures and execute the implementation. Percentage of time devoted to this duty: 15%
- Monthly evaluation of staff performance. The division managers will submit staff evaluations to [the beneficiary] once per month. [The beneficiary] uses these reports to make decisions regarding future assignments and promotions. Percentage of time devoted to this duty: 5%
- Review performance data (i.e. Financials, sales reports) to monitor and measure productivity and goals progress. Percentage of time devoted to this duty: 15%
- Weekly report to Board of Directors of the affiliate company in China. Percentage of time devoted to this duty: 15%

The petitioner stated in the business plan that it planned on filling eleven positions subordinate to the beneficiary "once it is fully operational," and submitted a projected organizational chart with estimated hire dates for its proposed employees through 2017.¹ The organizational chart specified that the petitioner planned on hiring an assistant/translator subordinate to the beneficiary in December 2013, as well as an IT manager, an advertising manager, and an advertising agent in 2014. In sum, the petitioner projected it would employ five employees, including the beneficiary, by the end of 2014. The chart reflects that the company would hire a publishing manager, a design manager, a virtual platform technician, and an IT assistant in 2015, raising the headcount to 9 employees. In 2016, the petitioner intends to hire a course content manager, a second virtual platform technician, a second IT assistant, a project staff employee, a second advertising agent, and a course designer. Finally, in 2017, the petitioner indicates that it will add a second course designer and a second project staff employee, for a total staff of 17 employees. Overall, the chart suggested that the petitioner planned on hiring four employees subordinate to the beneficiary during the first year, including an assistant/translator, an IT manager and an advertising manager supervising an advertising agent. The company projects that when it is fully staffed, the beneficiary would supervise an assistant and five subordinate managers, each of which would have two subordinates in their respective divisions (publishing, IT, course content, advertising and design).

The petitioner's business plan also included a projected income statement reflecting that the company would commence operations in November 2013. For 2014, the petitioner projects that it will earn \$390,000 in "fees" and that it would pay \$160,000 in payroll expenses during its first full year in operation. The projected income statement further indicated that the petitioner's revenues would escalate to \$1,000,000 after the second year of operation. The petitioner's business plan did not identify the size of the investment

¹ The petitioner indicated on the Form I-129 that the beneficiary's intended dates of employment in the United States would be from November 1, 2013 through October 31, 2014.

in the new office or its anticipated start-up costs. The petitioner submitted its bank account statement from September 2013 reflecting a balance of \$10,063.

The director issued a request for evidence (RFE) stating that the evidence submitted was insufficient to establish that the petitioner would support the beneficiary in a qualifying managerial or executive capacity within one year of the approval of the petition. The director stated that the petitioner's business plan failed to provide supported timetables and benchmarks for the company's development and did not articulate how it planned on achieving its business objectives during the first year. Therefore, the director requested that the petitioner provide a letter from the foreign entity explaining the need for the new office, the proposed number of employees and their positions, the amount of investment in the new venture, how the foreign entity would pay the beneficiary and commence doing business in the United States, and how the new venture will support the beneficiary in a qualifying capacity within one year. The director asked the petitioner to provide a business plan with a feasibility and/or marketing study outlining the probability of the business supporting the beneficiary within one year and timetables for each proposed action during the first year. Further, the director requested an organizational chart reflecting its proposed positions, duties, expected education levels, salaries and, if applicable, the names of the employees who will fill these positions.

Finally, the director asked that the petitioner submit evidence demonstrating the size of the foreign entity's investment in the U.S. venture, including wire transfers, bank statements, deposit receipts, or other documentation indicating that the foreign has paid for the new venture's expenses or that it has the financial capability to support the petitioner as it launches its operations. The director noted that the petitioner provided evidence of only \$10,063 in its bank account and observed that foreign entity bank account statements reflected low funds.

In response, the petitioner asserted that the director misunderstood its proposed hiring plans and indicated that it plans on hiring four employees subordinate to the beneficiary immediately upon the beneficiary's arrival in the United States, including the proposed executive assistant, IT manager, advertising manager, and advertising agent. Further, the petitioner stated that it projects that it will hire the publishing manager, at least one virtual platform technician and IT assistant, at least two advertising agents, and a design manager by the end of the first year of operation, with a total proposed staff of 11 employees by the end of the first year. The petitioner referred the director to review the business plan and proposed organizational chart submitted at the time of filing. The petitioner did not provide the proposed duties, educational levels or proposed salaries for its future employees.

The petitioner stated that its sales and revenue forecasts were based upon analytics and other U.S. based mobile learning publishers, such as [REDACTED] and projected that it would grow at the same rate as these companies during its first several years of operation.

The petitioner also submitted an additional support letter from the president of the foreign entity which stated, in part, the following:

In light of current levels of [foreign entity] annual sales, we believe that with the company's original mentality of [REDACTED] book business development (expected 2013 sales will grow 15 million), together with the medical industry mobile learning

platform on-line operations, [the foreign entity] will enter a period of rapid development. We have been approached by investment companies and related industrial partners who are willing to cooperate more closely. Therefore we are fully committed to support the development of our U.S. company [the petitioner], and to provide all financial and non-financial resources to ensure that the U.S. branch's operations continue until it becomes profitable and self-sufficient.

Finally, in response to the director's requests for additional evidence pertaining to the size of the U.S. investment and the source of the petitioner's funding, the petitioner referred the director to review the foreign entity's audited balance sheets, corporate tax returns, and bank statements submitted at the time of filing.

In denying the petition, the director noted that the petitioner had made substantial changes to its projected hiring plans in response to the RFE without providing adequate explanation for such changes. The director stated that the evidence suggests that the beneficiary will perform functions similar to those performed by her subordinates and that she will be primarily engaged in performing non-qualifying operational duties. Further, the director indicated that the petitioner had not established the size of the foreign entity's investment in the petitioner through supporting documentary evidence and emphasized that the petitioner had failed to provide actions, timetables and benchmarks for the first year of operations.

On appeal, counsel contends that the director failed to consider detailed duty descriptions provided for the beneficiary and her proposed subordinates and asserts that the director improperly required that the petitioner provide evidence that the beneficiary will actually carry out her proposed duties. In addition, counsel states that the director failed to take into account the petitioner's hiring projections submitted in response to the RFE. Counsel contends that its hiring projections establish that the petitioner will support the beneficiary in a qualifying managerial or executive capacity after one year and states that it amended its hiring projections in response to the RFE due to a change in the expected approval date of the petition.

2. Analysis

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

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within 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.*

The petitioner has submitted a vague position description that fails to explain the nature of beneficiary's proposed day-to-day tasks in the United States. 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 sufficient 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). Notably, none of the beneficiary's proposed duties describe the actions she will take to establish the new business in the United States. Rather, the duties appear to describe the duties the beneficiary would perform in the future once the company is fully staffed. For example, the position description assumes the beneficiary's delegation of duties to five division managers, three of which are not projected to be hired by the end of the petitioner's first year of operation. Although the duty description suggests that the beneficiary will possess the appropriate level of authority to initiate the new company's operations, the petitioner has not met its burden to provide a detailed description of the proposed duties for the company's initial year.

Accordingly, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

In the present matter, the petitioner has not submitted sufficient supporting evidence to substantiate that it will support the beneficiary in a qualifying managerial or executive capacity within one year. The director requested in the RFE that the petitioner submit an organizational chart detailing the duties, expected education levels, and proposed salaries of each of its proposed employees. However, the petitioner failed to provide any additional evidence regarding its proposed staffing levels and organizational structure in response to the RFE, evidence essential to supporting its claim that the beneficiary would be sufficiently relieved from performing non-managerial duties within one year. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In fact, although the petitioner indicates that it plans on hiring four employees immediately upon the approval of the petition, it submits no evidence suggesting that these employees have been identified, what their duties will be, or their minimum requirements for employment. Further, as noted by the director, the petitioner has submitted inconsistent information regarding the number of employees to be hired during the first year. At the time of filing, the petitioner requested that the beneficiary be granted L-1A classification commencing on November 1, 2013. The petitioner's business plan anticipates that the company would

commence operations in November 2013, and the accompanying hiring plan indicated that the company would hire one employee in 2013 and three employees in 2014. In response to the RFE, the petitioner asserted that the director "misinterpreted the timetable for hiring," but nevertheless referred the director to review the proposed organizational chart submitted at the time of filing. As noted, that organizational chart clearly indicates that a total of four employees would be hired within one year.

On appeal, counsel for the petitioner asserts that "the original business plan with staff chart was drafted prior to the petitioner's decision to utilize the Service's premium processing option." Counsel asserts that the only "change" made in response to the RFE was based on the petitioner's anticipation of earlier start dates for all positions due to its decision to use premium processing. However, the petitioner did not submit a revised organizational chart or business plan in response to the RFE or the appeal. The dates utilized in the business plan, which was prepared in September 2013, the same month in which the petition was filed, indicate that the petitioner anticipated that the beneficiary would transfer to the United States in November 2013, a date that did not change in response to the RFE. This date would be consistent with the petitioner's anticipation of expedited processing of its petition. Therefore, counsel's claim that the petitioner shifted its hiring timeline forward based upon the use of premium processing is not persuasive. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Further, it is impossible to determine whether the projected salary expenses of \$160,000 for the first year of operations would cover more than five employees, since the petitioner never provided the requested salary information for the positions it intends to fill within the first year. Therefore, upon review of the totality of the evidence, the petitioner has not established that more than four employees would be hired during the first year of operations.

Likewise, the petitioner was asked to provide specific actions, milestones, and benchmarks relevant to the petitioner's first year of development, but only vaguely states that the company will follow a similar development track as two other companies, [REDACTED]. However, the petitioner does not describe these companies, their business models, how the petitioner is similar, or how and why it will follow a similar development track.

In addition, despite the request of the director, the petitioner failed to specifically articulate the size of the foreign company's investment in the petitioner, to document this investment, or to identify its anticipated start-up costs. The petitioner vaguely states that the foreign entity is committed to supporting the petitioner, that it projects substantial revenue in the future and that it has "been approached by investment companies and related industrial partners" regarding the new U.S. venture. However, it did not provide evidence that the foreign entity has transferred any funds to the petitioner or identify the amount of funds immediately available. Although the petitioner refers USCIS to review the foreign entity's financial documents, the record contains a 2012 income statement for the foreign entity which shows a net loss of nearly 300,000 Yuan for 2012. In addition, the petitioner submitted its bank account statement from September 2013 reflecting a balance of \$10,063, an amount that has not been shown to be sufficient to support its initial hiring of four employees upon approval of the petition and its initial operations. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)).

In sum, due to the lack of supporting evidence regarding the petitioner's plans and projected operations, the petitioner has not established that there is 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). Furthermore, the petitioner has not demonstrated the size of United States investment and the financial ability of the foreign entity to remunerate the beneficiary and commence doing business as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2), since it has not explained the size of the investment or corroborated it with supporting evidence, as requested by the director.

Finally, the petitioner has not consistently or adequately described the intended scope of the operation, its organizational structure, and its financial goals. The director advised the petitioner that its four-page business plan was lacking in detail and the petitioner failed to expand upon its intended actions and milestones in response to the RFE. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As such, the petitioner has provided only vague financial projections and failed to detail actions and strategies that would enable it to reach its benchmarks for income and hiring during the first year of operations. Absent corroborating evidence to support the petitioner's claim that it will hire at least four employees during the first year of operations, and absent position descriptions for these employee, the petitioner has not established how the beneficiary would be relieved from primarily performing non-qualifying duties within one year.

In conclusion, due to the lack of sufficient detail and supporting documentation, the petitioner's evidence does not support a finding that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the petition. For this reason, the appeal must be dismissed.

B. PHYSICAL PREMISES

The next 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 an office lease agreement dated August 16, 2013, valid from this date through to July 31, 2014. The language of the lease further indicated that it would renew annually. A floor plan attached to the lease reflected that the leased space was a one room office.

In the RFE, the director stated that the petitioner had not submitted sufficient evidence to establish that it had secured sufficient physical premises to house the new office. The director emphasized that the lease

indicated that the office was only one room, noting that this was inconsistent with its projection to hire seventeen employees before the end of 2017. As such, the director requested that the petitioner submit evidence indicating the square footage of the proposed premises, an explanation as to why it selected this space, and color photographs of the premises.

In response, the petitioner submitted a letter from its landlord confirming the lease and specifying that the office space has an area of 98 square feet. The petitioner stated that this office was sufficient to accommodate its present needs during the startup phase and that it projected it would acquire additional space "as our company matures."

In denying the petition based on a lack of sufficient physical premises, the petitioner stated that the evidence indicates that the space, being only 98 square feet in size, is not sufficient to accommodate the petitioner's hiring plans.

On appeal, counsel asserts that the director erred by requiring the petitioner to have sufficient physical premises to house its "fully grown" operations, rather than that required to commence doing business upon the beneficiary's arrival in the United States.

Counsel's assertions are persuasive. Upon review of the evidence, the petitioner has established that it has secured sufficient premises to house the new office. In the current matter, the director inappropriately required that the petitioner have a space sufficient to accommodate its projected employees for the next three years, which is not required by the regulations. The petitioner has submitted evidence indicating that it has secured commercial office space necessary to commence doing business. As such, the director's decision will be withdrawn with respect to this single issue.

C. MANGERIAL OR EXECUTIVE CAPACITY (ABROAD)

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign entity for at least one continuous year in the three years preceding the filing of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(B).

1. Facts

In the business plan submitted along with the petition, the petitioner stated that the foreign entity was established in 2005, that it operates in the Chinese medical industry, and that it "focuses on administrative resources, information consulting, medical planning editing, conference executive agencies and other integrated services," including publishing specialized magazines and books, "strategic support, conferences and exhibitions, journal media, teleconferencing, clinical trials," and the "production of a documentary broadcast on [REDACTED]." The petitioner indicated that the beneficiary acquired a 35% ownership interest in the foreign entity in September 1, 2012, at which point, she became the vice president of the foreign entity. The petitioner described the beneficiary's duties abroad as follows:

She is responsible for developing a new business area for the company to expand in the medical industry ---- the development of Mobile Learning Platforms for Distance e-Learning.

She is currently engaged in a joint venture with [REDACTED] to build Mobile Learning Platforms for pharmaceutical/medical equipment, and to provide intelligent terminal mobile learning courses (smart phone and PAD-side learning courses) to Chinese hospital doctors.

As Vice President of [the foreign entity], [the beneficiary's] primary responsibilities are as follows:

1. To explore and develop work platforms with Chinese and U.S. IT companies.
2. To establish cooperative business engagements with U.S. medical universities and institutions (information vendors) in order to develop course material.
3. To seek cooperation with multinational companies.

To meet these responsibilities, [the beneficiary] utilizes the company's vast resources in Beijing, Shanghai and Chengdu. She designs the policies and goals of each project in the process of developing Mobile Learning Platforms for Distance e-Learning, and assigns projects to our various division leaders. She then oversees the execution and the implementation of ongoing projects.

The petitioner submitted an employment agreement dated September 2, 2012 between the beneficiary and the foreign entity. The agreement indicated that the beneficiary would act as the company's vice president from September 1, 2012 through August 31, 2015 and earn a monthly salary of \$50,000.

The petitioner provided a foreign entity organizational chart reflecting that the beneficiary reports to the president and that it has a dotted line relationship to [REDACTED]. The chart further reflects that the president supervises five managerial subordinates including a financial manager, an administration manager, a "publish manager," a media product manager, and a Shanghai office manager. Likewise, the chart appears to indicate that the beneficiary also has a supervisory relationship with these managerial subordinates. In turn, each of the above referenced subordinate managers is shown to have varying levels of subordinates, whose names and positions were identified. For instance, the financial manager was shown overseeing a cashier, the administration manager supervising a chief commissioner and a personnel officer, a publish manager overseeing nine subordinates, the media product manager supervising an assistant and an IT developer, and a Shanghai office manager overseeing seven subordinates.

The director indicated in the RFE that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary was employed in a qualifying managerial or executive capacity abroad and requested copies of the beneficiary's training, pay or other personnel records; a foreign entity organizational chart with the names of its employees, their job titles, duties, education levels and salaries; and a letter from the foreign entity describing the beneficiary's typical duties and the percentages of time she spends on them, and how she directed the management of the organization or established its goals and policies.

In response, the petitioner submitted a letter from the president of the foreign entity explaining the beneficiary's role abroad as follows:

[The beneficiary] has been employed by the [foreign entity] since September 1, 2012 as Vice President. [The beneficiary] primarily [sic] responsibilities consist of the development of new strategic business and organizational work.

- The new strategic business includes: working with partners to develop mobile learning platforms for the medical industry.
- Organizational development includes: working with HR colleagues to establish a company-wide performance efficiency evaluation system, training system, personnel development system and organizational structure planning.

Regarding her work for new strategic business, [the beneficiary] has autonomy to make decisions in cooperation with partners, and is responsible for defining the terms of cooperation. [The beneficiary] mobilizes resources to carry out these partnerships and the content of the project. Regarding the project ---- a mobile learning platform in the medical industry for Chinese doctors including intelligent terminals for convenient mobile learning technology. [The foreign entity] is mainly responsible for coordinating hospitals, academic leaders, and pharmaceutical companies, as well as other content coordination. Through these partnerships we provide technical support, including platform technology and mobile courseware presentation, to enterprises, hospitals and other types of partners, as so the core role of [the beneficiary] is determining strategic directions and the implementation of programs, and then the partners take over the handling of the programs. In the future, after the platforms are formally launched, [the beneficiary] will be responsible for the management work in our U.S. subsidiary company, and through the U.S. subsidiary we will purchase leading medical courseware and we will approach U.S. pharmaceutical companies to promote our mobile learning platform products.

In addition, the president of the foreign entity added that the beneficiary is "responsible for the organizational development, guiding the efficient management of human resources, establishing a personnel training system, planning business development and planning work with the development plan." The petitioner did not submit any other evidence relevant to the foreign entity's organizational chart or its operations.

2. Analysis

Upon review of the record, the petitioner has not established that the beneficiary has been 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(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.* 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 working with partners to develop mobile learning platforms for the medical industry; working with HR colleagues to establish a company-wide performance efficiency evaluation system, training system, personnel development system and organizational structure planning; and determining strategic directions and the implementation of programs 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 the foreign entity's partners or projects on which the beneficiary worked, training or personnel development systems she developed, organizational structures she planned, or strategic directions and the implementation of programs she conducted. 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, the director requested that the petitioner list the beneficiary's specific daily tasks and the amount of time she devoted to each, but the petitioner did not submit this level of requested detail. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 understanding a beneficiary's actual duties and role in a business.

Here, the petitioner has submitted a confusing foreign organizational chart that does not clearly reflect the beneficiary's actual subordinates. Although the chart seems to suggest that the beneficiary oversees and controls five managerial employees abroad, the petitioner has submitted no supporting evidence to substantiate this assertion, or that it employs approximately twenty-six total employees. The director requested that the petitioner submit a foreign entity organizational chart with the names of the employees, their job titles, duties, education levels and salaries. Again, the petitioner failed to submit this probative evidence relevant to corroborating the existence of the beneficiary's subordinates and the beneficiary's place within the organization. Once more, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Further, the petitioner has provided little supporting evidence to substantiate its business operations and to confirm that its operations are sufficient to support the beneficiary in a qualifying managerial or executive capacity. For instance, the petitioner states on appeal that the foreign entity, and the beneficiary, works with hospitals, academic leaders, and pharmaceutical companies and that the foreign entity has developed mobile learning platform products for these customers. However, the record contains no supporting evidence such as published materials regarding its products and services or evidence of its joint venture relationship with

Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In addition, the petitioner asserts that the beneficiary earned a salary of 600,000 Yuan in 2012. However, this claimed salary is greater than the company's 525,942 Yuan operating income as reflected in a provided 2012 foreign entity income statement. Further, it is questionable that evidence on the record reflects the beneficiary receiving a substantial monthly salary from the foreign entity throughout 2012 when elsewhere the petitioner indicates that the beneficiary did not join the company until September 2012. 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).

Therefore, in conclusion, due to the lack of evidence submitted regarding the foreign entity's structure and operations, the petitioner has not established that the beneficiary has been employed in a qualifying managerial or executive capacity abroad. For this additional reason, the appeal will be dismissed.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.