



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 01 2014** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

SELF-REPRESENTED:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a Form I-140, Immigrant Petition for Alien Worker, to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The petitioner is a Florida limited liability company that claims to be a subsidiary of [REDACTED] the beneficiary's former foreign employer located in Mexico. The petitioner operates a tanning and beauty salon and seeks to employ the beneficiary as its "manager executive."

On August 21, 2013, the director denied the petition concluding that the petitioner failed to establish: (1) that it has a qualifying relationship with the foreign entity; (2) that it would employ the beneficiary in a qualifying managerial or executive capacity; and (3) that it has the ability to pay the beneficiary the proffered wage. The director further found that the petitioner failed to establish that the beneficiary was employed abroad for at least one year by the parent, affiliate or subsidiary of the petitioner, as required by 8 C.F.R. § 204.5(j)(3)(i)(B). This finding was based on the petitioner's failure to establish its qualifying relationship with the beneficiary's employer in Mexico.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director erred in determining that the beneficiary would not be employed in a qualifying managerial or executive capacity. Specifically, the petitioner states that the petitioner submitted a detailed description of the beneficiary's duties which supports a finding that the beneficiary "can easily be deemed a functional manager." The petitioner does not directly address its qualifying relationship with the foreign entity or its ability to pay the beneficiary's proffered salary.

I. THE LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate

or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140, Immigrant Petition for Alien Worker, for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

II. QUALIFYING RELATIONSHIP

The first issue to be addressed is whether the petitioner has established that it has a qualifying relationship with the foreign entity, [REDACTED]. 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. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

Affiliate means:

- (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
- (B) 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;

* * *

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

A. Facts

In a letter accompanying the Form I-140, the petitioner claimed to be a subsidiary of [REDACTED]. The petitioner is engaged in the tanning and beauty business and refers to the foreign entity as its "headquarters."

The petitioner submitted evidence that it filed its articles of organization with the Florida Secretary of State on December 9, 2010 identifying [REDACTED] as its managing members. The petitioner's 2012 limited liability company Annual Report dated January 17, 2012 indicates that its managing members are [REDACTED] and the beneficiary.

The petitioner also submitted a ten-page Spanish language document that appears to be the Mexican company's articles of incorporation. The document is followed by what appears to be a two page summarized English translation. No certification of translation was attached.

The director issued a Request for Evidence (RFE) dated March 13, 2013. The RFE asked for "the petitioner's Articles of Incorporation, the Operating Agreement (OA), meeting minutes, or other documentation that establishes ownership or control." Further, the director recognized that the petitioner already provided the Mexican company's articles of incorporation but did not include a certified English translation. The director advised the petitioner that "[i]f any document is in a foreign language, then it must be submitted along with a certified English translation."

In response to the RFE, the petitioner stated that it submitted corporation information for the foreign entity and documents to demonstrate the qualifying relationship. The petitioner provided a copy of its articles of organization, but no operating agreement or meeting minutes. The petitioner's response included a copy of its Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income for 2011 and 2012. These documents indicate that the company has two members: [REDACTED] and the beneficiary. The petitioner also provided IRS Form 8308 Report of a Sale or Exchange of Certain Partnership Interests to document the transfer in membership interest from [REDACTED] to the beneficiary on May 23, 2011.

Regarding the foreign entity, the petitioner submitted a one-page English language document titled [REDACTED]. A Florida Notary Public affixed her seal and signed her name under the statement: "I, hereby certify that the text appearing above is accurate translation of an original birth certificate in Spanish and that I am competent in both English and Spanish to render such translation." The document was dated June 6, 2013. Despite the notary public's certification that the document contains a translation of an original birth certificate in Spanish, the document contains the foreign company's name, date and place of creation, and "names of associates," and is accompanied by the previously submitted 10-page corporate document for the foreign entity. This translated document contains the following information regarding the foreign entity:

Name of the Associates	
[The beneficiary]	25 of Action
[REDACTED]	25 of Action

The director denied the petition, noting that the petitioner failed to submit the evidence requested in the RFE. The director found that the evidence of record did not support the petitioner's claim of a qualifying relationship with the foreign entity.

B. Analysis

Upon review, the petitioner has not established that it has a qualifying relationship with the foreign entity.

As general evidence of a petitioner's claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs are generally obligated by the jurisdiction of formation to maintain

records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner claimed that it was a subsidiary of the foreign entity but failed to present any evidence that the foreign entity has an ownership interest in the U.S. company.

In fact, the petitioner's evidence contradicts its claim that it is a subsidiary of the foreign entity. The limited evidence submitted suggests that the petitioner is actually owned by [REDACTED] and the beneficiary in equal shares, rather than by the foreign company. Despite the director's RFE, the petitioner failed to provide additional evidence such as its operating agreement, certificates of membership, meeting minutes or any corporate documents to support its claim that it is a subsidiary of the foreign entity. 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 petitioner submitted evidence relating to the foreign entity, however, none of the documents submitted are sufficient to meet the petitioner's burden of proof. The petitioner's summarized English translation of the foreign entity's Spanish-language articles of incorporation is insufficient. The regulations require that any document submitted to USCIS containing a foreign language shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3). The submitted summary translations do not meet these requirements and therefore will not be given any weight in this proceeding.

While the petitioner also provided a notarized document but it is unclear what the document was intended to show as the notary/translator indicated that she made the translation based on a birth certificate. The evidence presented regarding the foreign entity suggests that the petitioner may have been attempting to demonstrate that the two companies are affiliated based on the beneficiary's ownership. However, the petitioner did not assert this claim and the evidence does not support that relationship due to the deficiencies addressed above. Even if the documents regarding the foreign company were considered as probative, additional evidence would be required to establish that the beneficiary has a controlling interest in both the petitioning company and the foreign entity.

Finally, despite the director's conclusion that the petitioner failed to establish a qualifying relationship, the petitioner offered no relevant evidence or argument on appeal challenging the decision.

For the reasons discussed above, the AAO finds that the evidence submitted does not establish that the petitioner has a qualifying relationship with the foreign employer. Accordingly, the appeal will be dismissed.

III. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The second issue the director addressed was whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

A. Facts

The petitioner stated on the Form I-140 that it operates a tanning and beauty salon with eight employees. In a letter submitted in support of the petition, the petitioner stated that the beneficiary's role as manager executive would include the following duties:

[The beneficiary] will be continuing evaluating and reviewing the marketing strategies and customer service products of beauty and tanning services worldwide. She will then modify these services and develop new services and products and recommend to the [foreign entity] headquarters the appropriate service and or products not in use by that organization. . . .

In the area of human resources management, [the beneficiary] exercise authority in regard to hiring, firing, training, delegation of assignments according to capabilities, preferences and technical goals, discipline, promotions and remuneration. She conducts performance reviews and ensures that her staff followed corporate procedures.

Functioning autonomously, [the beneficiary] is responsible for managing and directing all development activities of [the petitioner] as they pertain to our international operations. [The beneficiary] routinely meets with our headquarters' directors from the international units to ensure that our corporate philosophy is understood and is being delivery [*sic*] accurately. . .

In sum, [the beneficiary] has autonomous control and exercises wide latitude and discretionary decision making in, establishing the most advantageous courses of action for the successful management and direction of our international activities.

The petitioner provided three Internal Revenue Service (IRS) Form 941 Employer's Quarterly Federal Tax Returns for 2012. According to these documents, the petitioner had three employees in the first quarter, two employees in the second quarter, and one employee during the third quarter. The petition was filed during the fourth quarter of 2012.

The petitioner's most recent Florida Employer's Quarterly Report, for the third quarter of 2012, indicated that the company had 0 employees in July, two employees in August, and one employee in September. The employees who received wages during the quarter were the beneficiary (\$1,250) and [REDACTED] (\$3,998.10).

In the RFE, the director requested additional evidence relating to the beneficiary's claimed managerial or executive role, including: a detailed duty description with the percentage of time spent on specific tasks; an organizational chart; and detailed information regarding the petitioner's employees including evidence of wages paid to employees. The director also directed the petitioner to provide information regarding contract workers if applicable.

In response to the RFE the petitioner provided the following position description, including the percentage of time the beneficiary allocates to the listed duties on a weekly basis:

Perform the management required to achieve the development of the company, according to plans and programs set up, taking into account the profiles that are within the Organization, the characteristics of the environment and the internal conditions of the company. 25%

Ensure the efficient utilization of resources, technical, financial and talent of the entity and the fulfillment of goals and programs approved by the Board of Directors. Give instructions on the development of each of the charges to all employees of the company, coordinating and guiding processes, and ensuring compliance with them. Lead and ensure full compliance with the administrative process in each of the levels of administration and operation of the business. 20%

Exercise supervision and control on administrative, operational, reception and Office units, programs and projects of the business. 20%

Analyze results newspapers and the operational and financial scope of the trading company statistics; evaluating them with functional managers of each area. 2%

Inform the Board about the situation and evolution of the company, through the account of results, comparison and deviations with the budget, etc. 2%

Submitting to the Board of partners the draft budget of income and expenditure of the trading company to run it once to be issued by such entity. 2%

Participate and advise managers in making important decisions. 2%

Define and track the quality policy of the company. 2%

Make appropriate decisions define a human resource policy. 2%

Sign contracts and agreements with customers and suppliers, issue acts which are necessary for the fulfillment of the objectives of the trading company covered by existing legal provisions. 1%

Promoting the adaptation and adoption of standards aimed at improving the quality and efficiency in the provision of services models and techniques. 5%

Lead starting up of an information system that supports the management of the company in their reception and dispatch, technical and administrative processes. 5%

Apply disciplinary sanctions that correspond by law or regulation. Issue functions, requirements and administrative procedures manuals. 1%

Review of official procedures and cost control. 1%

Develop objectives, strategies leading to improve working conditions, organizational climate, occupational health and the level of trading, and in particular to execute a process of continuing education for all staff of the entity. 5%

Direct and encourage national and international trade relations of the marketer. 5%

The petitioner also provided an undated organizational chart that depicted eleven (11) employees with the beneficiary in the senior position as "manager member." Directly subordinate to the beneficiary is a manager, [REDACTED]. The chart indicates that all other employees report to the manager and include: (1) a marketing and public relations employee ([REDACTED]); (2) a sales/front desk employee ([REDACTED] four therapists [REDACTED]); and three cleaning staff ([REDACTED] Ibanez).

The petitioner provided a brief duty summary for each position as follows:

1. MANAGING MEMBER - Responsible of the give direction [*sic*] to the Manager for the daily operation and to expand the organization, trying to be all the time upgraded with all the new techniques on all of our services that we offer.
2. MANAGER - Responsible of the daily operations and to apply all the strategies that the team analyze [*sic*] with the Manager Member.
3. MARKETING & P.R. – Responsible to do action plans to put on practice all the Marketing & Public Relations strategies, with the main purpose; sending new public to [the petitioner].

4. SALES/FRONT DESK - Responsible to sale to the public all the services that [the petitioner] offer[s], to share and explain with them the promotions that we have, and to make the appointments for the treatments.
5. THERAPIST - Responsible to give to the client the different services that [the petitioner] offers.
6. CLEANNING [*sic*] - Responsible to keep clean at any moment all the different areas of [the petitioner].

In support of the director's request regarding pay documentation, the petitioner submitted its IRS Form 941 for the fourth quarter of 2012 indicating that the petitioner had one employee.

The petitioner also provided copies of its IRS Forms 1096, Annual Summary and Transmittal of U.S. Information Returns, indicating that the petitioner paid a total of \$82,506.30 on 11 IRS Forms 1099, Miscellaneous Income, in 2012. The petitioner submitted copies of all 11 IRS Form 1099-MISC statements for nonemployee compensation paid during 2012. The petitioner also indicated that three employees, including [redacted] and a third individual not named on the organizational chart received IRS Form W-2s in 2012, but it did not provide copies of these documents.

Overall, seven of the individuals identified on the organizational chart received a 2012 IRS Form 1099. These employees included: all three cleaners (who earned between \$4,000 and \$5,640); the manager (\$6,727); the sales/front desk employee (\$16,459); and three therapists (who earned \$7,475, \$7,812, and \$15,300, respectively). The petitioner submitted valid licenses for the manager and one of the therapists listed on the chart, as well as expired credentials for a second therapist. The petitioner provided no evidence of wages or other payments to the marketing and public relations employee or to one of the therapists identified on the chart.

The petitioner also submitted a business plan dated May 2013 in which it stated that it currently had 9 employees including one manager, three therapists, three front desk personnel, and two cleaning staff.

The director reviewed the petition and concluded that the petitioner did not establish that the beneficiary would be employed in a qualifying managerial or executive capacity. In denying the petition, the director found that the beneficiary's duties were described in overly general terms, and further observed that the beneficiary has limited subordinate staff to relieve her from involvement in the day-to-day operational activities of the company.

On appeal, the petitioner asserts that the beneficiary will be employed in a qualifying capacity and that she has subordinate employees who are professionals. The petitioner further asserts that the beneficiary does not perform tasks to produce the company product or provide company services

but that the beneficiary's duties "are related directly to managing a major component of the petitioner's business."

B. Analysis

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

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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); *see also* 8 C.F.R. § 204.5(j)(5). The AAO reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of other employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

In this matter, the petitioner responded to the director's RFE with a lengthy job description; however, the description was vague and fails to give insight into how the beneficiary would spend her day. For example, the petitioner indicates that 25% of the beneficiary's day will be spent in the "development of the company" but offered no details regarding what specific tasks the beneficiary would perform within the scope of this responsibility. The duty description further refers to the beneficiary's complex supervision over "administrative, operational, reception and Office units, "evaluating company information "with functional managers of each area," and "advis[ing] managers" despite the fact that the petitioner failed to establish the existence of such a complex organization. The petitioner indicated that the beneficiary will allocate 20 percent of her time to "lead and ensure full compliance with the administrative process in each of the levels of administration and op[e]ration of the business," but again, offered no examples of specific tasks the beneficiary performs to carry out this responsibility. Overall, the petitioner indicates that these overly broad duties account for 65% of the beneficiary's time.

Therefore, the AAO concurs with the director's observation that the beneficiary's duty description is too vague and general to establish that she will primarily perform qualifying duties. Further, it fails to correlate in any meaningful way to the actual nature of the organization presented in this petition, that is a tanning and beauty business staffed by part-time therapists, cleaning staff, a front desk employee and one subordinate supervisor. The duties the petitioner did list were broadly described and provided little insight into what the beneficiary was to do on a day-to-day basis within the context of this business and its current organizational structure. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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

While the beneficiary likely exercises the appropriate level of discretionary decision-making over the business as a managing member, the petitioner has not established the nature of her day-to-day duties, such that they could be deemed to be primarily managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her 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, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner also failed to clearly establish the number of employees and/or contract workers it had on staff at the time the petition was filed. The petitioner claimed eight employees on its Form I-140, however, its undated organizational chart depicted 11 employees, and its IRS Form 941 for the relevant quarter of 2012 indicated that it had one employee at the time of filing. 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).

It appears that the petitioner may have counted its contractors as its employees in that it submitted 11 Form 1099-MISC indicating it hired contractors to support its business at some point during 2012. This does not resolve the inconsistency above. Notably, the 11 employees on the organizational chart do not mirror the individuals who received 1099-MISC forms for 2012. The petitioner has not established which contractors or employees were actually on staff or working for the company as of December 2012 when the petition was filed, and most of the payments made to contractors were not consistent with full-time employment for a full calendar year.

Moreover, the petitioner has not established that its manager was working on a full-time basis and therefore, it is not clear to what extent this employee would relieve the beneficiary from supervising the lower-level employees. The petitioner has not established that it actually employs the claimed marketing and public relations employee and has not established who was responsible for performing these duties when the petition was filed. Further, the petitioner has not established that it had any administrative staff in place to perform duties such as purchasing supplies, performing routine bookkeeping and banking duties, or other tasks associated with operating the company's salon. The petitioner did not explain how the company's largely part-time contract staff would relieve the beneficiary from performing a number of non-qualifying duties associated with operating the petitioner's business.

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

The petitioner indicates that the beneficiary supervises one subordinate manager who appears to work on a part-time basis. This individual is also licensed to provide the petitioner's cosmetology services, which raises questions regarding the scope of her supervisory responsibilities. The petitioner simply indicates the manager is "responsible of the daily operations," and it is unclear whether she can be deemed a managerial or supervisory employee.

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has presented some evidence of licenses and qualifications held by some employees, but it has not established that a bachelor's degree is necessary to perform the personal services offered by the business. 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).

Further, the petitioner claims for the first time on appeal that the beneficiary "can easily be deemed a functional manager," and states that she manages "a major component of the petitioner's business." 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). 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.

The petitioner has not adequately articulated or supported a claim that the beneficiary would be employed as a function manager. It has not identified which function or "major component" of the petitioner's business the beneficiary manages, nor has it provided the required detailed description of the beneficiary's duties or the amount of time she allocates to managing the claimed function.

In sum, the petitioner has submitted an inadequate description of the beneficiary's duties and insufficient evidence of its organizational structure. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by section 203(b)(1)(C) of the Act, and for this additional reason the appeal will be dismissed.

IV. ABILITY TO PAY

The next issue to be addressed is whether the petitioner has established that it has the ability to pay the beneficiary the proffered wage of \$65,000 per year.

8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The director found that the petitioner failed to provide evidence that it currently employs the beneficiary at the proffered wage, noting that the record contained one pay stub indicating the beneficiary's year-to-date salary as \$1,250 as of August 31, 2012. The director further determined

that the petitioner reported insufficient net income or net current assets on its 2012 IRS Form 1065 U.S. Return of Partnership Income to pay the beneficiary's proffered wage of \$65,000. Rather the petitioner reported a net loss of \$333,710 and net current assets of -\$70,600.

The petitioner does not object to the director's conclusion or otherwise address this issue on appeal. Accordingly, the AAO will affirm the denial of the petition for the reasons stated in the director's decision and dismiss the appeal.

V. EMPLOYMENT ABROAD

The fourth and final issue addressed by the director is whether the petitioner established that the beneficiary was employed by a qualifying entity abroad, specifically, the petitioner or its parent, affiliate or subsidiary, for one full year in the three years preceding the filing of the petition. This finding was based on the director's determination that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. The director did not address whether the beneficiary's employment abroad was in a qualifying managerial or executive capacity.

As discussed above, the petitioner has not established its qualifying relationship with the foreign entity, and therefore, the director's determination with respect to the beneficiary's one year of employment with a qualifying entity abroad will be affirmed. The petitioner has not addressed this issue on appeal.

Further, although not directly addressed by the director, the AAO finds insufficient evidence that the beneficiary's employment with the Mexican entity was within a qualifying managerial or executive capacity. 8 C.F.R. § 204.5(j)(3)(i)(B).

The petitioner's duty description for the beneficiary's employment abroad was brief and overly vague. The petitioner simply stated that the beneficiary's role as executive manager for the petitioner was "[b]ased on her critical experience acquired through having managed and supported functions as well as her acumen and managerial skill demonstrated during her tenure with our headquarters in Mexico, [the beneficiary's] ." Therefore, the director issued a request for evidence (RFE) requesting information about the beneficiary's work for the foreign entity, specifically her position title, all specific daily duties, the percentage of time spent on each of those duties, and an organizational chart showing the employees who reported to the beneficiary along with the employees' duty descriptions and education requirements.

In response to the director's requests for additional documentation relating to the beneficiary's duties abroad, the petitioner stated "[t]he beneficiary's duties in the company abroad included dealing with multinational tasks as a manager whose objectives includes supervising the functions of the company and making decisions for the greater good of the company." The petitioner submitted an undated organizational chart identifying the foreign entity's positions and assigned employees. The chart depicted the beneficiary as vice president, supervising an administrative director, a sales manager and an operation director. However, the petitioner provided no additional details regarding

the foreign entity's staffing, the beneficiary's duties, or the duties performed by her subordinate employees. 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 evidence of record provides no insight into the beneficiary's role with the foreign entity or any explanation of the nature of her actual duties. As such, the petitioner has not established that the beneficiary's role with the foreign entity in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved.

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, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

VI. CONCLUSION

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

ORDER: The appeal is dismissed.