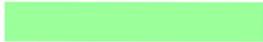


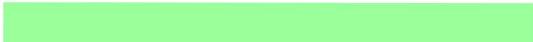


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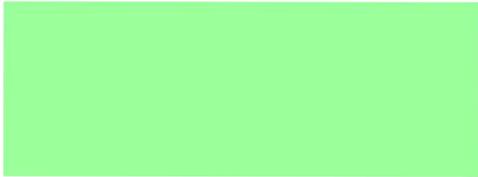


DATE: **DEC 15 2014** Office: CALIFORNIA SERVICE CENTER FILE: 

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 a Form I-129, Petition for a Nonimmigrant Worker, seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner states that it is engaged in the manufacture and sale of surfboards. The petitioner, a California corporation established in [REDACTED] indicates that it is an affiliate of [REDACTED] located in Australia. The petitioner seeks to employ the beneficiary as a global marketing relations manager for a period of three years.¹

The director denied the petition, finding the petitioner did not establish that the beneficiary is employed in a qualifying managerial or executive capacity with the foreign employer. Further, the director concluded that the petitioner did not demonstrate that the beneficiary will 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. On appeal, the petitioner contends that it has established with a preponderance of the evidence that the beneficiary acts, and will act, as a function manager overseeing an essential function of the organization.

I. THE LAW

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

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

¹ In the Form I-129, the petitioner stated in Part 5, Item 10 that the period of intended employment for the beneficiary was from "12/15/2013 to 12/13/2013." In the L Classification Supplement to Form I-129, Section 1, Item 12, the petitioner answered "Yes" when asked whether the beneficiary was coming to the United States to open a new office. Supporting letters and documentation submitted along with the petition also reflected that the petitioner was applying as a new office in the United States. See 8 C.F.R. § 214.2(l)(3)(v)(C). In a subsequent request for evidence (RFE), the director requested evidence to demonstrate that the petitioner would be likely support the beneficiary in a qualifying managerial or executive capacity after one year. In response to the RFE, the petitioner indicated that "the petitioner is requesting a validity period of three years with validity dates from 12/15/2013 to 12/15/2016." Further, the petitioner stated that it has been doing business in the United States for more than one year. Therefore, this appeal will be reviewed as if the petitioner applied as an existing office in the United States as of the date of the original petition.

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial; or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. THE ISSUES ON APPEAL

A. MANAGERIAL OR EXECUTIVE CAPACITY (FOREIGN EMPLOYMENT)

The first issue to be addressed is whether the petitioner has established that the beneficiary acted in a managerial or executive capacity with the foreign employer.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

A. Facts

The petitioner filed the Form I-129 on November 27, 2013. The petitioner states that it and the foreign entity are primarily engaged in designing and manufacturing surfboards and that the foreign entity "developed a brand of surfboards using new manufacturing techniques" used by many surfers around the world. The petitioner submitted a foreign entity profit and loss statement indicating that the company earned \$1,148,886 in Australian dollars during the 2013 fiscal year and an organizational chart reflecting that the foreign entity has ten employees.

The petitioner stated that the beneficiary has been employed as the global marketing and public relations manager since April 2012, noting that she "manages all marketing activities of the company and establishes the strategies to develop the [foreign entity's] brand among our worldwide customer base." The petitioner explained the beneficiary's duties abroad as follows:

[The beneficiary's] primary activities consist of overseeing all external communications on behalf of the company. For example, she supervises and approves drafts of press releases, company and product descriptions, management profiles, and any other information that is disseminated to the public. She also coordinates media interviews and photo shots with our founder, [REDACTED] our merchandise, and patented technologies for magazine articles, surfing websites, and other industry publications. These publications are instrumental in creating an informed awareness of our products and technologies. Media publications also substantiate our brand as a producer of high quality surfboards that rival those of industry leaders. [The beneficiary's] management of

these interviews and her keen ability to present the core products of our company is key to achieving widespread acceptance as a legitimate surfboard manufacturer.

As the Global Marketing and Public Relations Manager, [the beneficiary] is also responsible for planning all marketing campaigns and managing the [foreign entity's] brand image. For example, [the beneficiary] plans the advertisements distributed online and in industry publications. This includes developing strategies for each marketing campaign, including the targeted audience, allocated budget, and specific content included in each advertisement. In addition, [the beneficiary] works with the Director and Founder . . . to develop and manage the company's brand. This requires her to understand the strategic vision espoused by [redacted] and make the necessary decisions to achieve the desired corporate identity. For example, [the beneficiary] is responsible for approving the design of the company logo and its use on all merchandise and publications. She also sets the policies and procedures for employees to understand how to conduct business in furtherance of the company's branding strategies.

In addition, the petitioner stated that the beneficiary was responsible for providing "demo boards to professional surfers used in competitions" and managing the endorsement of their products by professional surfers, which it states is "a key factor to the market acceptance of our products." Further, the petitioner indicated that the beneficiary "directs our online presence," "plans the layouts and content," and that she "oversees the work of our web developers and designers and instructs them according to the plans and layouts she creates." The petitioner indicated that the beneficiary is also "solely responsible for the marketing and public relations department."

The petitioner provided a foreign entity organizational chart indicating that the beneficiary reported to the director of the company, [redacted] who was responsible for the creation and development of the company's patented surfboards. The beneficiary was not shown to have any subordinates. The chart reflected that the foreign entity employs an accounts, finance, and operations manager who oversees a head shaper and production manager and a sales and customer service manager. The head shaper and production manager was shown to supervise two employees specializing in "sanding and filler coats" and two laminators. The chart also reflected that the sales and customer service manager oversees a warehouse and sales assistant.

The petitioner submitted a profit and loss statement covering the period from June 2012 through June 2013 indicating that the foreign entity paid approximately \$190,000 Australian dollars to "contract labour," approximately \$172,000 Australian dollars in salaries and wages, and incurred just over \$27,000 Australian dollars in marketing expenses during this period out of a total of just over \$488,000 in expenses invoiced during this period. The petitioner submitted foreign entity marketing materials reflecting pictures of its surfboards and photographs with surfers holding their products, including a marketing document listing the beneficiary as the global marketing contact for the foreign entity. The petitioner provided foreign entity payroll documentation covering June 2012 through June 2013 indicating that the beneficiary received \$42,307 Australian dollars during that fiscal year.

The director later issued an RFE on December 4, 2013. The director requested that the petitioner submit a more detailed organizational chart listing of the foreign entity's employees by name and title with a

summary of their duties, education levels and salaries. The director further asked the petitioner to provide a letter from the foreign entity describing the beneficiary's managerial or executive decisions and duties, including the percentage of time she spends on each of her tasks.

In response, the petitioner submitted a job duty description for the beneficiary specifying the beneficiary's main responsibilities and tasks and the time she allocated to each. The petitioner indicated that the beneficiary was responsible for creating and executing all "brand communication collateral, advertising and creative direction;" managing and approving all logo use and copy; creating and executing all trade show booths and printed material; working with the AUS and USA sales teams; creating, updating and maintaining press lists; writing all copy and press releases; building and updating public relations files; and updating copy, promotional imagery and all written communication at the company's website.

The petitioner submitted an updated organizational chart relevant to the foreign entity that largely mirrored the chart provided previously on the record with a few changes at the operational levels. The petitioner provided duty descriptions for each of the employees in the organizational chart, their general education levels and salaries. The beneficiary's description reflected that she earned \$40,000 Australian dollars per year and her education consisted of a high school certificate and university.

The director issued a second RFE on January 21, 2014. The director stated that the evidence indicated the beneficiary was primarily assisting with the day-to-day non-supervisory duties of the business. The director proceeded to request largely the same evidence demanded in the previous RFE.

In response, the petitioner stated that the beneficiary has acted as a function manager of marketing from 2012 to the present time. The petitioner provided an expanded duty description for the beneficiary in her position abroad, as follows:

25%: The overall growth of brand awareness in key international markets – through strategic brand/PR planning, thus increasing sales through the [foreign entity and petitioner] custom programs (AUS and USA) and [redacted] distribution program.

- Establish policy and strategic development plan for marketing and PR events
- Create media exposure through channeling with major magazines and media outlets (ie. [redacted] etc.)
- Meet with heads of licensed distribution [redacted] for exposure meeting and product awareness as well as receive sales projections on target market areas (international with main focus in U.S. and Australia)
- Confer with Director on budgeting requirements to better promote brand awareness and advertisement and channeling exposure through offline and online mediums

15%: Professional surf team rider management – leveraging partnerships with key brand sponsors such as [REDACTED] etc.

- Enter and negotiate into contractual agreement with major retailers for events, venues, product promotion
- Promote team rider management in selection of sponsored athletes and celebrity brands in conjunction with major retailers
- Provide budgetary guidelines and authorize financials required for successful team rider direct and indirect sponsorship
- Provide and organize venues and partner and alliance for competitive events for branding purposes including national and international competition
- Authorize and organize event launch in major conventions and product shows

20%: Online sales/marketing management and Social Media community growth.

- Allocate and authorize resources for web development and approve contents for publications in direct web as well as social media community of product brands.
- Review and authorize press release materials

5%: Brand partnerships and product collaborations.

20%: Retail marketing and global store brand presence and product education.

- Determine sector guidance on sales performance to research trends and correct deficiency through promotions and sales as well as support offerings to increase visibility and sales in target market

15%: Design and execution – Copy writing, Advertising Material and all external brand communication.

- Approve final design and execution of copy writing, advertising and brand communications
- Allocate companies, contract employees, and internal employees for job assignment as needed.

The petitioner provided the same foreign organizational chart and subordinate job duties provided in response to the director's previous RFE.

In denying the petition, the director concluded that the evidence indicates that the beneficiary is primarily assisting with day-to-day non-supervisory duties while employed with the foreign entity. The director found that the petitioner did not demonstrate that the beneficiary qualifies as a function manager since the evidence reflects that she is primarily engaged in non-qualifying operational duties, also noting the petitioner's failure to describe the essential function managed by the beneficiary.

On appeal, the petitioner contends that the beneficiary has established with a preponderance of the evidence that the beneficiary acts as a function manager for the foreign entity overseeing and controlling the foreign entity's marketing activities.

B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary is employed in a qualifying managerial or executive capacity with the foreign entity.

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 definitions of executive and managerial capacity 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).

Beyond the required description of the job duties, United States Citizenship and Immigration Service (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company'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 business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

In the present matter, the petitioner has submitted duty descriptions reflecting that the beneficiary has been primarily engaged in the performance of non-qualifying operational duties. For instance, the beneficiary's duties indicate that she performs a significant number of duties which do not fall directly under traditional managerial or executive duties as defined in the statute, including writing all press releases, copywriting, coordinating interviews and photo shoots, designing company logos, providing demonstration surfboards to surfers, directly creating media exposure through magazines and newspapers, organizing promotional events and venues, and managing the company's social media presence. Although the petitioner has submitted a duty description reflecting percentages of time the beneficiary devotes to various tasks, the aforementioned non-qualifying duties are intermingled with various asserted managerial tasks, making it difficult to discern whether she is devoting a majority of her time to qualifying duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Although the petitioner lists the beneficiary's job duties abroad, such as overseeing web designers, developers, contractors and foreign entity employees; establishing policies and a strategic development plan; providing budgetary guidelines; authorizing financials; and negotiating contractual agreements, it fails

to provide details or supporting documentation to substantiate the beneficiary's performance of these duties. For instance, the petitioner asserts that the beneficiary oversees and directs web designers, developers and other contractors assigned to the marketing function, but provides no evidence to corroborate this claim. The petitioner does not articulate the policies the beneficiary disseminated, the development plans she created, partnerships she brokered, or contracts she negotiated while working for the foreign entity to support her primary performance of qualifying executive or managerial duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). In sum, the petitioner has submitted duty descriptions indicating that the beneficiary devotes a significant portion of her time to the performance of non-qualifying operational duties and the petitioner has not substantiated that the foreign entity engages sufficient employees or contractors to assist in relieving the beneficiary from these duties.

On appeal, the petitioner primarily asserts that the beneficiary qualifies 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 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. § 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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

The petitioner has not demonstrated that the beneficiary has acted as a function manager for the foreign entity for at least one year. As previously discussed, the beneficiary's foreign duty description indicates that she is likely primarily engaged in the performance of non-qualifying operational duties. The petitioner had failed to substantiate the beneficiary's performance of mostly qualifying duties with the foreign entity. In addition, the petitioner has not submitted evidence to establish that the foreign entity employs independent contractors in the marketing function as necessary to relieve the beneficiary from her stated non-qualifying tasks, such as copywriting, coordinating interviews and photo shoots, providing demonstration surfboards to surfers, creating media exposure through magazines and newspapers, organizing promotional events and venues, and managing the company's social media presence. As indicated above, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties).

Further, the provided evidence leaves question as to whether the beneficiary manages an essential function of the foreign entity. For instance, the foreign entity's financials reflect that the company spent just over \$27,000 Australian dollars on marketing from June 2012 to June 2013 out of a total of just over \$488,000 in expenses. Given that the marketing expenses represent a relatively small amount of overall expenses, there is question as to whether the beneficiary's claimed management of this function was sufficiently critical to be deemed an essential function of the organization. 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). Further, the petitioner has not adequately explained the beneficiary's marketing activities abroad as necessary to determine whether these are essential to the company. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

For the foregoing reasons, the record does not support a finding that the beneficiary is employed in a qualifying managerial or executive capacity with the foreign entity. For this reason, the appeal will be dismissed.

B. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES EMPLOYMENT)

The next issue to be addressed is whether the petitioner has demonstrated that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

1. Facts

In support of the Form I-129, the petitioner stated that the beneficiary will be transferred to the United States to fulfill a role similar to that which she performs abroad, noting that the beneficiary "will be a functional manager, responsible for developing the company's U.S. marketing activities." Specifically, the petitioner described the beneficiary's proposed duties as follows:

Because [foreign entity] surfboards are already sold in the United States, there is an existing need for [the beneficiary's] managerial services to direct communications with our U[.]S[.] customers. Some of her management activities in Australia involved U[.]S[.] publications and media. However, with the opening of a showroom and production facility in [redacted] California, we will devote significant resources to public relations events in an attempt to inform the industry of our U[.]S[.] expansion plans. Accordingly, [the beneficiary] will be required to develop the overall strategies for these events, such as the specific content to be distributed, desired media coverage, and any appearances from professional surfers that will target our ideal customers. She will also negotiate strategic partnerships with other U[.]S[.] companies in the industry to build brand awareness and increase familiarity with the [foreign entity] brand. Our inaugural events are crucial to establish a strong public perception of our brand.

After our initial public relations events are concluded, [the beneficiary] will establish normal marketing procedures to be used by the company going forward. Once these strategic decisions are made, [the beneficiary] will establish the detailed marketing policies and procedures to guide future employees. She will plan the advertising content, type of media used, publications to advertise in, and how often each advertisement will recur. She will also coordinate interviews and photo shoots about the company to appear in magazines and other industry publications. To sell our surfboards and patented technology, it is very important that our marketing efforts and public communications clearly explain the benefits of our unique products. Well planned, particular public relations are vital to differentiating our brand from the others in the industry.

In addition, the petitioner indicated that the beneficiary would also "continue to develop the company's online presence," "gear certain social media communication toward increasing our U[.]S[.] audience," "continue to work with professional surfers who endorse our brand," and place products amongst these professionals.

The petitioner submitted an organizational chart reflecting that the beneficiary would report to [REDACTED] Managing Director, who in turn would oversee a sales and customer service manager and a production manager. The chart indicated that the sales and customer service manager supervises an intern while the production manager oversees a manager at [REDACTED], a licensed manufacturer of [REDACTED]. The manager at [REDACTED] was shown to supervise employees working for this contractor, including a head shaper, laminator, a pre-sander/hot coater and a sander.

The petitioner provided financials indicating that it had earned just over \$92,000 in revenue through May 2013. The petitioner provided a business plan that included a detailed marketing strategy, noting that the petitioner planned on targeting "mid to high income earners" and to emphasize the "superior ride" of its boards. The marketing plan stated that the beneficiary would leverage a team of professional surfers to market the product, ten of which were mentioned by name, including [REDACTED], who it stated was added to the "team" in 2007. The marketing plan further explained that the petitioner would present itself at "key trade shows," organization "branded events," and take advantage of editorial and "mass PR" opportunities. The petitioner indicated in the business plan that during the third year of operation it planned to expand the "employee team" to handle growth in sales, including divisions devoted to "Customer Service and Sales, Marketing, [and] Manufacturing/Production Management." The petitioner stated that its expansion in the United States would be funded by its sales in the U.S. market and that it would launch a global website in February 2013 through a \$20,000 investment to support "branding, marketing, and sales." The petitioner further submitted a detailed marketing plan.

In addition, the petitioner indicated in its business plan that the beneficiary had "over 7 years experience in the industry," working for "[REDACTED] and [REDACTED]". The petitioner noted that the beneficiary specialized in "marketing and PR" and executed large scale events. The petitioner stated that the beneficiary would "focus on growing the brand in the U[.]S[.]" through "targeted PR strategies."

In the first RFE, the director stated that the evidence failed to demonstrate that the new office would support the beneficiary in an executive or managerial position after one year. The director requested that the

petitioner submit evidence describing the proposed nature of the new office, its scope, organizational structure and financial goals, including feasibility or market studies, a timetable of actions and a list of all proposed employees, their duties, and expected educations. Further, the director asked the petitioner to provide evidence of investment in the new business venture on the part of the foreign entity.

In response, the petitioner stated that the director was mistaken, noting that the company has been doing business in the United States for more than one year and that the foreign entity has been selling surfboards in the United States for a number of years. The petitioner submitted a duty description relevant to the beneficiary's proposed U.S. employment identical to the foreign duty description it submitted in response to the director's RFE, which is set forth previously in this decision.

The petitioner provided an updated U.S. organizational chart reflecting that the beneficiary again reported to [REDACTED] the director of the petitioner. The chart indicated that [REDACTED] supervises an outsourced employee devoted to tax and accounts, an outsourced employee focusing on "payroll," another outsourced employee listed as the owner of [REDACTED], a production manager & shaper (list as "to be hired"), and a sales and customer service coordinator. The chart further reflected that: the production manager and shaper would oversee two laminators and a sanding and filler employee; that the sales and customer service coordinator would supervise a warehouse and sales assistant; and that the outsourced manager from [REDACTED] would oversee a shaper, laminator and pre-sander/hot coater.

In the second RFE, the director stated that the evidence submitted was insufficient to establish that the new office will support the beneficiary is a qualifying managerial or executive capacity after one year. As such, the director again requested the same evidence requested in the previous RFE. The director asked that the petitioner explain the inclusion of [REDACTED] in the company's organizational chart.

In response, the petitioner stated that the beneficiary will manage an essential function of the organization marketing the company's surfboards "to consumers across the globe." The petitioner indicated that the beneficiary would manage relationships with media outlets, photographers, specialized advertisers, marketers, retail outlets, and sponsored surfers. The petitioner explained that the beneficiary would have wide discretionary authority in recruiting personnel and granting and authorizing expenditures and that she would "be at the top of the organization hierarchy exercising executive/managerial discretion next to the President [REDACTED]."

The petitioner allocated the beneficiary's proposed duties as follows:

[The beneficiary] as a Global Marketing and PR Manager has the authority to exercise discretion on the following **(30% of duties)**:

- Select media outlets for promotional branding including but not limited to product advertisement, event sponsorship, press release
- Request and allocate necessary budgetary requirement for projects
- Authorize sponsorship of company products for recognized athlete and endorsement contracts and provide budgetary allocation for team for international and national competition to promote product. . . .

The essential functional responsibility of [the beneficiary] as Global Marketing and PR manager includes the following (**30% of duties**):

- Discuss and strategize with top director and executive, [REDACTED] on matters relating to target market, including but not limited to the U.S. and Australian markets and provide comprehensive periodic plans by weekly, monthly, quarterly and annual venues of project events
- Communicate with key stakeholders, including major distributorship management and financial professionals in order to determine the type of financial budgeting requirements in conjunction to project events, including competition sponsorship, product sponsorship, and advertisements
- Review vision and projected product venues as well as company production capabilities to produce advertisement and media campaigns geared towards meeting sufficient sales goals through increased exposure
- Contact key media outlets when scheduling new product launch events, company profile introduction, product performance and patented technology to increase awareness of company's products

[The beneficiary's] role with [the petitioner] as a Global Marketing and PR Manager is essentially unchanged but expanded to include Australia as well as the U.S. market. [The beneficiary's] job duties include the execution of PR and marketing events as follows (**20% of duties**):

- Recruit and enter into contractual hiring of companies, staff and necessary personnel to carry our promotional events, including participation in national and international competition
- Recruit and hire companies as well as promotional staff for product convention/shows and key demonstration events
- **Act as ultimate authority in absence of the Director [Emphasis Added]** for major company decisions and budgetary requirements. Make key recommendations and compose key strategic policy that affects the entire organizational structure to best promote company's outreach activities
- Work in conjunction with other functional and working divisions to conduct and hold regular periodic conferences to discuss and make policy recommendations in congruence to company's mode of operation

As explained in the initial petition and subsequent response to USCIS, the beneficiary is acting in the capacity of functional management whereas the following duties apply (**20% of duties**):

- Allocate and assign contract companies and enter into financial contracts to develop advertisements and to approve final design and release

- Hire necessary personnel for live events – 1,000 – 5,000 spectator participation events (national, international competition) and to create partnerships and form alliances in order to participate in major product and branding opportunity events
- Recommend product and distribution of structural guideline to best promote company's product in relation to competitive products.
- Procure, receive and review various feasibility reports from financial and data publication companies to make policy decisions in entering specific market and demographics for live events, offline and online events.

Furthermore, the petitioner explained that its distributing and manufacturing partners are restricted from marketing the company's products thereby making the efforts of the beneficiary's proposed marketing department essential to its success in the United States. The petitioner stated that the beneficiary would outsource key components of the function, making the control and supervision of other employees non-essential to the functioning of the department. The petitioner indicated that the beneficiary would have sole discretion "for functional implementation relating to promotion, marketing and advertisement events conditioned to the Director's clearance of budgetary approval." The petitioner stated that the beneficiary would manage a budget of nearly \$50,000 during 2013, which would be increased to over \$200,000 by 2015. The petitioner submitted four employment agreements, which are signed by the beneficiary. The petitioner stated that this demonstrates that the beneficiary "exercises managerial discretionary authority for recruitment as well as termination of all subordinate staff."

The petitioner submitted an organizational chart nearly identical to that previously provided on the record. However, the most recent organizational chart was modified to reflect that the beneficiary would oversee a sales and customer service coordinator, who in turn supervises a warehouse and sales assistant. The petitioner provided minutes of its board of director's meeting dated November 18, 2013 indicating that the beneficiary was appointed as secretary of the petitioner in place of [REDACTED]

In denying the petition, the director stated that the submitted organizational chart reflected that the beneficiary primarily assisted with the day-to-day non-supervisory duties of the business thereby precluding her from acting in a qualifying managerial or executive capacity. Further, the director concluded that the petitioner had not submitted sufficient evidence to establish that the beneficiary would be primarily employed as a function manager and stated that the petitioner had not adequately described the function to be managed by the beneficiary.

On appeal, the petitioner states that it has provided a detailed description of the beneficiary's managerial responsibilities and their relation to an essential function of the organization, including her controlling financial and organizational resources and her responsibility for entering into agreements on behalf of the company. Further, the petitioner asserts that the beneficiary exercises executive authority "next to the President" and asserts that all administrative staff are under the her direct authority.

2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity.

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

Beyond the required description of the job duties, United States Citizenship and Immigration Service (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company'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 business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

In the present matter, the petitioner has submitted duty descriptions for the beneficiary's proposed U.S. employment indicating that she will likely primarily perform non-qualifying operational duties. For instance, the duty description submitted in support of the petition and in response to the director's first RFE reflects that the beneficiary will perform a number of duties that do not fall directly under traditional managerial or executive duties as defined in the statute, including organizing public relations events, media interviews, and photo shoots; updating imagery and copy of the company's website; managing the petitioner's social media communications; creating and executing on trade show booths and materials; writing all copy and press releases; and building and updating "PR files." However, in response to the director's second RFE, the petitioner provided a materially different description of the beneficiary's duties which deemphasized these non-qualifying duties. This duty description offered more qualifying duties for the beneficiary, including her responsibility for contract negotiations, managing budgets, and setting company policies. Further, the petitioner modified the company's organizational chart to reflect that she will act in an executive capacity as a secretary and oversee a subordinate manager. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In sum, the petitioner has not provided sufficient supporting evidence to substantiate that the beneficiary will primarily perform qualifying managerial duties. The beneficiary's latest duty description states that the beneficiary delegates or dictates non-qualifying duties to contractors and employees with respect to public relations, trade shows, and marketing and other marketing functions, but fails to detail or evidence the existence of these contractors or employees or provide evidence of her organization of marketing events. The petitioner has not specified the events the beneficiary will plan or specific marketing policies she will implement. Indeed, the marketing plans of the petitioner appear rather well established in the petitioner's

provided business plan, leaving question as to whether beneficiary will be primarily engaged in setting these policies, rather than partaking in the non-qualifying operational duties to carry them out. In fact, the petitioner states that it does not plan to hire any employees within the beneficiary's department until its third year of operation, leaving doubt as to whether the beneficiary will be primarily relieved from performing her referenced non-qualifying tasks. As noted, the petitioner has submitted duty descriptions indicating that the beneficiary devotes a significant portion of her time to the performance of non-qualifying operational duties and the petitioner has not substantiated that the petitioner engages sufficient employees or contractors devoted to the marketing function to relieve her from her enumerated non-qualifying tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Although the petitioner provides various qualifying duties for the beneficiary in her capacity abroad such as overseeing web designers, developers, contractors and foreign entity employees; establishing policies and a strategic development plan; providing budgetary guidelines; authorizing financials; and negotiating contractual agreements, it fails to provide specific or supporting documentation to support the performance of these duties by the beneficiary. For instance, the petitioner asserts that the beneficiary will oversee and direct web designers, developers and other contractors assigned to the marketing function, but provides no evidence to substantiate this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, the petitioner primarily asserts that the beneficiary qualifies 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 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. § 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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

The petitioner has not demonstrated that the beneficiary will act as a function manager. As previously discussed, the beneficiary's duty descriptions indicate that she will likely be primarily engaged in the performance of non-qualifying operational duties. The petitioner has failed to substantiate that the

beneficiary will primarily perform qualifying duties with the petitioner. Indeed, the beneficiary's duty description appears modified in response to the second RFE to conform the beneficiary's proposed employment to the regulations, rather than articulating the true nature of her duties. In addition, the petitioner has not submitted evidence to establish that the foreign entity employs independent contractors in the marketing function as necessary to relieve the beneficiary from the stated non-qualifying tasks, such as copywriting, coordinating interviews and photo shoots, providing demonstration surfboards to surfers, directly creating media exposure through magazines and newspapers, organizing promotional events and venues, and managing the company's social media presence. As indicated above, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties). Therefore, the petitioner has not established that the beneficiary will be employed as a function manager in the United States.

For the foregoing reasons, the record does not support a finding that the beneficiary will be employed in a qualifying managerial or executive capacity with the petitioner. For this reason, the appeal will be dismissed.

III. CONCLUSION

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

ORDER: The appeal is dismissed.