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



U.S. Citizenship
and Immigration
Services

DATE: **NOV 27 2013** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER: 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,

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 this nonimmigrant petition seeking to extend the beneficiary's employment as a 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 Florida corporation, states that it operates as a technology consultancy business. The petitioner claims to be a subsidiary of [REDACTED] located in [REDACTED] Brazil. The beneficiary was previously granted one year in L-1A classification and the petitioner now seeks to extend his employment as chief executive officer for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

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 contends that the adjudicating officer did not review or misunderstood the evidence presented with the original petition and in response to the request for evidence. The petitioner submits a brief and additional evidence on appeal.¹

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.

¹ The record of proceeding contains a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by the petitioner. The State of Florida has suspended the attorney designated on the Form G-28 from the practice of law. Therefore, the AAO will not recognize the attorney in this proceeding. See 8 C.F.R. §§ 1.1(f), 103.2(a)(3), 292.

- (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 record reflects that the director treated the petition as an extension of a petition involving a new office, and cited to the evidentiary requirements at 8 C.F.R. § 214.2(l)(14)(ii).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;

- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 14, 2013. The petitioner stated on the Form I-129 that the beneficiary will be employed as "chief executive officer" and indicated that the company had three employees and a gross annual income of \$246,076.00 as of the date of filing.

In an addendum to the Form I-129, the petitioner described the beneficiary's proposed duties as follows:

- Coordinate with the board of directors for the development and implementation of corporate programs
- Ensure the developmental programs are designed in a way to meet the organizational goals and objectives
- Oversee the overall management of the human resource department, quality and operations departments to ensure it is in line with company policies
- Work on the management succession planning of the organization to ensure that a capable management is in place to handle work effectively at all times

In its letter of support, the petitioner stated that the beneficiary has been performing the following duties since being granted L-1A status:

As the CEO of [the petitioner], [the beneficiary's] major functions have been to plan, develop, and establish overall policies and objectives for the company in accordance with its vision and growth strategies. He has been providing direction and leadership for the subordinate managers within each department in the company and has also been overseeing the design, marketing, promotion and quality of programs, and services provided by the company.

Together with the Director of Operations and the Accounts Manager, [the beneficiary] has been making recommendations for the yearly budget and reviewing the company's financial position each quarter to ensure that the company's actual expenses follow the financial

guidelines set out by the implemented budget plan. As the executive in charge of human resource management, [the beneficiary] has been in charge of hiring, disciplining, terminating, and setting the remuneration policies of the company managers and supervisors, according to the company's policies and approved budgets. Finally, as the primary community and public relations executive, [the beneficiary] has been responsible for assuring the organization and its mission, programs, and services are consistently presented in a strong and positive image to its clients and business partners.

[The beneficiary] has been delegating to each of the key managers the tenets of our company's trade and building the kind of corporate culture that has worked so successfully for us in the past. Perhaps most importantly, [the beneficiary] has been traveling throughout the United States in order to meet with potential clientele and has been networking within the industry, as well as the financial and commercial communities, in order to establish our company's reputation and good will.

The petitioner submitted an undated business plan indicating that it plans to hire nine employees over the next five years, to include: a chief executive officer (the beneficiary), a director of operations, an accounts manager, an office manager, a sales advisor, a marketing advisor, an accountant, a clerk/bookkeeper, and a secretary. The business plan includes an organizational chart for the U.S. company depicting the beneficiary as chief executive officer, supervising a director of operations, [REDACTED]. The director of operations supervises an accounts manager, [REDACTED] and an office manager position that is currently vacant. The organizational chart shows that the accounts manager supervises a sales advisor position and a marketing advisor position, both of which are currently vacant. The office manager position supervises an accountant position, a secretary position, and a clerk/bookkeeper position, all of which are currently vacant.

The petitioner's business plan also includes position descriptions for each of the positions listed on the organizational chart. The beneficiary's position is described as follows:

The primary job responsibilities of the Chief Executive Officer, hereby referred to as [the beneficiary], are to ensure that all lines of the business within the organization are running efficiently and within the established budget. [The beneficiary] is responsible to serve as a communicator, decision-maker and a leader, responsible for protection of the organization's financial assets while ensuring compliance with board directives. He will devise a strategic plan that will generate revenues, create new opportunities for business and help the company to remain competitive in the marketplace. Strong emphasis on cost management will be a critical component to the company's success. Above all else, he is responsible for ensuring that all organization and developmental goals of the company are established and practiced.

Specific Duties:

- Setting and updating strategies and goals – 30% (Approximately 12 hours per week)
- Delegation of individual duties and team building – 25% (Approximately 10 hours per week)
- Capital allocation – 20% (Approximately 8 hours per week)
- Executive mentoring – 5% (Approximately 2 hours per week)

The remaining 20% (approximately 8 hours per week) of his time will be dedicated to overseeing the following duties:

- Having a strong organizational presence of all operations
- Creating company and performance objectives according to the core values of the parent company . . .
- Keep close contact with executives from the parent company
- Constantly keep updating the board of directors of any major change, unforeseen issues or new large supplier or client.
- Develop groups and strategies for investment challenges
- Review company's financial matters with Director of Operations
- Evaluating high- or low-performing business and teams
- Participating in special events for philanthropic purposes or to generate new business with clients
- Mentor a qualified prospect who may be considered as a possible replacement successor for the role of CEO (most likely the Director of Operations)
- Routinely monitor workplace for areas where growth is needed or possible and where existing resources can be further enhanced
- Coordinate hiring guidelines and job descriptions with the Director of Operations
- Creating an annual organizational budget and monitoring cash flow.

The petitioner submitted copies of its Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2011 and the first, second, and third quarters of 2012. The Forms 941 state that the petitioner had two employees at the end of 2011, two employees during the first quarter of 2012 and three employees during the second and third quarters of 2012. The petitioner also submitted its Form UCT-6, State of Florida Employer's Quarterly Report, for the second and third quarters of 2012 showing three employees, the beneficiary, [REDACTED] for each quarter.

On January 23, 2013, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit additional evidence to establish that the U.S. company has reached a point in its organizational hierarchy that elevates the beneficiary to a position that is primarily executive or managerial.

In response, the petitioner submitted a letter describing the beneficiary's duties as follows:

As CEO of [the petitioner], [the beneficiary] has been responsible for overseeing the expansion of the business into three up-and-coming business sectors, focusing primarily on distribution and consultation services for electronics producers, manufacturers and distributors seeking to improve their processes, increase profits and decrease costs. In general terms, [the beneficiary] has been directing and coordinating the formulation of programs to increase productivity and efficiency, and has been directing the overall management of the organization, exercising wide latitude in discretionary decision-making, receiving only general supervision from the parent company in Brazil and the board of Directors.

More specifically, [the beneficiary] has been identifying new business opportunities, assessing the feasibility of and making recommendations on new investment and business developments in order to ensure a return appropriate for partners and shareholders while safeguarding the security of company assets. At all times, he has been keeping his "finger on the pulse" of client companies and partners in order to identify opportunities for expansion and improve services to clients and solutions to any contractual or operational issues. He always aims to maintain client satisfaction and project a positive company image in the market.

[The beneficiary] splits his time among key activities, including making strategic decisions, generating goodwill in the community, and engaging with major clients and prospects. . . .

* * *

In sum . . . [the beneficiary] will be an executive for [the petitioner] in every sense of the word. [The beneficiary's] only duties are directing the management of the company, establishing goals and policies for the corporation and exercising a wide-latitude of decision making for the best interest of the corporation. . . . Thanks to the hiring of key personnel and the plan to hire additional personnel, [the beneficiary] will spend 100% of his time solely performing executive duties. . . .

The petitioner went on to provide a breakdown of the beneficiary's routine duties on a typical day, and further explained that the routine presented "is very similar to a typical days' agenda during one of [the beneficiary's] trips to Brazil." The petitioner provided a duplicate copy of the organizational chart and position descriptions provided with the business plan at the time of filing the petition.

The petitioner submitted pay stubs for the beneficiary, [REDACTED] and [REDACTED] for the period August 2012 to January 2013, as well as IRS Forms W-2, Wage and Tax Statement, for 2012.

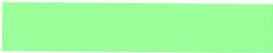
The petitioner submitted an "Agreement for Services" contract with [REDACTED] indicating that it hired [REDACTED] for consulting services to assist with the requirements of U.S. export regulations as they pertain to the petitioner's products, technology, and services. The petitioner also submitted a "FedEx Pricing Agreement" in which FedEx agrees to provide shipping services for specific prices exclusive to the petitioner.

Finally, the petitioner submitted a work schedule for the beneficiary outlining his daily tasks from December 1, 2012 to December 21, 2012.

On March 27, 2013, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director observed that, according to the work schedule provided in response to the RFE, it appears the beneficiary is the sole buyer for the U.S. company and that the petitioner has not hired any sales representatives to relieve the beneficiary from performing those duties. The director further observed that the petitioner stated that the beneficiary would be managing an essential function by directing and managing all aspects of the company's goals and objectives, but there are no employees to perform the function to be managed and it appears that the beneficiary himself performs such functions. The director found that the petitioner is a distributor of products and has acquired office and warehouse space; however, the petitioner does not employ anyone to manage or work in the warehouse to provide inventory control and shipping and receiving duties. Finally, the director acknowledged that the petitioner's organizational chart indicates that it has three employees, the beneficiary, Director of Operations, and Accounts Manager, but determined that the petitioner failed to establish who performs the non-qualifying operational duties of the business.

On appeal, the petitioner contends that the beneficiary will be employed in an executive capacity. Specifically, the petitioner states:

This language was used to show that by [the beneficiary] directing the management of the entire organization, he is essentially directing the management of every function of the organization by laying out the company's goals and policies. Without the organizational goals and policies, the company and its respective functions/departments are unable to function properly and have no clear direction. The denial seems to miss the point that the cover letter said directing the management, not managing. . . . He would direct the Director of Operations in the respective management of his function/department. And although the denial states that they believe [the beneficiary] is performing the functions to be managed, they completely fail to address the job duties listed in the business plan for the Director of Operations or the Accounts Manager. In addition, the denial fails to address why they believe these two employees are not capable of managing their respective functions or departments, even though



they are listed as doing so in the initial submission, as well as in the response to the RFE. Furthermore, although the denial briefly mentions the fact that the U.S. Company has independent contractors, they fail to even give any weight to this fact.

* * *

[The position descriptions for the Director of Operations and Accounts Manager] clearly states what every employee's job requires and the duties they will perform. It even goes on to say that since the U.S. Company is in its infancy and still growing, that the Accounts Manager may handle some job duties from other employee positions until they are filled. Furthermore, the language in the denial continually fails to take into account the evidence on independent contractors used by the U.S. Company.

* * *

Submitted with the RFE response are two contracts, which specifically pertain to the inventory control and shipping and receiving duties. One contract is with FedEx, who the U.S. Company uses to ship and receive products on behalf of the company. In addition, there is also a contract for Export Solutions, which helps the U.S. Company set-up and run the warehouse in regards to inventory control and shipping and receiving.

The petitioner also submitted a second brief and described the beneficiary's position as managerial in nature. The petitioner provided the following details about the beneficiary's managerial position:

All of the information and documentation submitted thus far shows that the Beneficiary's position is in fact managerial in nature and the position he intends to fill is in fact an executive position, regardless of the number of subordinate employees to be supervised. . . .

* * *

As CEO of [the petitioner], [the beneficiary] has been directing the management of the entire organization in accordance with the corporate goals. In that capacity, he been conferring with company officials to plan objectives, develop organizational policies, and coordinate functions and operations. [The beneficiary] possesses discretionary authority to coordinate and direct the work of subordinate employees or independent contractors, and he is responsible for the proper execution of the company's policies and principles, receiving only general supervision from the Board of Directors of the organization. He is also responsible for the implementation of administrative and operating procedures for the company's sales, distribution, and marketing projects. In addition, he reviews activity reports and financial statements, to determine the progress and status in attaining objectives and revising objectives

and plans in accordance with changing business conditions. He coordinates the formulation of financial programs to provide appropriate funding for projects or continuing operations to maximize the returns on investments and to increase productivity. He also evaluates the performance of subordinate employees or independent contractors for compliance with the organizations' established policies and objectives and contributions in attaining objectives.

Additional Detailed Duties and Responsibilities:

- Lead the development and implementation of strategic and operational plans in all areas of the company, aiming to ensure their development, growth and continuity.
- Define the policies and objectives of each area, coordinating the implementation of respective action plans, facilitating and integrating the work of teams in order to optimize efforts for achieving the objectives of the company.
- Identify opportunities, assess the feasibility and make recommendation on new investment or new business developments in order to ensure an appropriate return for partners, owners and shareholders and to safeguard the security of assets in the company.
- Stay in touch with the direction of the client companies and partners to identify opportunities for expansion or improved products/services or solutions to any contractual or operational issues, aiming to maintain the satisfaction of clients and project a positive image in the market.
- Direct human resources activities, including the approval of human resource plans and activities, the selection of directors and other high-level staff, and establishment and organization of major departments.
- Analyze operations to evaluate performance of the company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change.
- Oversee monthly and quarterly assessments and forecasts of organization's financial performance against budget, financial and operational goals.

Upon review, and for the reasons discussed herein, the petitioner has not established that the petitioner 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. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's

business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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

At the time of filing the petition and in response to the RFE, the petitioner refers to the beneficiary as an executive. On appeal, the petitioner clearly states that the beneficiary's position is managerial; however, the petitioner states that "the beneficiary's position is managerial in nature and the position he intends to fill is in fact an executive position." A beneficiary may not claim employment as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. At a minimum, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity or each of the four criteria set forth in the statutory definition for managerial capacity.

On review, it appears that the beneficiary's job duties have evolved throughout the record. At the time of filing, the petitioner characterized the beneficiary's role as chief executive officer, noting he will devote 30% of his time to "setting and updating strategies and goals," 25% of his time to "delegation of individual duties and team building," 20% of his time to "capital allocation," 5% of his time to "executive mentoring," and the remaining 20% of his time to miscellaneous other duties. In response to the RFE, the petitioner described the beneficiary as an executive and indicated that he has expanded the business into three new sectors, directs and coordinates the formulation of programs, and directs the overall management of the organization, exercising wide latitude in discretionary decision-making and receiving only general supervision from the parent company in Brazil and the Board of Directors. The petitioner also submitted a work schedule showing a typical day for the beneficiary, which included travel throughout northern Florida to meet with clients, and a brief work schedule for most of the month of December 2012, showing that the beneficiary represented the U.S. company at a trade show and organized the booth for the show. The work schedule also shows many hours where the beneficiary performed "problem solving, pending matters, e-mails and calls," but fails to elaborate on those topics to demonstrate whether his time focuses primarily on managerial, executive, or non-qualifying duties. On appeal, the petitioner describes the beneficiary's position as managerial and indicated that he "lead[s] the development and implementation of strategic and operational plans"; "define[s] the policies and objectives of each area"; "stays in touch with the direction of the client companies and partners"; "direct[s] human resources activities"; "analyze[s] operations to evaluate

performance of the company and its staff in meeting objectives"; and "oversee[s] monthly and quarterly assessments and forecasts of organization's financial performance."

The inconsistent job duties, work schedules, and vague percentage breakdowns fail to establish that the beneficiary will be engaged in a primarily managerial or primarily executive position. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its partial owner and chief executive officer, the petitioner has not provided sufficient consistent information detailing the beneficiary's duties to demonstrate that these duties qualify him as a manager or as an executive. Although the petitioner submitted multiple position descriptions and lists of job duties for the beneficiary throughout the record, the petitioner failed to provide detailed explanations of the beneficiary's actual duties and failed to provide information concerning the amount of time the beneficiary devotes to specific 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. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Where the petitioner did attempt to clarify the beneficiary's duties, it simply paraphrased the statutory definitions of executive and managerial capacity at sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Based on the current record, and the fact that the beneficiary's duties have evolved throughout the record, the AAO is unable to determine what duties the beneficiary actually performs. Due to the inconsistent position descriptions and lists of job duties, it is impossible to determine whether the claimed managerial duties and executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's multiple descriptions of the beneficiary's job duties do not establish what proportion of the beneficiary's duties are managerial in nature, what proportion are executive in nature, and what proportion are actually administrative or operational. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that his 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, 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).

Here, the petitioner states that a bachelor's degree is required for each of the beneficiary's current subordinates, the "director of operations" and the "accounts manager"; however, the duties listed for each position by the petitioner, are not indicative of a position that is professional in nature. Additionally, the petitioner indicates that the beneficiary's direct subordinate will be the director of operations, whose stated duties include some supervisory functions, such as "managing work product and deadlines of subordinates – 20%," "communicate job expectations with staff, and provide coaching and monitoring – 25%," "maintain staff by recruiting, selecting, orienting and training employees – 5%," "establishing policies, procedures and work schedules," and "analyze the attendance and regularity of the working staff." The description of the director of operations' duties indicates that he allocates some time to specific business functions and some time to managing lower-level staff. Although the beneficiary is shown to have one subordinate with supervisory duties, he has not been shown to *primarily* supervise and the control the work of other supervisory, professional, or managerial employees. The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The fact that one of the beneficiary's subordinates is claimed to supervise lower-level employees is not sufficient to elevate the beneficiary to a position that is managerial in nature. The petitioner has failed to demonstrate that the beneficiary's duties will primarily focus on the management of the organization or personnel, rather than producing a product or providing a service of the petitioner.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of

the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary performs as a function manager. The petitioner did not articulate the beneficiary's duties as those of a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate he manages an essential function of the U.S. company. The petitioner merely compared the beneficiary's position directing the management of the company to a function manager, but failed to establish that the beneficiary's actual duties relate to managing a specific essential function or how much time he will allocate to managerial duties.

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. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

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. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although at the time of filing and in response to the RFE, the petitioner claimed that the beneficiary is an executive at the U.S. company, the only executive duties listed for the beneficiary merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F. 2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29

(D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner indicates that the beneficiary has one direct subordinate, a director of operations, who supervises an accounts manager, and provided position descriptions for each position. The position description for the accounts manager position shows that he performs duties related to sales, investment, and financial matters; however, it remains unclear who performs the duties related to consulting services, client services, obtaining new sales, marketing, customer relations, inventory, shipping, etc. Additionally, the petitioner's business plan states that it relies on sub-contractors for finance, human resource needs, and the day-to-day support functions of the office environment. The petitioner states that it "sub-hires an accountant to handle the financial functions, and it utilizes temporary staffing agencies to fill the role of secretary/office support." The petitioner adds that "both positions report to the Office Manager, who is charged with the responsibility of reviewing all their work. . . ." However, the petitioner has not submitted any evidence supporting its use of sub-contractors for these services, nor has it hired an office manager to supervise such functions.

The petitioner relies on an agreement for services contract with [REDACTED] claiming that the contract provides that [REDACTED] "helps the U.S. company set-up and run the warehouse in regards to inventory control and shipping and receiving." However, according to the contract submitted in response to the RFE, [REDACTED] simply assists the U.S. company in the completion of official forms and training its staff to run the warehouse efficiently; nowhere on the contract does it state that [REDACTED] provides personnel to the U.S. company or assumes any responsibility over the U.S. company's warehouse and shipping and receiving tasks. Additionally, the petitioner's business plan clearly states that it does not actually handle any products or inventory in its role strictly as an intermediary consultant; all shipping and moving of products will be handled strictly by the product providers, with the petitioner simply acting as a guiding source. Therefore, the petitioner's actual business remains unclear as it has leased 300 square feet of air-conditioned warehouse space and contracted [REDACTED] to train its staff in warehouse management.

The other "contract" relied upon by the petitioner is with FedEx, "who the U.S. company uses to ship and receive products on behalf of the company." The document submitted in response to the RFE is a pricing agreement that also does not provide the petitioner with any personnel or assume any responsibility over the petitioner's warehouse and shipping and receiving tasks; FedEx is a courier service that can be hired by any individual or company in the world.

Overall, it appears that the beneficiary is the only employee who interacts with vendors, suppliers, clients, etc. and therefore, the petitioner has not established that the beneficiary has sufficient staff to relieve him from performing non-qualifying administrative or operational duties.

The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

Although not discussed in the director's decision, the evidence of record fails to establish that the petitioner 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(I).

The petitioner stated on the Form I-129 that it has a parent-subsidiary relationship with the foreign entity. Specifically, the petitioner stated that the U.S. company is "100% owned by [REDACTED] (the foreign company)." In support of this claim, the petitioner submitted the articles of incorporation for [REDACTED] dated March 31, 1995, indicating that the maximum number of shares of stock authorized is 100 and that [REDACTED] owns 99 shares and [REDACTED] owns 1 share. The petitioner also submitted the articles of amendment, dated April 15, 1996, amending the corporation's name from [REDACTED]. In addition, the petitioner submitted the articles of amendment, dated October 23, 2000, amending the corporation's name from [REDACTED] and the distribution of shares to 70 shares for [REDACTED] and 30 shares for [REDACTED]. The petitioner did not submit any stock certificates or a stock ledger for the U.S. company. The petitioner did submit the articles of incorporation of the foreign entity indicating that the maximum number of shares of stock authorized is 60,000 and that [REDACTED] (the beneficiary) owns 54,600 shares and [REDACTED] owns 5,400 shares.

In support of the petition, the petitioner submitted a copy of its 2011 IRS Form 1120, U.S. Corporation Income Tax Return. The 2011 Form 1120 at Schedule K, which includes questions related to the petitioner's ownership and control, is marked "yes" at question 4b which asks, "[a]t the end of the tax year: **b.** [d]id any individual or estate own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote?" Additionally, the 2011 Form 1120 also at Schedule K is marked "yes" at question 7 which asks, "[a]t any time during the tax year, did one foreign person own, directly or indirectly, at least 25% of **(a)** the total voting power of all classes of the corporation's stock entitled to vote or **(b)** the total value of all classes of the corporation's stock?" The question further indicates that the percentage owned is "100" and the owner's country is "BR" (Brazil). Further, the 2011 Form 1120 at Schedule G, Part II, states that [REDACTED] owns 100% of the company's voting stock. In this case, the record contains contradictory evidence and fails to demonstrate the actual ownership of the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the

petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 cannot be approved.

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

IV. 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.