



U.S. Citizenship  
and Immigration  
Services

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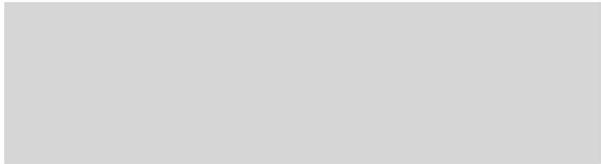
DATE: APR 27 2015

PETITION RECEIPT#: [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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to 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 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, an Oklahoma corporation established in [REDACTED] states that it will operate as a restaurant. It claims to be an affiliate of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as the "owner, general manager" of its new office in the United States.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

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, the petitioner contends that it established that the beneficiary will be employed in a managerial capacity within one year of commencing operations. The petitioner submits a letter in support of the appeal.

#### I. THE LAW

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

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, 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. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying managerial capacity within one year of approval of the new office petition.

### A. Facts

The petitioner filed the Form I-129 on January 14, 2014. The petitioner submitted a letter of support, dated December 27, 2013, signed by [REDACTED]. In its letter of support, the petitioner briefly described the beneficiary's proposed position in the United States as follows:

We wish to obtain the professional services of [the beneficiary] in the position of General Manager and CEO. His duties shall include but are not limited to the following:  
Organizes and directs with authority, responsibility, and accountability to plan, implement and monitor operation, profitability, quality service and customer relations. Oversee all aspects of running a unique restaurant, including budgets, quality service, advertising, and pricing. Effectively create a marketing and management program to maintain optimum occupancy levels, income, and value of company. Effectively select, hire, train, motivate, counsel and reward employees.

The petitioner submitted its business plan, prepared by [REDACTED] President of [REDACTED]. The business plan describes the beneficiary's proposed role and initial staffing plans as follows:

[The beneficiary] owns 100 percent of the corporate stock of [the petitioner]. [REDACTED] serves as President of [the petitioner] and right now she is managing the day-to-day activities, such as advising the renovation of the premises, applying for permits, etc. After [the beneficiary] arrives in the United States, he will adopt a strategic planning and oversight role as well as managing the day-to-day operations of the business.

During the start-up year, [the petitioner] is expected to generate sales in the amount of \$1,150,000 and employ one manager, four chefs, six waiters, a receptionist/cashier, a dishwasher, and a bus employee.

The business plan includes a "Forecasted Statement of Income and Retained Earnings" projecting \$291,000 in salaries and wages for 2014, its first year in business. The statement further states that its assumption on staffing includes one manager, four chefs, six waiters, one cashier, one dishwasher, and one bus employee.

The petitioner also submitted a staffing plan, including job duties for the general manager (1 position), host/hostesses (1-2 positions), servers/waiting staff (4-6 positions), sushi chefs (4 positions), bartender (1-2 positions), busboys/bussers (1-2 positions), and dishwasher (1-2 positions). The general manager position is described as follows:

Delivers revenues and profits by developing, marketing, financing, and providing appealing restaurant service; managing staff. Establishes restaurant business plan by surveying restaurant demand.

- Accomplishes restaurant and bar human resource objectives by recruiting, selecting, orienting, training, assigning, scheduling, coaching, counseling, and disciplining management staff; communicating job expectations; planning, monitoring, appraising, and reviewing job contributions; planning and reviewing compensation actions; enforcing policies and procedures.
- Maintains safe, secure, and healthy facility environment by establishing, following, and enforcing sanitation standards and procedures; complying with health and legal regulations; maintaining security systems.
- Maintains professional and technical knowledge by tracking emerging trends in the restaurant industry; attending educational workshops; reviewing professional publications; establishing personal networks; benchmarking state-of-the-art practices; participating in professional societies.
- Accomplishes company goals by accepting ownership for accomplishing new and different requests; exploring opportunities to add value to job accomplishments.
- Training and motivating staff[.]
- Plan and price items to meet profit margins[.]

The petitioner did not submit any additional information about the beneficiary's proposed position in the United States or the organizational structure of the U.S. company.

The director issued a request for evidence ("RFE") on March 24, 2014, advising the petitioner that the general description of the beneficiary's duties listed in its business plan was vague and non-specific and did not clearly establish that he would be performing in a qualifying managerial capacity. The director explained that a more specific breakdown of the proposed duties is needed for her role with the U.S. entity. The director instructed the petitioner to submit evidence, such as a description of her typical managerial duties and the percentage of time she will spend on each, an organizational chart or diagram, and answers to specific questions pertaining to her role at the U.S. company, to demonstrate that the beneficiary's proposed position in the United States will be in a managerial capacity at the end of the petitioner's first year of operations.

In response to the RFE, the petitioner submitted a letter dated June 10, 2014, signed by [REDACTED] as "current owner and president" and the beneficiary as "future owner and president", describing the beneficiary's proposed position in the United States as follows:

[The beneficiary] will serve as the owner, President, and Chief Executive Officer of [the petitioner], serve as the sole manager of the organization, supervise and control the work of 13 employees (four chefs, six waiters, one cashier, one dishwasher, and one bus employee) as well as all the employees of additional restaurants which are envisioned in Oklahoma, has authority of hire and fire all employees, has authority to promote all employees, has authority to approve leave for all employees, has authority to determine pay and pay raises for all employees, and exercises discretion over the day-to-day operations of [the petitioner] and other restaurants which are envisioned in Oklahoma as well as the day-to-day functions of all employees.

The organization charts of the foreign entity and [the petitioner] are quite simple. . . . At [the petitioner] and the envisioned additional restaurants in Oklahoma, all employees and/or the restaurant managers report directly to [the beneficiary], are supervised by [the beneficiary], and are controlled by [the beneficiary].

The director denied the petition on July 24, 2014, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial capacity within one year of approval of the new office petition. In denying the petition, the director found that the petitioner provided only a vague description of the beneficiary's proposed duties. Further, the director determined that, based on the petitioner's projected organizational structure, the beneficiary would be acting as a first-line supervisor of non-professional staff at the end of the first year of operations.

On appeal, the petitioner submits a letter from [REDACTED], President of [REDACTED], dated August 10, 2014, expanding on the beneficiary's proposed position at the U.S. company and further describing his duties. The letter states that the beneficiary will be the general manager of "as many as six restaurants" in Oklahoma and Arkansas. It states that the beneficiary will initially directly supervise all employees and at six months after his arrival in the U.S., he will hire a manager who will take over the day-to-day management of the restaurant and staff so that the beneficiary can "focus his attention entirely on corporate level general management and strategic planning." The petitioner claims that at this point, the beneficiary will be relieved of all non-qualifying first-line supervisory duties, will report to the CEO of the foreign entity, and will be assigned the following duties:

- Corporate-level supervision and human resource management of all [REDACTED] Manager.
- Corporate-level strategic planning particularly for the development and opening of future [REDACTED]
- Corporate-level financial management of the [REDACTED] System.
- Corporate-level marketing management of the [REDACTED] System.
- Corporate-level management of support processes for the [REDACTED] System.

\* \* \*

A detailed breakdown of the beneficiary's duties as General Manager of the [redacted] System (six months after his arrival in the [U.S.] and during his future tenure) is set forth below.

- Conducts supervision and personnel management of all restaurant Managers 74.2 hours a month
- Conducts and manages strategic planning of [redacted] System 14.6 hours a month
- Conducts financial management of [redacted] System 18.9 hours a month
- Conducts marketing of [redacted] System 11.7hours a month
- Conducts management of support processes of [redacted] System 17.4 hours a month
- Reporting and travel time 20.4 hours a month
- Administrative and correspondence time 16.1 hours a month
- Productive hours 173.3 hours a month

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary would be employed in a qualifying managerial capacity within one year of commencing operations in the United States.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations may be engaged in a variety of low-level 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 that first year. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary in a qualifying managerial or executive position.

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.*

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must

clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

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

The petitioner first characterized the beneficiary's role as owner and general manager and briefly described his duties in very broad terms, noting that he will organize and direct with authority; plan, implement, and monitor operation, profitability, quality service and customer relations; oversee all aspects of running a unique restaurant, including budgets, quality service, advertising, and pricing; effectively create a marketing and management program to maintain optimum occupancy levels, income, and value of company; and effectively select, hire, train, motivate, counsel, and reward employees. The petitioner initially provided a second job description for the general manager position, noting that the beneficiary will recruit, select, orient, train, assign, schedule, coach, counsel, and discipline management staff; maintain safe, secure, and healthy facility environment by establishing, following, and enforcing sanitation standards and procedures; maintain professional and technical knowledge; accomplish company goals; train and motivate staff; and plan and price items to meet profit margins. These initial descriptions are very broad and fail to include any detail or specificity as to what the beneficiary will actually do on a daily basis, which is insufficient to show that the beneficiary will primarily perform qualifying duties. The petitioner failed to document what proportion of the beneficiary's duties would consist of managerial duties and what proportion would consist of non-managerial duties. The petitioner listed the beneficiary's duties but failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because the beneficiary's proposed daily tasks, as noted above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in either a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the RFE, the petitioner provided a brief and equally vague list of job duties for the beneficiary's proposed position, and again failed to allocate percentages of time the beneficiary would spend on specific duties. The petitioner simply stated that the beneficiary will serve as the owner, president, and chief executive officer; serve as the sole manager of the organization; supervise and control the work of 13 employees (four chefs, six waiters, one cashier, one dishwasher, and one bus employee) as well as all the employees of additional restaurants which are envisioned in Oklahoma; hire, fire, promote, authorize leave, and determine pay and pay raises for all employees; and exercise discretion over the day-to-day operations of the petitioner and other restaurants which are envisioned in Oklahoma as well as the day-to-day functions of all employees. Again, although specifically requested by the director, the petitioner failed to submit a detailed description of the beneficiary's routine duties to demonstrate that he will be primarily performing qualifying

duties within one year of commencing operations in the United States. 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).

On appeal, the petitioner submits an expanded description of the beneficiary's duties in response to the director's decision. The petitioner provides the same vague description but now adds the number of hours he will devote to certain duties, such as conducts supervision and personnel management of all restaurant Managers (74.2 hours a month); conducts and manages strategic planning of [REDACTED] System (14.6 hours a month); conducts financial management of [REDACTED] System (18.9 hours a month); conducts marketing of [REDACTED] System (11.7 hours a month); conducts management of support processes of [REDACTED] System (17.4 hours a month); reporting and travel time (20.4 hours a month); and administrative and correspondence time (16.1 hours a month). Here, the petitioner has not added any detail or clarification to the beneficiary's proposed position or actual job duties. Nor did the petitioner indicate how the duties it did submit qualify as managerial or executive in nature. 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). Further, the listed duties for the beneficiary's proposed position are typical of a general manager and do not elevate him to a position that is managerial in nature.

Furthermore, it appears that the petitioner has materially changed the beneficiary's position within its organizational structure on appeal. In the initial description of the beneficiary's duties and in response to the RFE, the petitioner does not state that the beneficiary will supervise subordinate restaurant managers. In her decision, the director specifically found that the beneficiary will be performing as a first-line supervisor of non-professional staff at the end of the first year of operations. Then, on appeal, the petitioner expanded the beneficiary's duties to include the direct supervision of multiple restaurant managers and a restaurant system that it failed to describe or explain. 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).

Overall, 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).

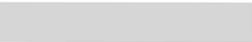
The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel

managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." See section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner failed to submit a proposed organizational chart for the U.S. company. The U.S. company's business plan did include a brief staffing plan, which indicated that it will hire one manager, four chefs, six waiters, a receptionist/cashier, a dishwasher, and a bus employee within its first year of operation. The petitioner provided brief job duties for each of the listed positions; however, the duties do not demonstrate that any of the positions will be supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. Rather, as noted by the director, the projected staffing plans submitted at the time of filing indicated that the beneficiary would act as a first-line supervisor of non-professional staff performing the day-to-day services of preparing and serving food.

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

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. See section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* Here, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its



day-to-day operations within one year. The petitioner did not indicate that the beneficiary would oversee management staff who would hand reoutine oversight of kitchen and wait staff or otherwise relieve him from involvement in the day-to-day operations of the restaurant.

Based on the evidentiary deficiencies discussed above, we cannot conclude that the beneficiary will be employed 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. QUALIFYING RELATIONSHIP

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

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

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

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

\* \* \*

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

A. Facts

On the Form I-129, the petitioner indicated that it is an affiliate of the beneficiary's foreign employer. Where asked to explain the company stock ownership and managerial control of each company, the petitioner stated, "[the petitioner] is owned 100% by the applicant [the beneficiary]."

In its initial letter of support, the petitioner described both companies and the qualifying relationship as follows:

[The petitioner] was created to run restaurants serving Japanese, Taiwanese, Malaysian and Korean food. The first restaurant will be located in [REDACTED] and our goal is to expand the business as a chain of restaurants based on well established market model. The start-up capital was provided by [the beneficiary] who owns 100% of the company's capital.

Our Foreign Entity is [the foreign entity], located in [REDACTED] China. It was formed in [REDACTED] by [the beneficiary] who owns 100% of the company's capital and who serves as a Chairman and CEO.

The petitioner submitted the translation of a document titled, Sole Proprietorship Enterprise Business License, dated December 26, 2011, indicating that the beneficiary is the sole proprietor of the foreign entity.

The petitioner submitted the following documents pertaining to its U.S. company:

- A Certificate of Incorporation, dated November 24, 2012, for [REDACTED]
- An Oklahoma Secretary of State Electronic Filing of Certificate of Incorporation, dated November 24, 2012, for [REDACTED], specifically stating that it is authorized to issue 100 total shares of common stock at \$1.00 par value.
- A copy of Share Certificate Number 0001, dated November 24, 2012, issuing 100 shares of [REDACTED] to the beneficiary.
- A Trade Name Report, dated September 25, 2013 and signed by [REDACTED] as President, indicating that [REDACTED] will carry out business under the trade name of "[REDACTED]"
- An Amended Certificate of Incorporation, dated November 19, 2013, for [REDACTED]
- A Certificate of Good Standing, dated November 19, 2013, for [REDACTED]

The petitioner's business plan describes its required start-up capital, investments, and ownership as follows:

[REDACTED] and [the beneficiary] formed [the petitioner] on November 24, 2012 in [REDACTED], Oklahoma. At that time [the beneficiary] invested \$100,000.00 start-up capital and he has made a commitment to invest another \$300,000.00 in the coming months. The investment is placed at risk and is not recoverable in the event the business should fail.

The petitioner submitted a "funds transfer notification" to its account for the following transactions:

- Received November 7, 2013 for \$29,988.00 from the beneficiary, listing [REDACTED] as the beneficiary.

- Received October 16, 2013 for \$3,857.22 from [REDACTED] as the beneficiary.
- Received August 19, 2013 for \$4,158.81 from [REDACTED] as the beneficiary.
- Received August 23, 2013 for \$19,988.00 from [REDACTED] as the beneficiary.
- Received May 8, 2013 for \$3,501.96 from [REDACTED] as the beneficiary.
- Received April 16, 2013 for \$37,988.00 from the beneficiary, listing [REDACTED] as the beneficiary.

The petitioner also submitted its bank statements from the [REDACTED] for the period November 29, 2012 to October 31, 2013, showing the following deposits:

- Deposit on December 11, 2012 for \$17,985.00 from the beneficiary.
- Deposit on December 13, 2012 for \$38,985.00 from the beneficiary.
- Deposit on December 20, 2012 for \$49,985.00 from [REDACTED]
- Deposit on April 16, 2013 for \$37,988.00 from the beneficiary.
- Deposit on May 8, 2013 for \$3,501.96 from [REDACTED]
- Deposit on August 19, 2013 for \$4,158.81 from [REDACTED]
- Deposit on August 23, 2013 for \$19,988.00 from [REDACTED]
- Deposit on October 11, 2013 for \$29,988.00 from [REDACTED]
- Deposit on October 16, 2013 for \$3,857.22 from [REDACTED]

It appears, based on this evidence, that the beneficiary has personally invested approximately \$94,958.00 in the petitioning U.S. company.

In response to the RFE, the petitioner submitted the following documents pertaining to its U.S. company:

- A copy of its Minutes of the Initial Meeting of the Directors of [REDACTED], dated November 24, 2012, resolving that [REDACTED] is issued 100 shares of stock for a consideration of \$500.
- A copy of Share Certificate Number 1, dated November 24, 2012, issuing 500 shares of [REDACTED] to [REDACTED]

#### B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the United States and foreign entities are qualifying organizations.

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

indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

At the time of filing, the petitioner submitted evidence supporting its claim that it has an affiliate relationship with the foreign entity. However, although not specifically requested, the petitioner submitted new evidence pertaining to its qualifying relationship in response to the RFE. The new share certificate and Minutes of the Initial Meeting submitted in response to the RFE indicate that the owner of its U.S. company is [REDACTED] and not the beneficiary as was previously claimed. This new evidence raises serious concerns as to the validity of the evidence submitted at the time of filing and calls into question the qualifying relationship enjoyed by the two entities. The petitioner did not explain why it submitted two completely different share certificates number 1, issued on the same date, reflecting different information. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the RFE, the petitioner submitted a letter describing the beneficiary's proposed duties at its U.S. company. The letter is dated June 10, 2014 and signed by [REDACTED] as "current owner and president" and by the beneficiary as "future owner and president." This statement further raises concern as to the actual ownership and control of the U.S. company. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Based on the evidentiary deficiencies and inconsistencies discussed above, the evidence on record does not support the petitioner's claim that the U.S. and foreign entities have an affiliate relationship. As such, the petitioner has not met its burden to establish that the U.S. and foreign entities have a qualifying relationship. For this additional reason, the petition cannot be approved.

#### IV. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the petitioner has not established that the beneficiary has been employed abroad in a position that was managerial or executive, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

The petitioner first characterized the beneficiary's role as chairman and CEO and failed to provide a description of the beneficiary's position abroad. The beneficiary's resume noted that he presided over all meetings and made decisions; reviewed and signed all important documents; was in charge of product development, sales, market trends, company investment planning, marketing decisions, and feasibility review; controlled the operation of the financial capital and the financial activity of the company; was responsible for personnel transfers; made decisions of company management personnel employment, wages, benefits, and payments; audited company planning goals; and presided over the activities inside and outside the company. The petitioner did not provide any details or specific tasks related to his briefly listed duties, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Further, although the

petitioner submitted an organizational chart showing the beneficiary at the top tier of the hierarchy with at least eight employees, the petitioner failed to submit any information relating to the subordinate employees at the foreign entity who would carry out the tasks associated with the day-to-day activities of the company, such as producing a product or providing a service, in order to relieve the beneficiary from performing non-qualifying operational and administrative tasks. This is particularly important because the petitioner's description of the beneficiary's duties abroad fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*. 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). As such, the petitioner has not demonstrated that the beneficiary functions in a managerial or executive capacity at the foreign entity.

Based on the evidentiary deficiencies discussed above, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved.

#### V. CONCLUSION

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

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.