



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 23 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)

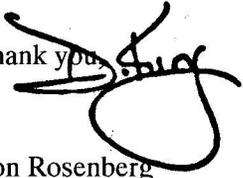
ON BEHALF OF PETITIONER:

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 Vermont Service Center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Puerto Rican limited liability company, established in [REDACTED] that asserts it will be engaged in retail sales of clothing and accessories as a franchisee. The petitioner claims to be an affiliate of the foreign entity, [REDACTED] located in the Dominican Republic. The petitioner seeks to employ the beneficiary as the general manager of its new office.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a managerial or executive capacity within one year of approval of the petition, and (2) that the beneficiary had been employed in a qualifying managerial or executive capacity with the foreign entity.

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 asserts that the director's decision was erroneous as a matter of law.

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, Petition for a Nonimmigrant Worker (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.

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.

II. Employment in the United States in a Managerial or Executive Capacity

The first issue is whether the petitioner has established that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of the approval of the new office petition.

A. Facts

The petitioner submitted a letter dated June 18, 2013 in support of this petition stating that it intends to open two retail franchise stores in Puerto Rico during the year; one dedicated to women's apparel [REDACTED] and the other dedicated to an Italian luxury sportswear brand (Paul & Shark). The petitioner stated that the beneficiary would be paid USD \$72,000.00 per year for his full time work at the [REDACTED] retail store location. The petitioner's business plan referred only to the [REDACTED] store and estimated its first full year of salary expenses at GBP £70,000.00 (British Pounds), approximately USD\$113,583.00. The petitioner asserted that it currently has approximately eight employees and intends to have four employees at each of the two stores within the first year. The petitioner provided a lease for the [REDACTED] retail store space but provided only a lease proposal for the [REDACTED].

On the Form I-129, Petition for a Nonimmigrant Worker, and in a supporting letter, the petitioner stated that the beneficiary will be employed as the general manager of a franchisee clothing and accessories retail store [REDACTED] performing the following duties:

[the beneficiary] will be principally responsible for organizing, implementing, directing and controlling [petitioner's] operations. In that respect he will be in charge of making business decisions to develop the [REDACTED] brand and its image in Puerto Rico. [The beneficiary] will be responsible for the implementation of innovative methods to develop the brand experience, and will be accountable for compliance with the franchisor's standards. As General Manager, [the beneficiary] will primarily focus on achieving [petitioner's] effective performance following the franchisor's strategies and parameters. [The beneficiary] is expected to implement his mastery and proficiency in brand development in order to achieve a competitive advantage for [the petitioner] and the [REDACTED] brand in Puerto Rico.

The petitioner further states that one of the beneficiary's main objectives would be to ensure the "successful continuation of the operation" and "focus on achieving the Company's goal and objectives."

In regards to personnel management, the petitioner described the beneficiary's duties as follows:

[The beneficiary] will exercise authority in the recruitment, management, control, coordination, promotion and remuneration of [petitioner's] staff. He will follow-up the staff training and development. He will also conduct performance reviews and will be responsible for ensuring that his staff follows the appropriate procedures and achieve the Company's goals. Accordingly, [the beneficiary] will be responsible for the direct supervision of all of [the petitioner's] employees.

The petitioner also included a document describing the beneficiary's objectives and duties as the general manager in a bulleted list format as follows:

Objective: Direct the management of [the petitioner] and establish company policy to obtain profit contribution in the business operation.

Duties:

- Responsible for organizing, implementing, directing and controlling [the petitioner's] operations.
- In charge of making business decisions to develop the [REDACTED] brand and its image in Puerto Rico. Responsible for the implementation of innovative methods to develop the brand experience, accountable for compliance with the franchisor's standards.
- Achieve [the petitioner's] effective performance. Develop company's strategic plan by studying technological and financial opportunities.

- In charge of the achievement of a competitive advantage for [the petitioner] and the [redacted] brand in Puerto Rico.
- Ensure the successful continuation of the operation of [the petitioner] franchise store and focus on achieving the Company's goals and objectives.
- Responsible for the recruitment, management, control, coordination, promotion and remuneration of [the petitioners] staff.
- Follow-up the staff training and development; conduct performance reviews.
- Responsible for the direct supervision of all of [the petitioner's] employees.
- Supervise and coordinate efforts regarding production and marketing.
- Develop Company's image; maintain quality service; establish and enforce organization's standards; enforce ethical business practices.
- In charge of [the petitioner's] client base.
- Identify risks and opportunities to make commercial decisions.

The petitioner's organizational chart depicted the beneficiary as the petitioner's general manager working at the address of the store selling [redacted] products but overseeing the '[redacted]' store and a separate [redacted] store, both to be located in Puerto Rico. The chart further indicated that each store will have its own store manager and four employees; though none of the employees were named.

On August 5, 2013, the director issued a request for additional evidence (RFE) instructing the petitioner to establish that the petitioner's business would grow to support a managerial or executive position within one year by providing evidence such as detailed staffing information, a more detailed job description for the beneficiary, and the financial goals and ability of the foreign entity to remunerate the beneficiary and begin doing business.

In response, the petitioner submitted a second organizational chart indicating that the petitioner's store ([redacted] brand) would be open November 2013 and a second store, ([redacted]) was planned for August 2014 with the beneficiary's wife inserted to serve as vice president, overseeing the store managers at both stores.

The petitioner described the store manager position, stating that the manager would "supervise sales associates' day-to-day performance and attendance and convey that feedback to the general manager," and supplement sales associate training sessions already provided by the general manager. The store manager job description also includes: dealing with customer service issues, doing regular inventory checks, and other tasks related to the store's daily operation.

The petitioner stated in a letter dated October 1, 2013 that it "is about to open a [redacted] store" and it "is in the process of establishing a [redacted] store." The petitioner further explained that the beneficiary is to serve as the general manager in Puerto Rico during the first year of operation, after which the petitioner "will replace him by transferring his responsibilities to the store managers and/or contracting additional employee(s) to assume his responsibilities."

The petitioner's business plan projects a monthly payroll of GBP £5979.00, equivalent to approximately USD \$9703.00, and a first full year payroll of £71750.00, approximately USD

\$116,435.00, with slight incremental increases for each year thereafter. According to an undated letter from the foreign entity, “the shareholders have invested USD \$250,000.00 in establishing [the petitioner’s] operations in Puerto Rico.” The foreign entity asserted that the petitioner’s business plan indicated that the petitioner would have an operating income of USD \$1,000,000.00 to support the beneficiary’s remuneration, company payroll and all other business costs for both stores. The operation will create at least six jobs at the [REDACTED] store and six jobs at the [REDACTED] store. The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive position within one year of commencing operations.

On appeal, counsel for the petitioner now states that the petitioner wishes to employ the beneficiary as its president and chief executive officer with an approximate gross salary of USD \$60,000 and an entirely new list of duties, as follows:

- Direct the company’s financial operations to maximize investments and increase efficiency.
- Direct and provide guidance to Store Manager and Assistant Managers in coordinating activities, supervision and training of sales staff.
- Analyze and monitor financial sales reports to evaluate store performance and to determine areas of potential cost reduction, program improvement, or policy change.
- Establish, direct, and implement corporate and operational policies, objectives, and activities of company pursuant to local and federal laws and regulations.
- Serve as primary liaison with [REDACTED] regarding contractual obligations, supply and inventory, branding policies, etc.
- Make all policy and business decisions to develop the [REDACTED] brands and respective images in Puerto Rico.
- Negotiate or approve contracts or agreements with suppliers, distributors, federal or state agencies, or other organizational entities.
- Direct human resources activities, including the approval of human resource plans or activities such performance reviews and the selection of managerial staff.
- Overall responsibility for the recruitment, management, control, coordination, promotion and remuneration of [REDACTED] staff.
- Develop international trade activities through foreign affiliates.
- Represent foreign manufacturers and locate prospective marketing channels for construction products and technology.
- Negotiate contracts with distributors in Puerto Rico and facilitate the import of materials from overseas manufacturers.

Counsel asserts that the petitioner intends to transfer the beneficiary to the United States in an executive capacity. Counsel asserts that the beneficiary “is the only executive with the requisite knowledge and experience with the specialized construction products and technology to

successfully represent these manufacturers in the Puerto Rican market and negotiate with local construction materials retailers.”

Counsel explains that “[f]ormer counsel’s inadvertent misunderstanding of [the beneficiary’s] role also contributed to an understandable mischaracterization of the position offered as that of a General Manger instead of the correct executive position as President and CEO.” Counsel did not make an assertion that prior counsel provided ineffective assistance.

The petitioner submitted a third organizational chart to demonstrate that as of November 2013 it has six employees; one store manager, one full-time assistant store manager, and four part time sales clerks. The petitioner reiterates its intent open the second retail store in June 2014. The petitioner submitted additional documents including a yearly earnings report, banks statements, and an unaudited balance sheet.

B. Analysis

Upon review, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year.

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

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Here, the petitioner has established that it has acquired sufficient physical premises but it has not established: (1) how the beneficiary would be relieved from performing non-managerial duties

within one year; (2) consistent information regarding the company's proposed staffing; or (3) the size of the financial investment in the United States.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The beneficiary's list of 12 proposed duties are vague and repetitive providing little insight into how the beneficiary would spend his day. For example, the beneficiary's duty description included generalized duties such as achieve "effective performance," achieve "competitive advantage," focus on "goals and objectives," and "identify risks and opportunities" but it did not include specific tasks to demonstrate the actual work the beneficiary would perform. 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).

The duty 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). According to the petitioner, the beneficiary would oversee two retail stores and he would be responsible for the "direct supervision" of all of the petitioner's employees and provide training. Despite the petitioner's stated intent to open a second retail store, the petitioner provided insufficient evidence relating to this second store in its initial petition or in response to the director's RFE. Specifically, the petitioner's business plan does not sufficiently incorporate the [REDACTED] store location. the beneficiary's duty description expressly refers to the [REDACTED] store but not the [REDACTED] store, the beneficiary is to work at the [REDACTED] store location, and there is no negotiated lease for the second store. Therefore, the petitioner has provided insufficient evidence to demonstrate that the [REDACTED] store location has been sufficiently developed and incorporated as a part of the petitioner's "new office" petition.

Although the petitioner's hierarchy initially depicted the petitioner's store managers as directly subordinate to the beneficiary, a second organizational chart submitted in response to the director's RFE inserted a new layer of management. Specifically, the second chart indicated that the store managers would report to the vice president and the vice president would, in turn, report to the beneficiary. The beneficiary's wife was listed as the vice president but the petitioner did not include her duty description. In addition, the beneficiary's duties involving his direct interaction with the store managers does not appear to have been altered despite the new vice president management tier. The petitioner has not resolved the inconsistency created by this

new organizational chart and the fact that the beneficiary, himself, is responsible for the “direct supervision” of all of the petitioner’s employees. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

According to the petitioner’s business plan, it will pay just over the equivalent of USD \$113,000 in yearly salaries initially. Of that amount, USD \$72,000 is to be paid to the beneficiary leaving approximately USD \$41,500.00 of the salary budget for the four to five employees and a vice president. It is not clear how the petitioner can afford to hire a vice president, full time store manager and sufficient sales associates to operate the petitioner’s [REDACTED] store with a total budget of just over USD \$41,500.00. If we fail to believe that the facts stated in the petition are true, then the assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). While the petitioner asserted that the foreign entity in the Dominican Republic would have sufficient funds to remunerate the beneficiary, cover payroll and other business costs, the evidence which includes unaudited financial statements, unclear tax returns, and other company documentation are insufficient to establish the foreign entity’s ability to do so. We also note that, on appeal, counsel discusses the beneficiary’s other businesses abroad and asserts that [REDACTED] a Bulgarian company owned by the beneficiary is “the source of the funding for the establishment and development of both” the petitioning company and the foreign entity affiliate and “as the source of funds for all business activities” [REDACTED]’s role “is essential.” The assertion represents an unresolved conflict with the petitioner’s claim that the foreign entity affiliate would directly support the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, at 582.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm’r 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition’s products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth

the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

The petitioner stated that the beneficiary would serve as the general manager in Puerto Rico during the first year of operation, after which the petitioner "will replace him by transferring his responsibilities to the store managers and/or contracting additional employee(s) to assume his responsibilities." The petitioner's assertion that the beneficiary's duties could be transferred to a store manager or a contractor who primarily performs the tasks necessary to produce a product or to provide services and is responsible for the day-to-day operations of the business while engaged in direct supervision of lower level employees does not support the claim that the beneficiary's duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the combination of vague and non-qualifying duties in the beneficiary's job description, the discrepancies in the petitioner's description of its proposed structure, and the prevalence of overlapping duties to be performed by the beneficiary and his proposed subordinates, the AAO cannot conclude that beneficiary would be relieved from performing non-qualifying duties within one year of commencing operations.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns and 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").

We acknowledge counsel's assertion on appeal that the denial of this petition represents a "pattern of discrimination against small business enterprises" however, section 101(a)(44)(C) of the Act requires us to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." We have long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, we have also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that

the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008). Here, the petitioner has not met that burden.

On appeal, the petitioner sought to amend the petition by changing, among other things, the beneficiary's title and duty description.

Counsel's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). 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).

Based on the evidentiary deficiencies addressed above, the AAO will uphold the director's determination that the petitioner failed to establish it would employ the beneficiary in a qualifying managerial or executive capacity within one year of the approval of the new office petition. Accordingly, the appeal will be dismissed.

III. Foreign Employment in a Managerial or Executive Capacity

The second issue is whether the petitioner established that the foreign entity employed the beneficiary in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

A. Facts

The petitioner asserted that the foreign entity is the exclusive franchisee of the Paul & Shark brand in the Dominican Republic where it operates two retail stores and claims to have grossed USD \$263,738.00 (RD\$10,865,959.69 Dominican Pesos) in 2012. A letter from the foreign entity dated January 23, 2013 stated that the beneficiary earned an annual salary of RD\$390,000 per year; an amount equivalent to USD \$8,904.11 plus fringe benefits.

The petitioner's Form I-129 described the beneficiary's duties abroad as follows:

As [the foreign entity's] General Manager [the beneficiary] is principally responsible for directing, managing and attaining the goals and business objectives of both [redacted] stores. In this capacity, [the beneficiary] has exercised and continues to exercise discretionary decision-making in establishing the most advantageous strategies and courses of action for the successful management and direction of [the foreign entity] . [The beneficiary] exercises full authority in regard to hiring, termination, training, discipline, promotions and performance appraisals, while ensuring that his staff and personnel follow appropriate procedures.

The petitioner stated that the beneficiary has been working as the foreign entity's general manager in the Dominican Republic since 2007. The petitioner's Form I-129 indicates that the foreign entity and the petitioning company have a qualifying relationship since both are wholly owned by the beneficiary and his wife.

The foreign entity's organizational chart listed the beneficiary as the general manager overseeing three businesses; (1) [redacted] retail business with two store locations; (2) [redacted], and (3) [redacted]. Only the [redacted] business listed duty positions including one store manager and three store employees for each of the two locations. While the petitioner provided a general description of beneficiary's duties and evidence of his pay, it did not provide sufficient evidence regarding the foreign entity's other employees. The petitioner provided a self-prepared balance sheet dated December 31, 2012 and a self-prepared statement of revenue and expenses for calendar year 2012.

A copy of the foreign entity's tax form for 2012 indicates that wages and salaries were paid in the amount of RD\$890,000.00 including the beneficiary's pay of RD\$390,000.00. The tax forms were difficult to read but one line read "net benefits for period" in the amount of 910,549.78 Dominican Pesos, an amount equal to approximately USD \$20,834.00.

The director issued an RFE and instructed the petitioner to provide additional evidence to establish the beneficiary's managerial or executive duties, and a list of employees, their positions, and their salaries to demonstrate the staffing levels and the structure of the organization.

In response, the petitioner provided the following description of the beneficiary's duties abroad:

[The beneficiary] is principally in charge of negotiating the Partnership's vendor agreements and developing and promoting the [REDACTED] brand in the Dominican Republic. He is also in charge of the development of pricing models using internal event data and external market segment data to make sound pricing decisions. [The beneficiary] is responsible and accountable for the Partnership's capital expenditure, efficient inventory management, and customer experience. He has also been in charge of the supervision and successful training of [the foreign entity's] [REDACTED] stores' staff.

While executing his duties as the Partnership's General Manger, [the beneficiary] is principally responsible for the supervision, management and administration of the stores' personnel. As such, he has full authority to hire, terminate, discipline, train, promote and appraise the stores' personnel. He currently supervises four (4) full time employees in the Dominican Republic. [The beneficiary] dedicates approximately 50% of his time to establishing goals and objectives, verifying compliance with company's policies, and administering all of [the foreign entity's] business affairs, 30% to brand management and directing the stores' day to day operations, and 20% to personnel management.

A second organizational chart depicted the beneficiary as general manager with his wife reporting directly to him as vice-president. Store manager, [REDACTED] supervised four named employees and reported directly to the vice-president. The chart did not depict a second retail store. The store manager's duty description included providing feedback to the general manager, supplementing the general manager's training sessions to the sales associates, and make training recommendations to the general manager based on customer service issues. The petitioner also provided the sales associates duty description but included no description for the vice-president. Documentation related to the foreign entity's employees was limited to the store manager's 18 month employment contract effective April 15, 2013.

The director determined that the petitioner had not established that the beneficiary was employed abroad in a qualifying capacity. Rather, the director found the beneficiary's duties vague and stated that the petitioner had not established that the beneficiary would be involved in the supervision and control of other supervisory, professional, or managerial employees who would relieve the beneficiary from performing non-qualifying activities. The director observed that the petitioner provided payroll evidence only for the beneficiary, provided no vice president duty description, and provided an employment contract for a store manager contracted to start on April 15, 2013, just over three months prior to the filing of this petition. Therefore, the director concluded that it appeared the beneficiary supervised employees who directly performed the services of the operation.

On appeal, counsel seeks to amend the petition by listing two additional affiliates of the petitioning company. Counsel states that not only did the beneficiary previously work for two companies established in Bulgaria but he founded them and continues to work for and receive compensation from those companies as president and chief executive officer. Counsel states that the beneficiary is "in charge of all executive decisions and business development" of all the

companies. Counsel explains that prior counsel failed to fully explain the beneficiary's roles as president and chief executive officer of these additional businesses abroad. Counsel did not directly address the stated deficiencies regarding the beneficiary's duties abroad. Instead, the petitioner appears to intend to amend the claimed qualifying relationship by including two additional affiliates to the petitioning company and asserting that the beneficiary has an executive position overseeing all four companies which would then be sufficient to establish the beneficiary in a qualifying executive capacity..

B. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The 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). Here, the petitioner sufficiently document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, despite the director's request for information regarding the percentage of time the beneficiary would allocate to specific tasks. 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).

Although the petitioner divided the beneficiary's duties into categories of 50%, 30%, and 20%, the categories are vague; described as 30% to brand management, 50% to other duties including "administering" all of the foreign entity's "business affairs," and 20% to personnel management. 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). The petitioner did not describe what the beneficiary was responsible for within each of those categories.

The petitioner added that the beneficiary is "principally in charge of negotiating the Partnership's vendor agreements and developing and promoting the [redacted] brand" and has been in charge of "supervision and successful training of. . . stores' staff" but these are all potentially non-qualifying duties. Further, the petitioner asserted that the beneficiary "supervises four (4) full time employees." Since the store manager's contract was due to start in April 2013, it cannot be concluded that the new store manager was one of the four full time employees whom the beneficiary supervised. Despite the percentages provided, the narrative of the beneficiary's

duties indicates that the beneficiary will be primarily performing non-qualifying duties. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm’r 1988). For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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

As noted, the director requested that the petitioner submit a detailed foreign organizational chart, including information regarding the members of the beneficiary’s immediate department, their titles, duties, education levels, and salaries. However, the petitioner only submitted an organizational chart that added the beneficiary’s wife as vice president, named the store manager, and listed the names of four store employees. The petitioner failed to provide any evidence to demonstrate the actual employment of those named individuals. Again, 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 not identified or submitted any supporting evidence to support that the existence of the beneficiary’s subordinate employees. 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 petitioner has provided inconsistent organizational charts with respect to the beneficiary’s claimed subordinates, first indicating direct oversight of the store manager but then submitting a new organizational chart inserting a vice president position in response to the director’s RFE. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner now attempts to significantly amend the petition on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of*

Obaigbena, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it in response to the director's request for evidence. *Id.*

The petitioner now urges consideration of the beneficiary's executive oversight of two additional companies in order to bolster the beneficiary's role in an executive capacity abroad.

Once again, counsel's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The petitioner has not sufficiently established that the beneficiary was employed in a qualifying executive capacity with the foreign entity. As noted previously herein, the petitioner's description of the beneficiary's duties is vague and includes non-qualifying duties. Further, the petitioner has provided almost no detail regarding the foreign entity's organizational structure or the beneficiary's duties as necessary to demonstrate that the beneficiary directs the management of the organization. As such, the petitioner has not established that the foreign entity employs the beneficiary in a qualifying managerial or executive capacity. The appeal will be dismissed.

V. 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.