(b)(6)

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

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 2 2 2014 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 California Service Center Director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation formed in November 2010, is a network and application security solution provider. It is a subsidiary of located in China. The petitioner seeks to employ the beneficiary as its Chief Strategy Officer (CSO) for a period of approximately three years.

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 the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. The petitioner also asserts that the petition should be treated "the same like a new office case." The petitioner submits a brief and additional evidence in support of the appeal.

I. The Law

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

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

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

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

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. Factual and Procedural History

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, and Form I-129 Supplement L, L Classification Supplement to Form I-129. On the Form I-129, the petitioner described its business as a "Start-up," with no reported gross annual income and eight current employees in the United States. On the Form I-129 Supplement L, the petitioner described the beneficiary's proposed duties in the United States as "to set up research department and serve as the Chief Strategy Officer (CSO) of the [U.S.] Entity."

In a letter submitted with the initial petition, the petitioner reiterated that it wishes to employ the beneficiary "to set up and lead our Research Department." The petitioner stated that the primary business of the U.S. entity is to provide marketing, sales, technical support and customer-engineering services in support of the foreign entity's products that are sold in the United States, and to be a research and development (R&D) and technology development center for exploring new product lines with higher entry barriers. The petitioner stated that it currently employs eight staff members under the following four departments: Finance & Administration; Marcomm; Presales & Support; and Sales. The petitioner stated:

> Subject to the approval of the subject petition, the beneficiary will be temporarily transferred from the Foreign Entity to the US Entity to set up the 5th department, i.e., the Research Development and serve as the [CSO] to lead such department. [The beneficiary] will remain the CSO of the Foreign Entity so that he can lead the synchronize research and technology development of both Foreign and US entities. The main purpose of such transfer is to extend the headquarters' technology research function to the US site and avail the abundant high-tech resources in the Silicon Valley to speed up its technology department [*sic*].

The petitioner stated that after the beneficiary's transfer, he "will interview and recruit 4~5 researchers in the latter half of 2013 and will spend and allocate his time in leading and supervising such researchers to perform their respective functions."

The petitioner also explained that it is the wholly owned subsidiary of the foreign entity. The petitioner described the business activities of the foreign entity as "an industry leader in providing enterprise-level network security solutions and services." The petitioner described the foreign entity as having a current paid-in capital of approximately USD$ 12.04 million, 1,423 employees in its Chinese headquarters, and established subsidiaries in the United States and Japan. The petitioner further described the beneficiary's duties for the foreign entity as its CSO, in which he was "in charge of the company's technology research function to explore the front-line technologies [*sic*]."

The petitioner also submitted the following evidence in support of the petition:

1. Its Articles of Incorporation, filed with the Office of the Secretary of State of the State of California on November 23, 2010;
2. The foreign entity's organizational chart depicting the petitioner as one of two branch offices reporting to the Director, International Business. The chart also depicts a "Research Center at US," described as "the team that [the beneficiary] plan to start at US [*sic*]," as one of four departments reporting directly to the CSO;
3. An organizational chart of the departments and employees underneath the CSO in China, and descriptions of each department;
4. The U.S. entity's organizational chart depicting five departments including Research, which is led by the CSO. The CSO is depicted as overseeing two departments: Strategic Research, comprised of 1-2 unnamed strategists, and Security Research, comprised of 3 researchers;
5. The petitioner's 2011 Form 1120, U.S. Corporation Income Tax Return, showing a total income of $926 derived completely from dividends; and
6. The petitioner's 2012 Form 1120, U.S. Corporation Income Tax Return, showing a gross receipts or sales amount of $270,321.

The director issued a request for evidence (RFE) instructing the petitioner to submit additional evidence, including: a letter describing the beneficiary's typical executive or managerial duties and the percentage of time to be spent on each; an organizational chart listing all of the beneficiary's subordinates in the United States by name, summary of duties, educational levels, and salaries; copies of the U.S. entity's payroll; and copies of employment agreements entered into by any newly hired employees who will be managed by the beneficiary.

In response to the RFE, the petitioner explained:

> Petitioner's current company structure consists of mainly sales, pre-sales support and administrative functions. The L-1A beneficiary is coming to the US to set up and lead a new R&D Department in the US that is similar to the R&D department that the L-1A beneficiary is currently leading at the foreign entity, with a smaller scale. In other words, L-1A beneficiary will interview and recruit his subordinate employees only after he obtains L-1A visa approval and assumes his CSO position in the US. As such, the petitioner's proposed US organization chart submitted in the filed petition contains only the existing employees and did not include the targeted 4~5 new employees which will be hired only after L-1A beneficiary is on-board. For the same reason, petitioner currently does not have payroll summary, W-2 forms or employment agreement of employees under the L-1A beneficiary's direction as your office requested.

In a separate letter, the petitioner reiterated that the beneficiary will set up the new research department in the United States with two sections: Security Research and Strategic Research. The petitioner reiterated that the beneficiary "will remain CSO of our parent company in China so that he can lead the synchronize [*sic*] research and technology development at both sites." The petitioner then stated that the beneficiary will be employed in a managerial capacity in the United States, and will spend "around 60% of his time on the

Security Research Section (with targeted 3 researchers including 1 senior researcher and 2 researchers) and 40% of his time on Strategy Research Section with targeted 1~2 Strategist) [*sic*]." The petitioner provided a description of the beneficiary's proposed duties in the United States, as follows:

> [The beneficiary] will allocate approximately 50% of his working time on the following job duties:
>
> - Followed the decided company level business strategy and goal, define department functions and establish annual targeted performance goals, conduct periodic department performance review with director levels employees, coordinate, arbitrate and reconcile cross-departments cooperation or conflicts to achieve maximum business interest (20%) [*sic*];
> - Review project-based research and business plans and proposals from executive team and technology management team of the company and exercise final approval authority (10%);
> - Explore, interview and hire/fire researchers and engineers, define their job function/duty, supervise and guide their work, conduct annual performance review (10%);
> - Monitor the effectiveness and efficiency of research project related processes and tune the processes (5%);
> - Budgeting and financial control (5%).
>
> [The beneficiary] will allocate approximately 30% of his working time on the following job duties:
>
> - Direct the activities related to company level technology strategy development, execution, review, provide guidance and sponsorship to specific strategic initiatives, participate the executive decision making and approval (15%) [*sic*];
> - Explore technology opportunities at the market and organize corresponding interview, technology seminar, collaborative workshop, execute technical licensing or cooperation projects on behalf of company, select and decide the establishment of business alliance with U.S. leading industries, manage the research collaboration activities with universities and other research institutes and keep good communications with technology executives of partners (10%) [*sic*];
> - Provide guidance to the engagement for merging and acquisition (5%) [*sic*].
>
> [The beneficiary] will allocate approximately 20% of his working time on the following job duties:
>
> - Targeted to be the leader at the market, draft technical articles and presentations, present at marketing and technical events on behalf of the company; visit executives of critical customers (10%) [*sic*]; [and]
> - Lead and provide guidance to a number of technology communities and organizations worldwide, including [redacted] (10%).

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed by the United States entity in a managerial or executive capacity. In denying the petition, the director observed that since the petitioner has not yet hired any employees to fill the strategic research and security research positions that are subordinate to the beneficiary, "then it would be reasonable to conclude that the responsibility of performing many of the tasks associated with those positions would fall upon the beneficiary." The director concluded that because the beneficiary would likely be primarily assisting with the day to day non-supervisory duties of the business, the beneficiary is precluded from being considered a manager or executive.

On appeal, the petitioner disputes the director's reasoning and conclusions. The petitioner reaffirms that the beneficiary is coming to the United States to set up a new department and to interview and hire his subordinate staff. The petitioner asserts that there is no factual support for the director's conclusion that the beneficiary will be performing the non-qualifying research duties. The petitioner reiterates that the research duties will only be performed by the new hires and will not be performed by the beneficiary. The petitioner also reiterates that the beneficiary will remain as the CSO of the foreign entity so that he can lead the synchronized research and technology development at both sites. Finally, the petitioner asserts: "This case (set up new R&D department) should be treated the same like a new office case where there is no employees currently on board but USCIS granted one year approval period based on the 'proposed' business plan, job duty, organization chart and staffing for L-1A executive/manager position."

In support of the appeal, the petitioner submits copies of previously submitted evidence, as well as a copy of an unpublished AAO decision in which the AAO sustained the appeal based in part upon the L-1A beneficiary's supervision of subordinate staff in the foreign entity.

III. Discussion

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 by the United States entity in a managerial or executive capacity.

As an initial matter, we will address the petitioner's assertion that the instant petition should be treated like a new office petition. The regulations relating to a new office allows for a more lenient treatment of managers or executives, wherein a new office is granted a one-year period to commence doing business and develop to the point that it will support the beneficiary in a managerial or executive position, as opposed to having to establish eligibility at the time of filing. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines the term "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." Doing business is defined as "the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

Here, the record does not establish that the petitioner can be treated as a "new office." Specifically, there is insufficient evidence in the record to establish that the petitioner has been doing business in the United States for less than one year as of the date of filing, July 1, 2013. 8 C.F.R. § 214.2(l)(1)(ii)(F); 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner submitted no explanation or documentation to establish when it first began to conduct business in the United States. While the petitioner characterized itself as a "Start-up" company that has not realized any revenue on the Form I-129, this assertion is not corroborated by documentary evidence. 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 fact, the petitioner's 2012 Form 1120 shows that the company earned gross receipts or sales in the amount of $270,321, thus undermining the petitioner's claims that it is a start-up company with no revenue. The mere fact that the petitioner is setting up a new department within the existing U.S. company does not qualify the petitioner as a "new office" under the regulatory definition of that term at 8 C.F.R. § 214.2(l)(1)(ii)(F).

Therefore, this petition must be adjudicated pursuant to the regulatory requirements applicable to individual petitions pursuant to 8 C.F.R. § 214.2(l)(3)(i)-(iii). Specifically, the petitioner must demonstrate that it will employ the beneficiary in a managerial or executive position as of the date of filing the petition, not at some unspecified time in the future. 8 C.F.R. § 214.2(l)(3)(ii). 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).

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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, 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 (if any), the nature of the petitioner's business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate that the petitioner will and can support the beneficiary in a primarily managerial or executive capacity. *Id.*

Based on the record as presently constituted, we cannot conclude that the petitioner will employ the beneficiary in a primarily managerial or executive position as of the date of filing. As the petitioner concedes, the beneficiary will set up an entirely new department that currently has no employees. However, several of the petitioner's descriptions of the beneficiary's proposed job duties in the United States are dependent upon the existence of subordinate staff. For example, the beneficiary's proposed duties include supervising and guiding the newly hired researchers and engineers; directing their activities related to company level technology strategy execution; and managing their research collaboration activities. Without any subordinate staff to supervise, direct, and manage, and without any subordinate staff to perform non-qualifying research activities, it is unclear what actual duties the beneficiary will be performing in the United States.

Moreover, despite the petitioner's assertion that the beneficiary will not be performing any non-qualifying duties in the United States, the petitioner includes non-managerial tasks among the beneficiary's proposed responsibilities. For instance, the petitioner stated that the beneficiary would spend 10% of his time performing tasks such as exploring technology opportunities in the marketplace.[1] The petitioner also stated that the beneficiary will spend 10% of his time performing tasks such as drafting technical articles and presentations, and presenting at technical events.[2] As such, it is apparent that the beneficiary will be conducting some non-qualifying duties. While performing some non-qualifying duties will not necessarily render the beneficiary ineligible as a manager or executive, the existence of unresolved inconsistencies regarding the beneficiary's job duties leaves the record unclear as to what the beneficiary's actual job duties will be in the United States. The inconsistencies also undermine the credibility of the petitioner's claims and evidence.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Finally, the petitioner claims that the beneficiary will concurrently serve as the CSO for the foreign entity in order to synchronize the research and technology development at both sites. However, the petitioner's description of the beneficiary's proposed job duties in the United States does not list any duties specifically involving the foreign entity or its employees. To the contrary, the petitioner stated that the beneficiary will spend "around 60% of his time on the Security Research Section (with a targeted staff of three researchers) and 40% of his time on Strategy Research Section with targeted 1~2 Strategist) [*sic*]." This statement indicates that the beneficiary will devote 100% of his time to the U.S. entity and any employees it hires. The beneficiary's job description does not reference his continued responsibility for foreign staff. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

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). 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

[1] The petitioner specifically described the operational functions of the Strategy Research Section as including conducting research to explore business opportunities and identifying strategic technologies and products with great potential to the company.

[2] The petitioner specifically described the operational functions of the Security Research Section and Strategy Research Section as including drafting academic papers and reports and participating in technology events on behalf of the company.

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 Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. While the petitioner's research and development activities could be considered an essential function, the petitioner has not established that someone other than the beneficiary will be performing the non-managerial duties associated with the function until some unspecified date in the future. Nor has the petitioner provided adequate support for a finding that the responsibilities of the un-staffed security research and strategy research groups will be assigned to staff within the foreign entity until such time the U.S. staff is hired and trained.

The petitioner further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial capacity for L-1 classification through indirect supervision of overseas staff within the petitioner's organization. The petitioner has not established that the facts of the instant petition are analogous to those in the unpublished decision. Regardless, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Here, the petitioner indicated that the beneficiary would synchronize research and development activities between the U.S. and foreign entities, but, again, it has not demonstrated that the foreign entity's existing R&D department will relieve him of performing non-qualifying duties associated with U.S.-based research and strategy development efforts until employees can be hired.

Overall, the record contains numerous inconsistencies and deficiencies that raise doubt as to the petitioner's description of the beneficiary's proposed job duties in the United States and its ability to support the beneficiary in a qualifying managerial or executive capacity as of the date of filing. Accordingly, the appeal will be dismissed.

IV. Conclusion

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.