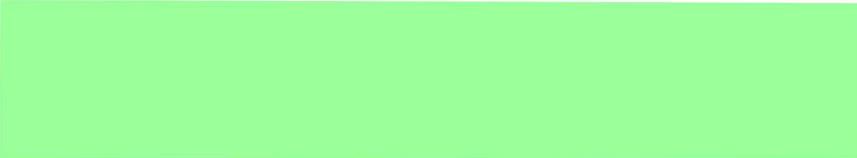


(b)(6)

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**



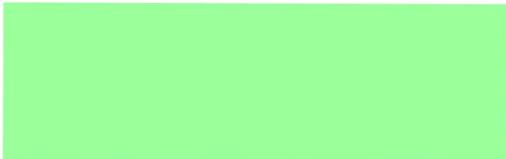
DATE: **DEC 22 2014** Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("the director"), denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

This nonimmigrant petition was filed seeking to extend the beneficiary's status 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, on the Form I-129 (Petition for a Nonimmigrant Worker) Supplement L, identifies itself as an affiliate of [REDACTED] a United Kingdom (UK) company organized in [REDACTED]. On the Form I-129, the petitioner lists its business as "Employment Recruitment Agency." The petitioner seeks to employ the beneficiary in L-1A classification as its managing director for two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in either a managerial or executive capacity for the U.S. entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to this office. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes that the beneficiary would be employed in a primarily managerial or executive position.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of 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

¹ The petitioner indicates on the Form I-129, that it was established in [REDACTED]. However, the petitioner's Articles of Incorporation reflect that it was registered as a corporation in Nevada on October 9, 2012.

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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. THE ISSUE ON APPEAL

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

A. Facts

The petitioner was incorporated on October 9, 2012. The petitioner filed the initial new office petition in March 2013 which was approved for a validity period from June 24, 2013 to June 25, 2014. The petitioner filed the instant petition on April 24, 2014 and indicated on the Form I-129 that it had three employees at the time of filing. On the Form I-129, the petitioner described the beneficiary's proposed duties in the United States as: "[o]verseeing managerial, staff development, recruiting, sales, project management, project delivery, production and liaison and executive duties and responsibilities." In a letter dated April 23, 2014, the petitioner emphasized its claim that the beneficiary would be "employed in a position that is primarily executive AND managerial in nature." (Emphasis in original.) To demonstrate the beneficiary's executive and managerial capacity, the petitioner provided a chart listing each of the elements of executive and managerial capacity under section 101(a)(44) of the Act and then noted that the beneficiary would be the individual performing duties consistent with these elements. In the chart listing the elements of managerial capacity, the petitioner indicated that the beneficiary would supervise specific employees who in turn are responsible for other employees. The petitioner indicated that the beneficiary allocates 75% of his time to managerial and executive duties and 25% of his time to negotiating contracts with potential clients and sourcing new clients.

The petitioner also submitted a two-stage project plan covering a time period between January 6, 2014 and February 28, 2014. The petitioner provided its business plan including information updates for the 2014 year. The business plan indicates that the beneficiary hired a recruiter [REDACTED] and a Global Head of Administration [REDACTED] ahead of schedule. The beneficiary plan includes the following description of the beneficiary's role as "Managing Director, Director of International Recruitment":

[He] is responsible for the overall management of the business. He manages a team of three managers and also acts as a billing Headhunter. In his managerial capacity, he conducts reviews, training and support of his staff, and is ultimately responsible for all financial and operational elements of the company, including final sign off on all purchases of \$1,000 or more, any hiring or firing decisions etc. In his capacity as a billing Headhunter, [the beneficiary] manages his own portfolio of clients, generates new clients, delivers on projects and is responsible for carrying a personal billing target.

The business plan also includes a job description for a Contract Recruiter, North American Region [REDACTED] [REDACTED] who is identified as a "W-2" employee. This description indicates that the position is responsible for developing a portfolio of clients and will be responsible for developing a team of headhunters and an internal administrator/researcher. The description indicates that she "will be a very hands-on manager, building and managing a portfolio of clients, generating new business and working alongside the Research team to delivery against her project portfolio."

The business plan stated that the Global Head of Administration is the company's "Office Manager" and that she is responsible for "everything outside of sales, headhunting and research" including credit control, HR, accounts, and liaison with suppliers. The business plan indicates that she manages a part-time credit controller and a U.K.-based administrator.

Finally, the business plan indicates that the beneficiary's spouse holds the position as Director/Head of Research, but that she had experienced a delay in obtaining her U.S. work authorization and was inactive when the business plan was updated. Her role involves overseeing, training and developing two researchers, and delivering research projects of her own.

The petitioner submitted its organizational chart depicting the beneficiary directly over individuals in the positions of VP Global Sales and Recruitment (a U.K. based position), Recruiter, Contract Recruiter, VP Global Back Office and Support (the beneficiary's spouse, identified in the business plan as Head of Research), and Global Head of Administration. The petitioner submitted a second organizational chart which did not include the Contract Recruiter, but did identify two proposed U.S.-based researcher positions. The petitioner also included a copy of its Nevada Employer's Quarterly Contribution and Wage Report for the first quarter of 2014. The Nevada wage report recorded two individuals who worked in March 2014. The individuals listed on the Nevada wage report correspond to the positions of Recruiter and Global Head of Administration on the organizational charts.

The initial record also included portions of the beneficiary's passport, his approval for one year in L-1A classification, the petitioner's corporate documents, the foreign entity's unaudited financial statements for the year ending December 31, 2012, the petitioner's lease and photographs of the office, and letters regarding the beneficiary's transfer to the petitioner and regarding the petitioner's projects with a third entity.

Upon review, the director issued a request for additional evidence ("RFE") on May 5, 2014, advising the petitioner that the description of duties provided for the beneficiary's position at the U.S. company is insufficient to ascertain what duties the beneficiary will perform on a daily basis. The director also found that the organizational chart did not clearly show the reporting lines among employees and supervisors. The director outlined the evidence that could be submitted.

In response to the director's RFE, the petitioner submitted a five-page organizational chart with explanatory notes, dated May 6, 2014. The first page of the chart (Chart 1) shows the beneficiary directly over individuals in the positions of VP Global Sales and Recruitment, VP Global Back Office and Support, and Global Head of Administration, which the chart designates as first-line supervisors. The notes on the chart indicate that the Vice President, Global Back Office and Support, commenced employment on May 1, 2014 after obtaining work authorization in April 2014. Chart 5 shows the individual in this position supervising two researchers in the UK and two additional research positions in the U.S. which are yet to be filled.

Chart 1 depicts the Vice President, Global Sales and Recruitment as located in the UK and the notes on the chart indicate that the U.S. based recruiter reports directly to the Vice President, Global Sales and Recruitment, but that between 1pm and 5pm (Pacific time) the U.S. based recruiter reports to the beneficiary if he requires any immediate guidance. The organizational chart shows that an additional recruiter, located in the UK, also reports to the Vice President, Global Sales and Recruitment.

The organizational chart depicts the second U.S. based employee in the position of Global Head of Administration. Chart 4 indicates that she supervises two employees in the UK.

The petitioner also noted on a separate document that the Vice President, Global Sales and Recruitment, "spends 70% of his time leading by example; managing his portfolio of clients, generating new business and

working alongside the Research team to deliver his project portfolio" and that while each member of the team reporting to this position "carries a personal billing target, he has overall responsibility for the team target." The petitioner further noted that the "Global Head of Administration" hired in January 2014 is a part-time supervisor but will become a full-time employee on June 9, 2014. The petitioner indicated that the individual in the position of Vice President, Global Back Office and Support, hired May 1, 2014, "is responsible for a team of two researchers, who deliver research projects alongside the recruiting team and has an open headcount to hire two researchers." The petitioner indicated further that this individual "works in a very 'hands-on' capacity, training and developing her team and delivering research projects of her own."

The petitioner also submitted a summary of the beneficiary's duties on a day-to-day basis. The petitioner indicated that the beneficiary would spend 25 percent of his time "[n]egotiating contracts with potential clients and sourcing new clients." The petitioner further broke down this task into elements referenced as managerial, executive, and functional. The petitioner noted that the beneficiary would spend 35 percent of his time "[m]anaging, overseeing and supervising the activities of the Project Leaders (Supervisory level employees) whose teams manage the delivery of the projects [the petitioner] has won." The petitioner indicated the duties associated with this task are managerial and executive. The petitioner stated that the beneficiary would spend 30 percent of his time "[r]eviewing and allocating daily tasks with mid-level managers (who in turn, pass onto their subordinates)." Although the petitioner associated these tasks with "mid-level managers," the breakdown of duties referenced individuals as "Supervisor level Project Leaders" and noted that the beneficiary would spend 23 percent of his time meeting, discussing, and reviewing projects with these individuals and would spent 5 percent of his time coordinating with the VP, Global Sales and Recruitment, and 2 percent of his time leading and directing the Global Head of Administration. The petitioner indicated that the 30 percent of time spent on this task was managerial. The petitioner stated further that the beneficiary would spend 10 percent of his time "[c]arrying out other executive leadership duties," such as financial planning, infrastructure, headcount and internal recruitment, marketing strategy, liaising with external CPAs, attorneys, bank and policy definition. The petitioner concluded by noting that the beneficiary would spend a total of 67 percent of his time on managerial duties, 26 percent of his time on executive duties, and 7 percent of his time on functional duties.

Upon review, the director determined that the petitioner had not presented evidence sufficient to establish eligibility and denied the petition.

On appeal, the petitioner asserts that the director ignored the evidence submitted, including evidence that the beneficiary supervises managers who supervise lower-level workers. The petitioner contends that the beneficiary, thus, is not a first-line supervisor. The petitioner further claims that the evidence submitted also demonstrates that the beneficiary serves in an executive capacity. The petitioner disagrees with the director's conclusion that the beneficiary primarily performs routine operational activities rather than managing a function of the business. The petitioner also references the beneficiary's prior approval for an L-1A classification and avers that the director failed to give sufficient deference to the prior approval. Finally, the petitioner asserts that the director misapplied the preponderance of the evidence standard which resulted in the erroneous denial of the instant petition.

B. Standard of Review

In light of counsel's reference on appeal to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncseca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established by a preponderance of the evidence that the beneficiary will be employed in a qualifying capacity under the extended petition.

C. The Beneficiary's Managerial and Executive Capacity

We have reviewed the petitioner's descriptions of the beneficiary's duties in order to determine if the petitioner has provided a description sufficient to establish that the beneficiary would be employed in the United States in a managerial or executive capacity as defined at 101(a)(44)(A) or (B) of the Act.

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").

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.* Here the petitioner provided broad descriptions of the beneficiary's duties, relying primarily on the fact that the beneficiary is the individual who partially owns the petitioner and is the individual at the top of the organizational chart. The petitioner initially provided a job description that essentially paraphrased the definitions of managerial and executive capacity without identifying specific tasks associated with these duties. 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 same time, the petitioner submitted a business plan indicating that the beneficiary has been and will be serving in a dual role, with responsibility for the overall management of the business as well as acting as a billing headhunter with responsibility for managing his own portfolio of clients, generating new clients, delivering on projects and carrying a personal billing target. The petitioner did not attempt to reconcile this information with its assertion in its supporting letter that the beneficiary is not responsible for carrying out the delivery of projects or the provision of the petitioner's recruiting services.

In response to the director's RFE, the petitioner provided a more detailed description of the duties the beneficiary would be expected to perform. The petitioner asserted that the beneficiary would spend a total of 67 percent of his time performing managerial duties. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act. If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. Section 101(a)(44)(A)(iii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iii).

The petitioner indicated that the beneficiary would spend 35 percent of his time "[m]anaging, overseeing and supervising the activities of the Project Leaders (Supervisory level employees)." Although the petitioner divided these duties into managerial and executive tasks, upon review the petitioner did not have individuals employed in the United States or in the UK that will primarily perform supervisory duties, when the petition was filed.

When the instant extension petition was filed, the petitioner provided supporting evidence that it employed a U.S. based recruiter and a part-time Global Head of Administration. The petitioner does not claim that the U.S. based recruiter position is a supervisory or managerial position, and moreover, the description of duties corresponding to the recruiter position does not support such a claim. Upon review of the Global Head of Administration position, we find that the petitioner has not provided sufficient evidence to support the petitioner's placement of this individual on the organizational chart in a managerial or supervisory position. That is, the record does not include probative evidence establishing that the part-time employee in this position managed or will manage one UK based, part-time credit controller, the UK based administrator, and two researchers. 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)). It is not credible that this part-time employee performed the above generally described duties as well as performing the duties related to credit control, HR, accounts, purchasing, etc. Moreover the record is insufficient to establish that the individual in this position will perform primarily supervisory, managerial, or professional duties.

The petitioner also explained that the beneficiary continued to supervise the foreign entity's Vice President, Global Sales and Recruitment, who is characterized as a part-time first-line supervisor over the U.S. based recruiter, as well as a full-time first-line supervisor over a UK based recruiter. However, upon review of the description of the duties of the UK based Vice President, Global Sales and Recruitment position, the petitioner stated that the individual in this position "spends 70% of his time leading by example; managing his portfolio of clients, generating new business and working alongside the Research team to deliver his project portfolio." Thus, the petitioner's own description of this position is not that of an individual who primarily supervises two employees, but rather is a description of a position in which the individual primarily performs the duties necessary to deliver a project portfolio. The record is insufficient to establish that the Vice President, Global Sales and Recruitment, position is primarily a first-line supervisory position. Additionally, the description of duties does not support a finding that the position is a professional position.²

² In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Here, the petitioner's claim that the beneficiary's foreign subordinate possessed a bachelor's degree does not automatically lead to the conclusion that the employee was employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is actually necessary to perform the duties described. In addition, the record does not include documentary evidence establishing that the foreign subordinate has a degree.

The petitioner indicates that it plans to hire additional employees in the future, and acknowledges that the Vice President, Global Back Office and Support, was not employed when the instant petition was filed.³ Even if we considered the employment of the individual in this position, whose claimed employment began May 1, 2014, the petitioner has not submitted a description of duties that supports the claim that the individual in this position primarily supervises the two foreign research positions. For example, the petitioner does not indicate how much time she will spend supervising the research positions and how much time she will spend managing her own research projects. Moreover, the record does not include documentary evidence of this individual's employment or the employment of the individuals the petitioner claims she supervises. 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, supra.*

Accordingly, the record is insufficient to support the petitioner's claim that beneficiary spends the majority of his time managing subordinate supervisors or managers.

Similarly, the petitioner indicated that the beneficiary would spend 30 percent of his time "[r]eviewing and allocating daily tasks with mid-level managers (who in turn, pass onto their subordinates)." Although the petitioner indicated that all the tasks associated with this duty would be in a managerial capacity, the record again, does not establish that the beneficiary's subordinates are actually mid-level managers. The petitioner did not establish that any of the individuals identified as supervising lower-level employees, primarily performed a supervisory function when the petition was filed. Thus again, the petitioner has not established the beneficiary is more than a first-line supervisor of non-professional employees. The beneficiary's position as depicted on the organizational chart and throughout the record is at most that of a first-line supervisor of non-professional employees. The petitioner has not established that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. The record does not establish that the beneficiary in this matter is primarily a personnel 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. Again, 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

³ A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition.

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 record is insufficient to establish that the beneficiary will primarily manage an essential function.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex 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. A review of the totality of the record reveals that the beneficiary does not have a subordinate level of managerial employees to direct. When reviewing the descriptions of the individuals identified as first-line supervisors on the petitioner's organizational chart, as noted above, one individual was not yet hired when the petition was filed, another individual only worked part-time when the petition was filed, and the third individual, located in the UK, spent 70 percent of his time performing duties related to his project portfolio. The record is thus insufficient to establish that these individuals are primarily managerial employees.

The petitioner also indicated that the beneficiary would spend 25 percent of his time "[n]egotiating contracts with potential clients and sourcing new clients." At the time of filing, the petitioner identified these duties as "functional" as opposed to managerial or executive in nature. In response to the RFE, the petitioner divided this area of responsibility into managerial, executive, and functional tasks. However, we agree with the petitioner's initial classification of these duties as non-managerial in nature. Duties such as "negotiating contracts" and "sourcing new clients" are operational tasks necessary to the petitioner's ongoing operations rather than managerial or executive tasks. We also note that the responsibility for financial planning and marketing strategy, are responsibilities that require the beneficiary to perform the operational and administrative tasks associated with these responsibilities. That is, the record does not substantiate that the petitioner employs anyone who is primarily performing the duties associated with establishing a marketing strategy or selling the petitioner's recruitment services, other than the beneficiary.

Finally, the petitioner's response to the RFE also failed to elaborate upon the position description provided in the petitioner's 2014 business plan which indicates that the beneficiary spends some undisclosed portion of his time acting in the position of billing headhunter. Because neither of the petitioner's breakdowns of the beneficiary's duties included this concurrent non-managerial role, the descriptions contained in the petitioner's letters can reasonably be deemed incomplete and the duties assigned to specific tasks would appear to apply only to the beneficiary's role as managing director. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It remains unclear how much time the beneficiary allocates to his role as a billing headhunter and how much time is allocated to the claimed managerial or executive aspects of his job.

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, 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. While several of the overbroad duties described by the petitioner may fall generally under the definitions of managerial or executive capacity, the lack of specificity, the petitioner's failure to expressly acknowledge the beneficiary's role as a headhunter in its supporting statements, and the lack of subordinate employees raises questions as to the beneficiary's actual primary responsibilities. 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. *Matter of Ho*, 19 I&N Dec. at 591.

III. PRIOR APPROVAL

On appeal, counsel relies on the prior approval for the petitioner to open a new office and asserts that USCIS must give deference to such approval. The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Moreover, the prior petition was subject to the evidentiary requirements pertaining to new offices at 8 C.F.R. § 214.2(l)(3)(v), while the current petition is subject to evidentiary requirements applicable to an extension of a new office petition at 8 C.F.R. § 214.2(l)(14)(ii). The initial approval was based on a finding that the beneficiary would more likely than not support a managerial or executive position within one year. The current petition requires the petitioner to establish that the beneficiary is in fact employed in a qualifying capacity at the end of the first year, and requires USCIS to examine the beneficiary's duties and the petitioner's organizational structure and staffing levels as that initial year comes to a close. See 8 C.F.R. § 214.2(l)(14)(ii)(D).

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, to employ the beneficiary in a predominantly managerial or executive position, the petitioner is ineligible by regulation for an extension. Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

IV. CONCLUSION

In this matter, upon review of the totality of the record, the record does not demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.