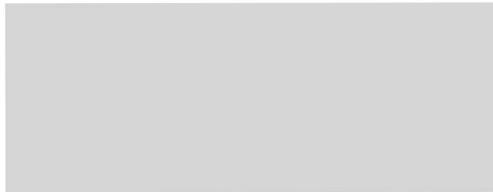


**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

(b)(6)



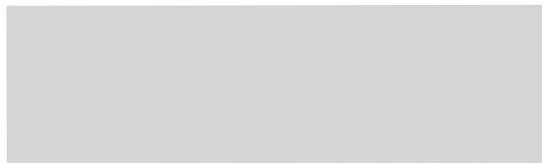
DATE: **MAY 26 2015**

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner:  
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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas limited liability company, states that it engages in "retail trade." The petitioner claims to be a subsidiary of [redacted] located in [redacted] Pakistan. The petitioner seeks to employ the beneficiary as the president/CEO of its new office in the United States.

The director denied the petition on three alternative grounds, concluding that the evidence of record did not establish that: (1) the petitioner has secured sufficient physical premises to house the new operation; (2) the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization; and (3) the beneficiary was employed in a managerial or executive capacity by a qualifying organization abroad.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office for review. On appeal, the petitioner asserts that it acquired sufficient physical premises and that the beneficiary was employed for one year in an executive capacity abroad. The petitioner submits a brief and duplicate copies of previously submitted evidence in support of the appeal.

## I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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 ISSUES ON APPEAL

### A. Physical Premises

The first issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

#### 1. Facts

The petitioner filed the Form I-129 on August 16, 2013, and therefore must establish that it satisfied the requirements at 8 C.F.R. § 214.2(l)(3)(v)(A) as of this date. 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. 1978).

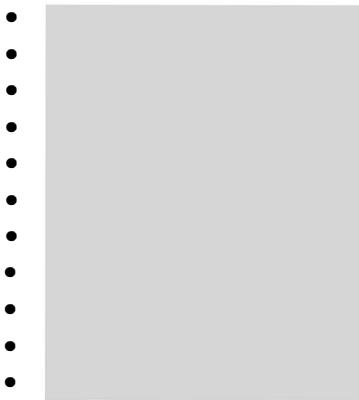
On the Form I-129, the petitioner indicated its address as " [REDACTED] Texas [REDACTED]" The petitioner submitted a copy of its lease at the listed address for an office space of "approximately 1,000 square feet, designated as Unit #506." The lease lists the landlord as " [REDACTED]" and the tenant as " [REDACTED]" The lease commences on July 1, 2013 for a one-year term and continues on a month-to-month basis thereafter. The entire lease agreement is two pages.

The director issued a request for evidence ("RFE") on January 14, 2014, advising the petitioner that there were multiple irregularities found with the submitted lease agreement with [REDACTED]. The director noted that there is no evidence in the record to establish that [REDACTED] owns the property being leased or is otherwise authorized to lease said property, nor is there evidence that a lease has actually been executed, such as monetary transactions. The director further noted that public records appear to indicate that the proposed space to be leased may be a storage facility and may not be zoned for commercial use. The director instructed the petitioner to submit photos of the leased property as well as evidence that the space has been zoned for commercial use by the city of [REDACTED] Texas.

In response to the RFE, the petitioner submitted a copy of a new lease agreement between [REDACTED] and [REDACTED] for the premises located at [REDACTED], Texas [REDACTED]. The lease specifically states that it is for approximately 1,872 square feet of interior space. The lease is signed, and thereby executed, on October 16, 2013, and the document indicates, per addendum, that possession of the leased premises will commence on December 1, 2013. The petitioner also submitted copies of three checks, numbers 0993, 0994, and 0995, dated October 10, 2013, December 1, 2013, and January 1, 2014, with the same account number but not listing the account holder's name, each payable to [REDACTED] in the amount of \$3,300.00.

The petitioner submitted photos of a storage space lined with rows of boxes from floor to ceiling, the outside of a retail space with advertisements for electronic products, the inside of a retail space with electronic products and a marquee reading "[REDACTED]" and the outside of a commercial building showing a cut-off name ending in "[REDACTED]" and a large sign, which appears to reference the building itself and all of its retailers, reading as follows:

[Partial cut-off name] [REDACTED]



The director denied the petition on May 8, 2014, concluding, in part, that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director observed several discrepancies in the petitioner's initial lease commencing on July 1, 2013 and found that the petitioner failed to address those inconsistencies. The director found that, despite raising these concerns in the RFE, the petitioner's new lease commencing on October 16, 2013 was not in place at the time of filing the petition on August 16, 2013, and therefore not sufficient to establish eligibility for the benefit sought.

On appeal, the petitioner contends that it is uncertain of the director's concerns regarding its physical premises. The petitioner specifically states:

At the time filing [sic], Petitioner was housed in a temporary location while the permanent showroom and office facilities were being built. In response to request for evidence we provided Commercial Lease, Photographs, and rental payments.

\* \* \*

We are not sure what Service's concern is. It is very clear from the evidence in record that Petitioner has invested, acquired Physical premises, and created jobs to help the U.S. economy. It seems rather harsh that they will penalize Petitioner to start from a temporary location while building a permanent facility. Obviously the company cannot establish the new facility and then start managing. The management of the construction has to come prior to obtaining the facility and that is what Petitioner has done as would any other company in their position.

## 2. Analysis

Upon review, the petitioner has not established that it had secured sufficient physical premises to house the new office prior to filing the petition.

We acknowledge that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective, leaving flexibility in adjudicating this legal requirement. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations.

Here, the petitioner initially submitted a lease for 1,000 square feet of space with [REDACTED]. The petitioner did not describe the premises nor did it explain how the premises would be sufficient for it to conduct its business. When the director advised the petitioner that this evidence was not sufficient and requested additional information, rather than provide the additional information requested by the director, the petitioner submitted a newly-executed lease between [REDACTED] presumably the beneficiary, and [REDACTED] for 1,872 square feet of interior space. The new lease was executed on October 16, 2013, exactly two months after the petitioner filed the instant petition. Further, the photos of the claimed physical premises raise additional concerns regarding the petitioner's business and whether it is actually conducting business at said premises, rather than alleviating the concerns outlined by the director.

Furthermore, the petitioner states that it will hire ten employees by the end of the first year of operations. According to its organizational chart, the petitioner will hire an "admin & HR officer," a sales manager, a procurement officer, a "manager officer" with an assistant, both reporting to the "admin & HR officer;" three

sales representatives, reporting to the sales manager; and one procurement assistant representative, reporting to the procurement officer. However, the photos submitted of the claimed physical premises and the lack of a floor plan or other explanation to clarify where these employees will work given the retail space pictured prevents us from reasonably determining that an executive and at least three managers will share the physical premises in a retail setting. 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)).

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Due to the inconsistencies and deficiencies detailed above, the petitioner has not established that it had secured sufficient physical premises to house the new office as of the date of filing the petition. Accordingly, the appeal must be dismissed for this reason.

#### B. Employment Abroad for One Year

The second issue addressed by the director is whether the petitioner established that the beneficiary was employed on a full-time basis by a qualifying foreign entity for one continuous year within the three year period preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

##### 1. Facts

On the L Supplement to the Form I-129, the petitioner stated that the beneficiary was employed by the foreign entity from 1995 to 2013 with no interruptions. In its initial letter of support, the petitioner again stated that the beneficiary has worked as the head of operations at the foreign entity since 1995.

The petitioner submitted the beneficiary's resume embedded in its business plan as Appendix A. The beneficiary's resume states that she has been the "GM" of the foreign entity from 2010 to date (the business plan is dated July 15, 2013).

The petitioner submitted a document titled "Salary certificate" from the foreign entity, signed by [REDACTED] General Manager, certifying that the beneficiary "has been working with [the foreign entity] since January 2009 as Finance Manager." The petitioner also submitted an organizational chart for the foreign entity depicting the beneficiary at the top tier of the hierarchy as the "Operation Head." The organizational chart does not list [REDACTED] in any position.

The petitioner also submitted ten handwritten "Debit Vouchers," representing payments made to the beneficiary for 120,000 Indian Rupees in September, October, November, and December of 2012, and in January, February, March, April, May, and June of 2013. The "Payer" in each of the debit vouchers is not

listed. Each of the handwritten debit vouchers, except for June 2013, bear the signature of [REDACTED] (same as that on the salary certificate referenced above) on the line for "Prop. Manager." The debit voucher for June 2013 is not signed by anyone.

In the RFE, the director advised the petitioner that the employment verification letter and debit vouchers submitted are internally generated documents that were not supported by corroborative evidence in the record that would establish that the beneficiary has one continuous year of full-time employment abroad with a qualifying organization, and that the employment had occurred within the three years before her application for admission to the United States. The director instructed the petitioner to submit evidence to satisfy this requirement.

In response to the RFE, the petitioner submitted a letter, dated April 8, 2014, addressing the beneficiary's foreign employment. Specifically, the petitioner stated:

[The beneficiary] has worked as the Head of Operations of [the foreign entity] since 1995 .... Since 2009, [the beneficiary] has added responsibility of a Finance Manager. Currently, prior to temporary relocating to U.S., she had dual responsibilities as Head of Operations and Finance.

The petitioner also submitted a "payroll sheet" for the foreign entity listing 18 employees, including the beneficiary. The payroll sheet lists each month in 2013 and includes an amount of 100,000.00 (in unknown currency) for the beneficiary each month.<sup>1</sup>

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary has at least one continuous year of full-time employment abroad with a qualifying organization. In denying the petition, the director observed that the petitioner solely submitted internally generated documents as evidence of the beneficiary's employment abroad. The director found that the employment verification letter, written by the beneficiary's husband, and the handwritten debit vouchers were internally generated documents that were not supported by corroborative evidence in the record to establish the beneficiary's one year of continuous employment abroad with a qualifying organization.

On appeal, the petitioner asserts that the beneficiary was employed in a qualifying capacity by the foreign entity, but fails to specifically address the director's findings regarding the beneficiary's actual employment at the foreign entity for one continuous year. The petitioner simply refers to a letter from the foreign entity's "auditors" stating that the beneficiary has received a "regular salary" from the foreign entity in 2011 and 2012. In support of the appeal, the petitioner submits a letter from [REDACTED] Chartered Accountants, Audit, Corporate, Taxation & Financial Consultants, dated July 5, 2014. The letter states the following:

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<sup>1</sup> We note that the debit vouchers previously discussed demonstrate monthly payments to the beneficiary in the amount of 120,000 Indian Rupees from January to June of 2013. There is no explanation as to why the payroll sheet for 2013 lists payments to the beneficiary in a different amount (100,000 in unknown currency) during this same time period.

This is to certify and confirm that the amount . . . was paid/earned as Salary for June 30, 2011 & 2012. The Certificate has been issued on the basis of Salary Certificate provided by [the beneficiary] . . . Head of operations [redacted]

We further confirm that [the beneficiary] has filed tax returns for the Tax year 2011 & 2012.

## 2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary has one year of continuous employment with a qualifying organization abroad.

To review the required one year of continuous employment abroad, we must count back three years from the date that the petition is filed. The regulation at 8 C.F.R. § 214.2(1)(3)(iii) clearly requires that an individual petition filed on Form 1-129 be accompanied by evidence that the beneficiary "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." The definition of "intracompany transferee" also indicates that, if the beneficiary has been employed abroad continuously for one year by a qualifying organization within three years preceding the time of the beneficiary's "application for admission into the United States," the beneficiary may be eligible for L-1 classification. 8 C.F.R. § 214.2(1)(i)(ii)(A).<sup>2</sup>

Here, the petitioner submitted inconsistent statements regarding the beneficiary's employment at the foreign entity. First, the petitioner claimed that the beneficiary had been employed as the head of operations of the foreign entity from 1995 to 2013. Then, the beneficiary's resume states that she had been employed as the general manager of the foreign entity from 2010 to the present (July 2013). The salary certificate from the foreign entity, signed by [redacted], General Manager, certified that the beneficiary had been employed as the finance manager since January 2009. Further, the handwritten debit vouchers claim that she was compensated by someone from September 2012 to June 2013 and are signed by [redacted]. However, the organizational chart for the foreign entity shows the beneficiary as the "Operation Head" and does not list [redacted] in any position. This raises serious concerns regarding the validity of the salary certificate from the foreign entity and the handwritten debit vouchers submitted as evidence of her employment abroad. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Furthermore, the "debit vouchers" are internally generated and handwritten documents, and the petitioner has not provided any corroborating evidence, such as evidence of tax filings or bank accounts, to verify that these vouchers represent actual salary payments. The Board of Immigration Appeals has held that testimony should

<sup>2</sup> We note that counsel for the petitioner erroneously references the regulation at 8 C.F.R. § 204.5(j)(3)(i) in his appeal brief, which is not applicable to the matter currently before us.

not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.*; *see also Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998) (noting that there is a greater need for corroborative evidence when the testimony lacks specificity, detail, or credibility).

Due to the deficiencies and inconsistencies detailed above, the petitioner has not established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization. Accordingly, the appeal will be dismissed.

### C. Employment Abroad in a Managerial or Executive Capacity

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

#### 1. Facts

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

[The beneficiary] has worked as the Head of Operations in [the foreign entity] since 1995, and has played a key role in its success and business development. As an Executive presiding over a company with numerous employees and several locations, she supervised dozens of employees in upper management, including areas such as: business policy development, short and long term evaluation to make managerial and financial decisions, devising novel quality products and services, and creating new means of operating and functioning of optimum efficiency in an evolving market. Negotiating contracts with suppliers and clients for the distribution and marketing of computers accessories and networking, she became the primary liaison between the company and its clientele/consumer base, understanding the market on a micro and macro level.

... As Head of Operations, she was not only an integral part of the Executive Team, but all those in first-level managerial positions also reported to him [sic], including facets such as Finances, Sales, Marketing, Human Resources, and Production; these managers/officers in turn supervised and dealt with any second-level managers and lower-level employees. She was further responsible for the policies and business ethics that surrounded daily duties and obligations required by all persons and operations throughout the organization of the company. Collaborating with other executive-level employees, she developed and implemented marketing strategies utilizing current market information, consumer analysis, competitive and economic conditions, and innovative marketing and products. Furthermore, [the beneficiary] successfully represented his [sic] company as she conferred with appropriate

officials regarding: governmental regulations, domestic trade policies, domestic distributors, international distributors, and international trade policies.

As previously noted, the petitioner submitted the beneficiary's resume embedded in its business plan as Appendix A, which indicated that she has been the "GM" of the foreign entity from 2010 to date (the business plan is dated July 15, 2013). The resume outlines the beneficiary's duties and responsibilities in that position as follows:

- Responsible for overall planning management and control of financial resources and of human and material resources of the organization;
- Responsible for the day-to-day management and the staff;
- Take strategic overview and planning ahead to maximize profits;
- Managing budgets and financial plans and controlling expenditure;
- Recruiting, training and monitoring staff;
- Planning work schedules for individuals and teams;
- Completing a wide range of other administrative and managerial tasks;
- Set the direction and oversee the operations of the organization, formulate policies and implement plans;
- Setting and achieving sales and profit targets, manage profitability and growth by setting profit objectives, compare results to industry, set sales objectives, evaluate dependency on single product/customer, analyze market share & profitability by product line;

In addition, I also look after the management of the sister concerns of [the foreign entity] namely [REDACTED] where I perform the similar duties. However, my main focus remains on the planning and full time management of the main business [the foreign entity].

The petitioner also submitted an undated organizational chart for the foreign entity depicting the beneficiary at the top tier of the hierarchy as the "Operation Head" directly supervising [REDACTED] shareholder. The chart shows that the shareholder supervises the business development director, who supervises a marketing director and a technical director. The marketing director supervises [REDACTED] general manager, who supervises a sales head with three sales persons. The technical director supervises [REDACTED] technical department, who supervises a tech assistant.

In the RFE, the director advised the petitioner that the submitted description of the beneficiary's employment abroad was vague, generalized, and written by the beneficiary. The director pointed out inconsistencies in the record and noted that the petitioner did not submit descriptions of the beneficiary's subordinate employees' duties or evidence of their actual employment.

In response to the RFE, the petitioner described the beneficiary's position abroad as follows:

[The beneficiary] has worked as a Head of Operations of [the foreign entity] since 1995, and has played a key role in its success and business development. Since 2009, [the beneficiary]

has added responsibility of a Finance Manager. Currently, prior to temporary relating to U.S., she had dual responsibilities as Head of Operations and Finance. While working with the parent, she developed, implemented, and consistently applied business-related policies to optimize the quality of the organization as well as its employees. She also negotiated contracts and promoted sales of products and services, and was responsible for the recruitment of managers who operated the daily business. In addition, [the beneficiary] developed and implemented marketing strategies utilizing current market information, competitive and economic conditions, and innovative programs. Furthermore, [the beneficiary] developed pricing strategies, and responded to internal and external customer inquiry. She also met with the appropriate officials to: (i) propose transactions; (ii) negotiate confidentiality and service agreements; and (iii) coordinate the due diligence process with in-house counsel and outside auditors; she also directed the preparation and completion of sale contracts and other related documents.

The petitioner also submitted a letter from the foreign entity, dated April 1, 2014 and signed by [redacted] Managing Partner, describing the beneficiary's duties at the foreign entity as follows:

Head of Operations/Finance Manager of [the foreign entity] as an Executive Position

- Serving as the key U.S. contact for the shareholders and directors of the parent company;
- Planning and developing the U.S. investment;
- Developing, organizing and establishing operations pertaining to the purchase, sale and marketing of merchandise for sale in the U.S. market;
- Identifying, recruiting and building a management team and staff with background and experience in the U.S. retail market;
- Overseeing manager who in turn supervise subordinate employees in running day-to-day operations;
- Executing or recommending personnel actions and establishing a management team to run daily operations;
- Negotiating and supervising the drafting of purchase agreements;
- Ensuring the marketing of products to consumers according to the parent company's guidelines;
- Overseeing legal and financial due diligence processes and resolving any related issues;
- Supervising all financial aspects of the company;
- Developing organizational policies and objectives;
- Developing trade and consumer market strategies based on guidelines formulated by the parent company;
- Negotiating prices and sales terms and formulating pricing policies and advertising techniques; and
- Developing and implementing plans to ensure the company's profitable operation.

The petitioner also broke down the above duties and vaguely expanded them in order to correlate them to the requirements for managerial capacity.

The petitioner submitted the same organizational chart for the foreign entity as previously submitted, along with brief job descriptions for each of the employees listed in positions subordinate to the beneficiary. The job description for shareholder states that the incumbent takes care of all the financing needs of the company and manages investor relations; the business development director streamlines and develops relations with new markets and the corporate sector and explores new markets for "b2b" trade growth; the marketing director and marketing manager both develop and implement the marketing strategy of the company's various products, maintain relations with vendors and plan the new marketing approach, as well as the outlook of the company including public relations activities, social media, media, and website; the technical director focuses on the technical team development and research of new product lines; and the general manager manages and stream lines all the sales and marketing activities building customer relations and providing company feedback. The petitioner did not submit job descriptions for the sales head, sales representatives, technical head, technical assistant, office person, installers, or cleaner.

The director denied the petition concluding that the evidence of record did not establish that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity or in a position involving specialized knowledge. In denying the petition, the director observed that the petitioner solely submitted internally generated documents as evidence of the beneficiary's employment abroad and duties associated with her position. The director found that the employment verification letter, written by the beneficiary's husband, and the internally generated payroll register were not supported by corroborative evidence in the record to establish that the beneficiary was employed in an executive capacity at the foreign entity. The director further found that, although requested in the RFE, the petitioner did not submit evidence that the persons listed on the foreign entity's organizational chart were actually employed by the foreign entity, and did not submit the requested position descriptions and education credentials for the beneficiary's claimed subordinates.

On appeal, the petitioner asserts that the beneficiary was employed in an executive capacity at the foreign entity. The petitioner provides the following description of the beneficiary's position abroad:

[The beneficiary] has worked as a Head of Operations and Finance for [the foreign entity] since its initiation. In that role [the beneficiary] developed, implemented, and consistently applied business-related policies to optimize the quality of the organization and employees. [The beneficiary] also negotiated service contracts and promoted sales of products and services; supervised client service; and was responsible for the recruitment, hiring, promotion, discipline, and discharge of the personnel. In addition, [the beneficiary] developed and implemented marketing strategies utilizing current market information, competitive and economic conditions, and innovative programs. Furthermore, [the beneficiary] developed pricing strategies, and responded to internal and external customer inquiry. [The beneficiary] also met with the appropriate officials to: propose transactions, negotiate confidentiality and service agreements, coordinate the due diligence process with in-house counsel and outside auditors, and direct the preparation and completion of sale contracts and other related documents.

## 2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity or in a position involving specialized knowledge.

When examining the executive or managerial capacity of the beneficiary, we look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed executive or managerial capacity of a beneficiary, including the foreign entity's organizational structure, the duties of the beneficiary's subordinate employees abroad, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the foreign entity's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

In the instant matter, the petitioner indicated that the beneficiary has been employed primarily in a managerial position, pursuant to section 101(a)(44)(A) of the Act. The petitioner first characterized the beneficiary's role at the foreign entity as head of operations and provided a vague and generalized description of her duties abroad. The petitioner noted that, at the foreign entity, the beneficiary: supervised dozens of employees in upper management, negotiated contracts with suppliers and clients, developed and implemented marketing strategies, and represented the company with appropriate officials regarding: governmental regulations, domestic trade policies, domestic distributors, international distributors, and international trade policies. This initial description is not indicative of a position where the beneficiary primarily performs qualifying duties at the foreign entity. While these tasks are undoubtedly necessary in order to continue operations, the petitioner does not articulate or otherwise explain how these duties qualify as managerial or executive in nature. Accordingly, the petitioner has not provided sufficient information regarding the beneficiary's duties at the foreign entity to demonstrate that these duties qualify her as a manager or executive.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner also fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. The petitioner listed the beneficiary's duties as including primarily operational tasks and failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because most of the beneficiary's daily tasks at the foreign entity, as noted above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary has been primarily performing duties in 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 new list of job duties for the beneficiary's position at the foreign entity that are equally as vague and generalized as the description previously submitted. Although specifically requested, the petitioner did not provide any additional details or specific tasks related to the beneficiary's briefly listed responsibilities, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Although the petitioner attempted to break down the above duties and

vaguely expand them in order to correlate them to the requirements for managerial capacity, the petitioner's description of duties fails to provide any detail or explanation of the beneficiary's actual claimed managerial activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 , 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

When asked to submit a comprehensive description of the beneficiary's job duties abroad and a percentage of the allocation of time devoted to each listed duty, the petitioner submitted a new list of job duties and a brief breakdown vaguely correlating some of the duties to the requirements for managerial capacity. The new list of duties failed to offer any clarification as to the beneficiary's actual duties abroad and fell considerably short of satisfying the director's request for a comprehensive description of the beneficiary's duties. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Although afforded a second opportunity to provide the deficient information, the petitioner did not provide any detail or explanation of the beneficiary's activities in the course of both her current and proposed daily routine. 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). The vague description of the beneficiary's position abroad does not demonstrate that the beneficiary focuses the majority of her time on managerial duties rather than the day-to-day operations of the business.

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

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

Here, foreign entity's organizational chart shows that the beneficiary supervises several subordinate managers. The job descriptions submitted by the petitioner simply state that the minimum educational qualification required for entry into the positions of operational head, shareholder, business development director, marketing director, and marketing manager is "graduate." However, the petitioner does not establish what graduate degree it is referring to or why such a degree is necessary to perform the duties of the position. Moreover, the job descriptions for each of the positions do not indicate that any degree is required in order to perform the listed tasks. Accordingly, the record in this matter is insufficient to establish that any of the beneficiary's claimed subordinates' positions require a bachelor's degree, such that the individuals holding the

position could be classified as professional. Further, the position descriptions for the subordinate positions do not support a finding that these positions are professional, managerial, or supervisory positions. Thus, the record does not establish that the beneficiary's claimed subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner has not established, in the alternative, that the beneficiary is employed by the foreign entity 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 specifically 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 she manages an essential function of the foreign entity, rather than performing the duties related to the function.

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

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. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, the beneficiary has not been shown to be employed in a primarily executive capacity at the foreign entity. The petitioner failed to demonstrate that the beneficiary's duties primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the beneficiary do not demonstrate that the beneficiary will focus the majority of her time on executive duties rather than the day-to-day operations of the business.

Due to the deficiencies detailed above, the petitioner has not established that the beneficiary has been employed primarily in a qualifying managerial or executive capacity or in a position involving specialized knowledge at the foreign entity. Accordingly, the appeal will be dismissed.

### III. EMPLOYMENT IN THE UNITED STATES IN A MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition.

#### A. Facts

On the Form I-129, the petitioner stated that the beneficiary will be employed as president/CEO of the U.S. company and indicated that the company has eight projected employees and a projected gross annual income of \$500,000. In its initial letter of support, dated August 15, 2013, the petitioner described the beneficiary's proposed position as follows:

On a more specific level, his [sic] responsibilities involve the supervising of all managers and employees on both upper- and lower-management, directing all executive functions of [the petitioner] while simultaneously protecting the investments of both the subsidiary and the parent company. In addition to ensuring profitability and efficiency of the businesses, [the beneficiary] will also take a broader approach in establishing the goals for the short- and long-term. Policies and procedures will need to allow room for growth and further diversification into the U.S. trade and retail market while incorporating the needs, priorities, and advice of [the foreign entity]. As a President/CEO, one of his [sic] major responsibilities involves being a liaison between the subsidiary and the parent company. . . .

Overall, [the beneficiary] will have the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, determining [the petitioner's] future investments, conducting feasibility and market studies of future investments, advising owners of the Parent Company on where to further invest, supervising all financial aspects of the company and developing policies and objectives for the company. Although [the foreign entity] will retain complete control over its subsidiary's ultimate financial and managerial decisions, [the beneficiary] will also have the responsibility to map out consensual short and long-term goals, incorporating the input and advice of shareholders of [the foreign entity] in Pakistan.

As President and CEO of [the foreign entity's] United States subsidiary, [the petitioner], [the beneficiary] has been and will continue to be responsible for:

- Serving as the key U.S. contact for the shareholders and directors of the parent company;
- Planning and developing the U.S. investment;
- Developing, organizing and establishing operations pertaining to the purchase, sale and marketing of merchandise for sale in the U.S. market;
- Identifying, recruiting and building a management team and staff with background and experience in the U.S. retail market;
- Overseeing manager who in turn supervise subordinate employees in running day-to-day operations;
- Executing or recommending personnel actions and establishing a management team to run daily operations;
- Negotiating and supervising the drafting of purchase agreements;
- Ensuring the marketing of products to consumers according to the parent company's guidelines;
- Overseeing legal and financial due diligence processes and resolving any related issues;
- Supervising all financial aspects of the company;
- Developing organizational policies and objectives;
- Developing trade and consumer market strategies based on guidelines formulated by the parent company;
- Negotiating prices and sales terms and formulating pricing policies and advertising techniques; and
- Developing and implementing plans to ensure the company's profitable operation.

\* \* \*

[The beneficiary's] employment as CEO/President will afford her complete authority to establish goals and policies and exercise discretionary decision-making authority based upon policies and procedures developed by shareholders. She will further assume sole responsibility of all discretionary actions regarding profitable operations taken by the U.S.-based entity. [The beneficiary] will also supervise other professional and managerial employees, establish goals and policies for investment in the United States, and exercise wide latitude in discretionary decision-making under the mentoring of directors and shareholders of the Parent Company. The beneficiary's duties, therefore, are clearly "Executive or Managerial" in nature and are consistent with [the Act].

The petitioner's letter went on to provide broad duties, along with brief descriptions for each section, with accompanying percentages of time and hours the beneficiary will devote to each. However, the petitioner's letter is missing page six, and therefore the list and accompanying percentages appear to be incomplete; page five indicates that the beneficiary will devote 25%, or 10 hours a week, of her time to

"management/operational decisions and conducting due diligence for acquisitions of outlet" and 35%, or 12 hours a week, of her time to "combined company representation and business negotiations (contract negotiations and developing trade and marketing strategies)."

The petitioner's business plan, dated July 15, 2013, specifically states that the petitioner "will have a retail store-front for I.T. individuals and walk-in customers, which will act as the main form of distribution." The business plan describes the petitioner's marketing strategy and specifically lists marketing methods such as "cold calling and direct mail to dealers and stores across the country." The business plan further indicates that the petitioner will hire one owner, one technician, and one retail position in year one, an additional retail position in year two, an additional part-time technician and retail position in year three, a change from part-time to full-time technician in year four, and will maintain the same in year five. The business plan states that the beneficiary intends to utilize "outside professional advisors" such as a bookkeeper and accountant, a marketing professional for brand image consultation and development, and a lawyer for legal matters.

In the RFE, the director advised the petitioner that its business plan indicated that the beneficiary would be managing two individuals within the first year of operation but failed to describe the proposed duties or expected qualifications for those positions. The director instructed the petitioner to submit a detailed description of all the employees that the company intends to hire within the next year.

In response to the RFE, the petitioner submits a letter, dated April 8, 2014, and states that it started operations in [REDACTED] and intends to hire 10 employees by the end of the first year. The petitioner goes on to state that "[the beneficiary's] role presides over employees that handle a breadth of what functions are necessary for successful business development."

The petitioner submitted pay stubs for [REDACTED] for the period of February 1, 2014 to February 28, 2014 and March 1, 2014 to March 31, 2014, along with a copy of a certificate from the University of [REDACTED] indicating that [REDACTED] earned a Bachelor of Commerce on November 30, 1988. The petitioner did not indicate [REDACTED]'s actual position at the U.S. company.

The petitioner also submitted a letter from the foreign entity, dated April 1, 2014 and signed by [REDACTED] Managing Partner. This letter provided a description of the beneficiary's proposed duties in the United States that was identical to the description provided in the initial letter of support. However, the petitioner did not provide the same allocation of the percentage of time the beneficiary devotes to her duties in order to complete the missing information contained in page six of the initial letter of support. The petitioner did break down the listed duties and vaguely expanded them in order to correlate them to the requirements for executive capacity.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary at the top tier of the hierarchy as president/CEO, directly supervising an "admin & HR officer," a sales manager, and a procurement officer. The chart indicates that the "admin & HR officer" supervises a "manager officer" who supervises an assistant; the sales manager supervises three sales representatives; and the procurement officer supervises a procurement assistant and representatives.

On appeal, although not an issue listed in the director's decision, the petitioner reiterates the same description of the beneficiary's position in the United States provided with the petition and in response to the RFE, and asserts that the evidence of record establishes that the beneficiary will be employed in an executive capacity.

#### B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a managerial or executive position within one year of beginning operations for the United States business entity.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial/executive responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily 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.*

On review, the petitioner's brief description of the beneficiary's duties does not establish that the beneficiary will be engaged in either a qualifying managerial or executive position. While the petitioner provided a list of the beneficiary's proposed responsibilities, the majority of the duties described therein is overly broad and general and thus provide little insight into what the beneficiary will actually do on a day-to-day basis by the end of the first year of operations. For example, the petitioner states that the beneficiary will plan and develop the U.S. investment; oversee managers; negotiate and supervise the drafting of purchase agreements; ensure the marketing of products to consumers according to the parent company's guidelines; oversee legal and financial due diligence processes and resolve any related issues; and develop and implement plans to ensure the company's profitable operation. The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. Specifics

are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

Furthermore, the petitioner failed to submit details about the positions subordinate to the beneficiary in order to establish that the proposed subordinate positions are professional, managerial, or supervisory positions. The petitioner has not established that the proposed subordinate staff will relieve the beneficiary from performing non-qualifying operational and administrative duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Overall, the position description alone is insufficient to establish that the beneficiary's duties will 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 will realistically develop to the point where it will 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.

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. The petitioner is required to describe the nature of the office, the anticipated scope of the entity, its proposed organizational structure and its financial goals. See 8 C.F.R. § 214.2(l)(3)(v)(C).

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. In its business plan, the petitioner indicated that the nature of its business is a retail store-front for I.T. individuals and walk-in customers, which will act as the main form of distribution. Again, it describes its marketing strategy as "██████████".

However, the petitioner failed to establish who will provide these services, which are the core of its business. The business plan further indicated that the petitioner will hire one owner, one technician, and one retail position in year one to support the beneficiary as the president/CEO of its company. As there is no other staff to perform the core tasks related to its business, it is reasonable to expect that the beneficiary will be providing the actual consulting services of the business. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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").

Due to the deficiencies detailed above, the petitioner has not met its burden to establish that it will employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition. For this additional reason, the petition cannot be approved.

#### IV. QUALIFYING RELATIONSHIP

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

##### A. Facts

The petitioner stated on the Form I-129 that it has a subsidiary relationship with the foreign entity, and stated "[the foreign entity] (Pakistan) owns 51% shares of the Petitioner[.] Beneficiary owns 49% shares of the Petitioner[.]"

At the time of filing, the petitioner did not submit any evidence documenting the total number of shares it is authorized to issue. The petitioner submitted a document titled Minutes of Reorganizational Meeting, dated July 30, 2013, resolving that it will issue 51% (510) of its authorized stock to the foreign entity in Pakistan, and 49% (490) of its authorized stock to the beneficiary. The petitioner submitted a document titled Securities Register indicating that the foreign entity in Pakistan was issued certificate number one for 510 shares on July 30, 2013, and the beneficiary was issued certificate number two for 490 shares on July 30, 2013. The petitioner submitted a copy of certificate number one indicating that the foreign entity was issued 510 shares on July 30, 2013. The petitioner also submitted a copy of certificate number two issued to the beneficiary on July 30, 2013; however, certificate number two contains a discrepancy in the number of shares issued. The number on the top right of the certificate shows 490, but the number as written in the text of the certificate states "four hundred and ten."

The petitioner's business plan states the following regarding its start-up costs:

Start-up costs include \$77 thousand in capital assets and \$73 thousand in initial operating costs. These will be financed through \$150 thousand in personal equity and \$10 thousand through bank financing.

(b)(6)

*NON-PRECEDENT DECISION*

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\* \* \*

The cost of startup will be approximately \$149,000 and will include the following . . .

\* \* \*

The startup costs will be funded through the following sources:

Equity	150,000
Bank	<u>10,000</u>
	160,000

[The petitioner] will also require a minimum of \$10,000 in working capital financing for other operating costs.

\* \* \*

The first year budget will be as follows:

Website Development	5,000
Grand Opening Event	5,000
Advertising	3,000
Brochure Development	1,000
Yellow Pages	<u>1,000</u>
	15,000

The petitioner submitted its bank statement, dated August 13, 2013, indicating a balance of \$67,954.49 in its checking account and a balance of \$500.00 in its investment account. The petitioner submitted an additional bank statement page showing a "teller transaction credit on 08/09 (made after business hours)" in the amount of \$68,000.00. The credit transaction is marked as "pending" in the bank statement.

In the RFE, the director advised the petitioner that the submitted meeting minutes and stock certificates are internally generated documents, which are not supported by corroborative evidence in the record that would establish the claimed foreign entity is a majority owner of the U.S. company. The director instructed the petitioner to submit evidence to establish that it has a qualifying relationship with the foreign entity.

In response to the RFE, the petitioner submitted the same Securities Register and share certificates previously submitted, along with the same business plan outlining its start-up costs.

The petitioner submitted what appears to be a monetary form it claims is "proof of funds transfer." The form lists the beneficiary as [REDACTED] at [REDACTED] in Texas and an amount of 50,000.00 (in unknown currency). The form lists [REDACTED] as the applicant in [REDACTED]. At the fine print on the bottom of the form, which is illegible, there is a handwritten note of "Business Invest."

The petitioner also submitted a statement from [REDACTED] dated July 30, 2013 to August 28, 2013, for [REDACTED] in [REDACTED], Texas with an account ending in 5306. The statement shows four ATM deposits and a cash reward, totaling \$8,980.00. The statement also shows a teller transfer to an account ending in 4985 of \$68,000.00 on August 12, 2013; a second teller transfer to an account ending in 4998 of \$500 on August 12, 2013; and an online banking transfer to an account ending in 5319 of \$500 on August 27, 2013. The petitioner submitted a second statement from [REDACTED] dated July 28, 2012 to August 29, 2012, for [REDACTED] in [REDACTED] Texas (same account). The statement shows one teller transfer deposit of \$27,000.00 on August 17, 2012. The petitioner submitted a third statement from [REDACTED] dated January 6, 2012 to January 27, 2012 for [REDACTED] in [REDACTED] Texas (same account). The statement shows three ATM deposits, one on January 6, 2012 and two on January 17, 2012, totaling \$9,215.00, and one teller transfer deposit of \$11,500.00 on January 17, 2012.

The petitioner submitted a statement from [REDACTED] dated August 9, 2013 to August 31, 2013, for its U.S. company in [REDACTED] Texas with an account ending in 4985. The statement shows one teller transfer deposit of \$68,000.00 on August 12, 2013 and one ATM deposit of \$740.00 on August 21, 2013.

On appeal, the petitioner submits a copy of its 2013 IRS Form 1065, U.S. Return of Partnership Income, showing a discrepancy at Schedule B, which includes questions related to the petitioner's ownership and control. The petitioner marked "no" at question 3 which asks, "[a]t the end of the tax year: **a.** [d]id any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization, or any foreign government own, directly or indirectly, an interest of 50% or more in the profit, loss, or capital of the partnership?" The petitioner then marked "yes" at question 3 which asks, "[a]t the end of the tax year: **b.** [d]id any individual or estate own, directly or indirectly, an interest of 50% or more in the profit, loss, or capital of the partnership?"

#### B. Analysis

Upon review, the evidence in the record is insufficient to establish that the petitioning U.S. company has a qualifying parent/subsidiary relationship with the foreign entity.

In this case, the record contains contradictory evidence and fails to demonstrate the actual ownership of the petitioner. The discrepancy in the share certificate and the questions at Schedule B of the 2013 IRS Form 1065, raises serious concerns regarding the petitioner's actual ownership and control. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Furthermore, according to the petitioner's business plan, it requires \$149,000 in start-up capital, which is to be provided primarily through personal equity. The petitioner did not provide any explanations or clarifications as to its financial investment and acquisition of start-up capital. The petitioner's bank statement indicates that there was one "teller transaction credit" on August 12, 2013 for \$68,000. Although there is a statement from

an account that appears to belong to the beneficiary showing a transfer of \$68,000.00 to an account ending in 4985, which the petitioner's account ends in, the petitioner has not shown specifically where the money for that credit transaction came from or how it would acquire the outstanding \$81,000 in start-up costs illustrated in its business plan. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

At this time, we cannot determine whether the claimed parent company has made any capital contributions to the petitioning U.S. company, thus the petitioner's claim that the foreign entity has a parent/subsidiary relationship with the petitioning U.S. company has not been established. As previously stated, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Due to the deficiencies and inconsistencies detailed above, the petitioner has not met its burden to corroborate its claimed qualifying relationship with the foreign entity. For this additional reason, the petition may not 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 our office 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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.