



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 06 2013** OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

for 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.¹

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 engages in sales of automobiles, aquatic vehicles, electrical generators, and cooling systems. The petitioner claims to be a subsidiary of [REDACTED], located in Santiago, Dominican Republic. The petitioner seeks to employ the beneficiary as its president and general manager for a period of three years.

The director denied the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity.

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, counsel for the petitioner asserts that the evidence submitted establishes that the beneficiary will be employed in an executive and managerial capacity. Counsel for the petitioner submits a brief and additional evidence on appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien, are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

¹ On April 29, 2013, the AAO summarily dismissed the petitioner's appeal based on the petitioner's failure to identify an erroneous conclusion of law or statement of fact on the part of the director as a basis for the appeal. The AAO has since determined that the petitioner did in fact timely submit a brief and additional evidence in support of the appeal. Therefore, the AAO's decision dated April 29, 2013 is withdrawn and the appeal will be adjudicated on its merits.

- (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.

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 primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 27, 2012. The petitioner stated on the Form I-129 that the beneficiary will be employed as "president and general manager" and indicated that the company had six employees and a gross annual income of \$461,096.00 as of the date of filing.

In an addendum to the Form I-129L, the petitioner indicated that the beneficiary's position is executive in nature and described her duties as follows:

[The beneficiary] will continue to establish the goals and policies of the company. The sole shareholder to whom she has reported, [the foreign entity], will continue to rely on [the beneficiary's] suggestions of the type of automobiles and aquatic vehicles and their parts, electrical generators and cooling equipment systems to be sold; what other market segments to target; whether to offer additional products; and what other such products to offer. [The beneficiary] will continue to receive only general supervision and direction from the sole shareholder and she will continue to exercise wide latitude in discretionary decision-making, for example by setting prices and credit terms, based on forecasts of customer demand, and determining staffing levels of the company.

In her daily activities of directing the management of our company, she will continue to spend:

- a. 35% of her time daily on the review of the company's financial and budget activities to fund operations, maximize investments, and increase efficiency. This will include review of reports concerning past due accounts and review of collection activities. She will continue to meet with the Accountant once a week.
- b. 30% of her time daily on the review of closings and sales reports, including title sales and summations for DMV. She will meet with the Sales Manager and the Purchase Manager as necessary.
- c. 20% of her time daily on the review of marketing and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement.
- d. 15% of her time daily on the review of staff performance and on any administrative matter requiring her attention.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary as general manager, supervising the following individuals: [redacted] as "manager"; [redacted] as "sales"; [redacted] as "secretary"; [redacted] as "purchase"; and [redacted] as "accounting/lawyer."

The petitioner submitted the beneficiary's resume, which describes her current position at the petitioner's U.S. company as follows:

President & General Manager. Directs and coordinates all activities of the company, including marketing, pricing, sales, trade, distribution and storage of the automobiles and aquatic vehicles and their parts, electrical generators and cooling equipment systems. Establishes and implements the company's policies, goals, objectives, and procedures. Determines staffing requirements, interview, hire and train new employees. Manages the staff, prepare work schedules and assign specific duties. Directs and coordinates the company's financial budget activities to fund operations, maximize investments, and increase efficiency. Reviews financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement. Determines the types of automobiles and aquatic vehicles and their parts, electrical generators and cooling equipment systems to be sold, set prices and credit terms, based on forecasts of customer demand.

The petitioner also submitted brief descriptions for some of the beneficiary's subordinates. [REDACTED] responsibilities are listed as: "sales department," "buy at auction," "quotation preparation," "manager to dealing with other dealer [sic]," and "negotiation of vehicle experience 12 years [sic]." [REDACTED] responsibilities are listed as: "office manager of [the petitioner] 2012-present," "description," "sales," "loan processing," "inventory review," and "title clerk." [REDACTED] submitted a letter listing her own responsibilities as: "doing [the petitioner's] financial statements"; "paying and filing their sales taxes, unemployment taxes, [and] payroll reports"; "provide all W-2's forms [sic] for employees at the end of the year"; and "prepare corporate tax returns." [REDACTED] responsibilities are listed as "vehicles inventory purchaser." [REDACTED] responsibilities are listed as "secretary at [the petitioner] 2012 to present."

The petitioner submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for 2011 indicating that it paid \$101,730 in salaries and wages. The petitioner also submitted IRS Forms 941, Employer's Quarterly Federal Tax Return, and Forms UCT-6, Florida Department of Revenue Employer's Quarterly Report, for 2010 and 2011 indicating that it had five employees in the fourth quarter of 2011.

On September 10, 2012, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties indicating how those duties have been and will be managerial or executive in nature; (2) a list of U.S. employees, identifying each by name and position title, including position descriptions and a breakdown of the number of hours they devote to each duty; (3) IRS Forms 941 for the third and fourth quarters of 2011 and the first and second quarters of 2012; and (4) all IRS Forms W-2 and Forms 1099 issued in 2011.

The petitioner submitted: a list of employees; a breakdown of the beneficiary's daily tasks for one week; a similar breakdown of [REDACTED] tasks as the "sales manager"; and brief position descriptions for [REDACTED] as "purchasing manager," [REDACTED] as "office manager and sales executive," [REDACTED] as "secretary," and [REDACTED] as "tires and maintenance worker."

The petitioner submitted a "subcontract agreement" dated May 18, 2012, with [REDACTED] who is listed as the "office manager and sales executive." The petitioner submitted its 2011 IRS Forms W-2, Wage and Tax Statement, demonstrating that [REDACTED] was paid \$15,079.36, [REDACTED] was paid \$24,300.00, [REDACTED] was paid \$4,800.00, [REDACTED] was paid \$5,460.00, [REDACTED] was paid \$7,000.00, and the beneficiary was paid \$45,090.20.

The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2011 and the first and second quarters of 2012 indicating that the petitioner had four employees in the third quarter of 2011 and five in the fourth quarter, four employees in the first quarter of 2012 and four in the second quarter.

On November 27, 2012, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director found that the duties presented for the beneficiary are general managerial duties and do not specify what the beneficiary will be doing in the context of the petitioner's current staffing arrangement. The director further found that the beneficiary would not be involved in the control of the work of managerial, supervisory, or professional employees who would relieve her from performing non-qualifying operational and administrative duties.

On appeal, counsel for the petitioner contends that "the [b]eneficiary is acting as a bona fide manager *and* executive." Counsel further states that "the [b]eneficiary satisfies the regulations as being employed primarily as a manager where she manages *the essential function of managing the overall business of the organization* and it is *within that function*, that she manages employees." Counsel describes the beneficiary's eligibility as follows:

In the case at Bar, the Beneficiary satisfies all requirement of the regulations, specifically, at (i), where she manages the organization; and (ii), where she both manages an essential function, i.e., managing the overall business of the organization *and* controls the work of, *inter alia*, the Sales and Purchases Managers (managerial employees; one with 12+ years of experience in his field) and an Office Manager (professional with a degree); at (iii) where she has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) *and functions at a senior level within the organizational hierarchy and with respect to the function managed—i.e., managing the organization*; and (iv), where she exercises discretion over the day-to-day operations of the organization.

(Emphasis in original).

The petitioner submits the same breakdown of the beneficiary's daily duties and those of her subordinates previously submitted in response to the RFE. The petitioner submits a new organizational chart for the U.S. company depicting the beneficiary as general manager, supervising the following individuals: [REDACTED] as "manager"; [REDACTED] as "sales"; and [REDACTED] as "accounting/lawyer." The

"manager" supervises [REDACTED] as "secretary." [REDACTED] as "purchase," and [REDACTED] whose title was omitted.

The petitioner also submits its IRS Form 941 for the third quarter of 2012 indicating that it had five employees. The petitioner's Form UCT-6 for the third quarter of 2012 lists the five employees as: the beneficiary, [REDACTED] and [REDACTED].

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily 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 AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. However, 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, the petitioner did not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act; however, the duties presented for the beneficiary indicate that her role is executive in nature. On appeal, counsel for the petitioner claims that the beneficiary will be employed as a manager and an executive. Counsel goes on to state that the beneficiary manages an essential function of the U.S. company. 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.

In the instant matter, the petitioner characterized the beneficiary's role as president and general manager, noting she will "continue to establish the goals and policies of the company"; "will continue to receive only general supervision and direction from the sole shareholder"; and "continue to exercise wide latitude in discretionary decision-making." Those duties merely paraphrase, in part, 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. 1103, 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.).

At the time of filing, the petitioner further detailed the beneficiary's duties indicating that she will spend "35% of her time daily on the review of the company's financial and budget activities to fund operations, maximize investments, and increase efficiency"; "30% of her time daily on the review of closings and sales reports, including title sales and summations for DMV"; "20% of her time daily on the review of marketing and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement"; "15% of her time daily on the review of staff performance and on any administrative matter requiring her attention." While these tasks are undoubtedly necessary in order to continue operations, the petitioner has not indicated how such duties qualify as 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. 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. 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).

In response to the RFE, and again on appeal, the petitioner provided a breakdown of the beneficiary's daily routine and identified the tasks she performs throughout an eight hour work day. Although it is a comprehensive assessment of the duties performed by the beneficiary daily, the information provided does not demonstrate that she is primarily performing duties that fall within the statutory definitions of managerial or executive capacity. The petitioner describes some of her duties as "meet with sales and office staff to delegate tasks and prioritize activities to do in the week"; "review company's bank accounts, check cash availability, check on deposits . . . and verify whether checks and credit card payments were approved"; "review existing inventory and sales reports"; "meet with sales manager, [REDACTED] to review and discuss the payment of vehicles and/or suppliers"; "review reports of the GPS system . . . to verify that vehicles are being repossessed for non-payment"; "meet with maintenance supervisor, [REDACTED] to verify parts orders that are pending"; "explore market opportunities to increase our customer and product base"; "meet with manager, [REDACTED] to confirm proper documentation for each car that is to be sold"; "inspect the cars for presentable condition"; "verify vehicle demand statistics . . . [to] instruct [the] purchase staff on what vehicles to focus their attention"; "accompany the purchasing staff to [REDACTED]"; "review the files of vehicles sold to ensure proper temporary plates sequencing was done"; "check pending vehicle registrations and plate transfers so as to authorize those which are to be registered with the [DMV]"; "verify the information . . . in the various social media and websites to ensure the high quality of our marketing message"; "work on developing new marketing and sales opportunities for

our line of business"; "verify Inventory Control Reports"; "verify payroll information . . . [and] weekly sales tax information to be sent to the accountant"; "review the bank account information to determine deposits made in the week and bills paid"; "meet with secretary . . . [to] discuss and monitor current and delinquent customer accounts"; and "review each area of our business, such as sales, purchases, repairs, car yard, and warehouse, to ensure that each is in order."

Again, while these tasks are undoubtedly necessary in order to continue operations, the petitioner has not indicated how such duties qualify as managerial or executive in nature. The duties listed by the petitioner at the time of filing suggest that the beneficiary will be primarily an executive at the U.S. company; however, the daily breakdown of duties she performs does not include any executive duties. Rather, it appears that the beneficiary will function as a first-line supervisor of non-professional employees and is directly involved in all functional areas of the business and the duties performed by her subordinates, as well as a number of administrative areas. Although the petitioner provided a similar breakdown of duties performed by the beneficiary's subordinates, it has not demonstrated that those subordinates will relieve her from performing non-qualifying operational duties, such as marketing, purchasing, and quality assurance.

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 her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Further, on appeal, the petitioner submits a "current" organizational chart indicating that some employees have changed positions and that additional employees have been hired in the proposed positions at the time of filing the petition. As those employees were hired after the filing of the petition, they cannot be considered in this proceeding. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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 organizational chart submitted at the time of filing shows that the beneficiary supervises five individuals, one of which has a "manager" position title. In response to the RFE, the petitioner submitted an employee list adjusting the subordinates' position titles to "sales manager," purchasing manager," "office manager and sales executive," "tires and maintenance worker," and "secretary." The position descriptions for these subordinates include tasks that not indicative of a managerial, supervisory, or otherwise professional position. The petitioner has not established that any of the beneficiary's subordinates require a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that any of the beneficiary's subordinates supervise subordinate staff members, or manage a clearly defined department or function of the petitioner, such that he or she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and her 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. While the petitioner has submitted an organizational chart depicting the beneficiary as general manager supervising a manager, a sales person, a secretary, a purchasing person, and an accounting/lawyer person, the petitioner has not shown how the subordinate employees would free the beneficiary from performing non-qualifying operational duties. The petitioner has not provided credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

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.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns

in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

Here, counsel for the petitioner made a brief claim on appeal that the beneficiary will "manage the essential function of managing the overall business of the organization and it is within that function that she manages employees." However, counsel and the petitioner failed to explain the essential function to be managed by the beneficiary or provide a breakdown of the beneficiary's job duties to support such a claim and failed to demonstrate that the beneficiary will allocate at least 51% of her time to managing the essential function of "managing the overall business of the organization."

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, counsel for the petitioner asserts that the beneficiary is an executive and a manager; however, 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, none of the beneficiary's listed daily tasks include duties related to the broad goals and policies of the organization. The petitioner has not established that the beneficiary's subordinate employees relieve her from performing non-qualifying operational duties. The job duties provided for the beneficiary and her subordinates fail to demonstrate that the beneficiary will focus 51% of her time on executive duties rather than the day-to-day operations of the business.

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 had four direct subordinates at the time of filing. However, the job duties provided for the beneficiary and for her subordinates demonstrate that the beneficiary's subordinates will not relieve her from performing non-qualifying administrative and operational duties.

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

III. QUALIFYING RELATIONSHIP

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

The petitioner stated on the Form I-129 that it has a parent-subsidiary relationship with the foreign entity based on the U.S. company being "100% owned by the company abroad, [REDACTED]." Throughout the record, the petitioner claims that the foreign entity wholly owns the U.S. company; however, the record does not contain any supporting evidence of ownership, such as the articles of incorporation, stock certificates, corporate stock certificate ledger, or corporate by-laws.

In support of the petition, the petitioner submitted copies of its 2009 and 2011 IRS Form 1120. The 2009 and 2011 Forms 1120 at Schedule K, which includes questions related to the petitioner's ownership and control, are marked "no" at question 4 which asks, "[a]t the end of the tax year: a. [d]id any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization 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?" In this case, the record 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.