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

(b)(6)

DATE: JUL 0 3 2014 Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129) 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, a Texas corporation, states that it operates a retail operations and investments business. On the Form I-129 the petitioner claims to be the parent of located in , India.[1] The petitioner seeks to employ the beneficiary as the president/CEO of its new office in the United States.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity within one year of the approval of the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be performing qualifying executive functions at the U.S. company. Counsel submits a brief and duplicate copies of previously submitted 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.

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[1] Although the petitioner indicates on the Form I-129 that it is the parent company of the foreign entity, the record contains evidence that the petitioner issued stock to the foreign entity. Accordingly, the foreign entity appears to be the parent company and the petitioner appears to be a subsidiary of the foreign entity.

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

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive of managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

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

(v) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition.

A. Facts and Procedural History

The petitioner filed the Form I-129, on May 6, 2013. The petitioner stated on the Form I-129 that the beneficiary would be employed as president/CEO of the U.S. company and indicated that the company has 10 "projected" employees and a "projected" gross annual income of $1.3 million. In a letter dated April 30, 2013, the petitioner described the beneficiary's position as follows:

> As the President and CEO of [the petitioner], [the beneficiary] is the key U.S. contact for the shareholders and directors of the parent company. [The beneficiary] is employed at the highest position within the U.S. company, and supervises employees who run day-to-day operations including its subsidiaries. In sum, [the beneficiary] has the overall responsibility of planning and developing the U.S. investments, executing and recommending personnel actions, placing a management team to run the operations, supervising all financial aspects of the company and developing policies and objectives for the company.
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> Specific job duties include:
>
> - Serving as the key U.S. contact for the partners and directors of the parent company; Planning and developing the U.S. investment; Developing organizational policies and objectives; Working with managers to secure additional business through promotions and vendor networking; Providing top-down leadership and maintaining a rigorous approach to management via metrics throughout the company; Evaluating organizational efficiencies

for profitable operation; Developing the organization to its full potential and keeping personnel motivated and productive; Evaluating and improving policies and procedures as necessary; Conducting weekly meetings to ensure that managers are successfully monitoring staff performance. Time Spent 35%

- Expansion Activities: Managing all planning, expansion and investment activities; Creating a plan to secure additional business enterprises; Overseeing due diligence processes; Negotiating purchase agreements; Coordinating with financial institutions to obtain financing; Dealing with attorneys in the acquisition process and coordinating with engineers in environmental testing; Reviewing financial information pertaining to potential locations to determine feasibility. Time Spent 35%

- Supervising all financial aspects of the company; Working with a CPA to maintain stable financials and make financially sound, well-supported decisions based on financial records; and Preparing and presenting a yearly business plan, including financial statements and budgeting plans, to corporate executives. Time Spent 20%

- Hiring and supervising subordinate managers who will supervise lower level employees in running day-to-day operations; Executing or recommending personnel actions. Time Spent 10%

Therefore, Beneficiary is responsible for all our planning, expansion, and investment. He is employed at the highest executive level and has the complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] assumes sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation.

The petitioner submitted a business plan that briefly described its current employees and future staffing plan as follows:

> [The petitioner] will operate out of a small office. For months one through seven, there will be the five employees. By month seven, [the beneficiary] will be hiring an assistant to help with design work as well as administrative details.

The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2013 indicating that it had two employees and paid $3,700 in wages, tips, and other compensation. The attachment to the Form 941 shows that the petitioner paid $2,500 to and $1,200 to

The petitioner did not submit any additional information about its staffing plan or an organizational chart.

The petitioner submitted a copy of its business purchase agreement, where the petitioner agrees to purchase for $45,000. The business purchase agreement is dated April 16, 2013, and the scheduled closing date listed on the agreement is July 15, 2012. The petitioner also submitted IRS Forms 941 for the first, second, third, and fourth quarters of 2012 indicating that it had

12 employees in the first and second quarters, 10 employees in the third quarter, and 11 employees in the fourth quarter. IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2011, at Schedule K-1, shows that owns 100% of the stock of the company.

The petitioner submitted a copy of its management agreement, where the petitioner agrees to manage and operate the sales and service of a convenience store owned by doing business as beginning on July 1, 2013. The petitioner also submitted IRS Forms 941 for the first, second, third, and fourth quarters of 2012 indicating that it had one employee in the first, second, and third quarters, and two employees in the fourth quarter. The petitioner did not submit any information identifying the actual ownership of

On May 17, 2013, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, information regarding the beneficiary's proposed position in the United States and the organizational structure of the petitioning U.S. company and each of its subsidiary businesses.

In response to the RFE, counsel for the petitioner described the beneficiary's position in the U.S. as follows:

> As President/CEO, [the beneficiary] will be responsible for providing strategic leadership for the company by working with the Board of Directors and other management to establish long-range goals, strategies, plans, and policies. And through this executive-level position, he will have the ability to shape the future investments and progress of both companies via [the petitioner]. . . .
>
> His responsibilities involve the directing the overall [*sic*] organization of [the petitioner] while simultaneously protecting the investments of both the subsidiary and thus the parent company. In addition to ensuring profitability and efficiency of the businesses, [the beneficiary] will also take a broader approach in establishing the goals for the short- and long-term. Policies and procedures will need to allow room for growth and further diversification into the U.S. market while incorporating the needs, priorities, and advice of [the foreign entity]. As a President/CEO, one of his major responsibilities involves being a liaison between the subsidiary and the foreign company's shareholders and directors. . . .
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> * * *
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> [The beneficiary] will operate at a senior level with respect to the U.S. entity. As the President and CEO of the U.S. Company, he will hold the highest executive position. As such, the President or CEO of any company, and likewise in this company, is the highest executive/managerial position and reports to the shareholders or partners of the company. In this case, [the beneficiary] would report to the Board of Directors of [the foreign entity].
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> * * *
>
> In conclusion, Petitioner is a new office and [the beneficiary] is an executive employee overseeing the management of U.S. Operations. [The beneficiary] is not a first line manager and will not perform day-to-day work activities; instead he will oversee and direct the

> management and performance of key company goals and functions. [The beneficiary] will supervise the work of other supervisory, professional or managerial employees who are degreed individuals. [The beneficiary] is the executive at the very highest levels of decision-making within a company.

Counsel further described the petitioner's staffing as follows:

> Since [the beneficiary] is responsible for the overall corporate functions of the U.S. Entity, it would not be a wise business decision for him to be micromanaging the daily functions. Therefore, the Petitioner has levels of employment:

Executive Level:	President/CEO
Managerial Executive:	Operations Manager
Professionals/Managers:	Sales Manager
	Sign Production Manager
	Graphic Designer
	Restaurant Manager (2013)
	Managing Partner/Director – Retail Management of retail stores (2013)
	Accountant (in-house 2016)
First Line Manager:	Front House Manager
	Kitchen Manager
Staff:	Sales Executives (2014/2015)
	Sign Manufacturer & Installer
	Sign Manufacturer & Installer (2013/2014)
	Wait Staff
	Cook/Sous Chef
	Bussing Staff
	Line Cooks/Bakery Staff
	Cleaning Crew
	Assistant Managers (2014-2016 for Retail management operations)
	Store Clerks (2014-2015 Retail management operations)

The petitioner submitted an updated business plan stating the following about its current employees and staffing plan:

> [The petitioner] currently employs 5 U.S. workers . . . .
>
> The total employee count for [the petitioner] . . . for 2013 is 6, including [the beneficiary]. By the year ending 2017, the total employee count is 10. . . .

> This business plan does not include the people that [the petitioner] will be hiring through their additional investments in other businesses. Once L-1 approval has been granted to [the beneficiary], [the petitioner], through their Indian parent company, will purchase , a Mexican restaurant that currently employs 10 people. This will immediately increase the amount of U.S. workers that [the petitioner] employs to 15. . . . it is expected that they will need to hire at least an additional 2-3 more employees. In addition to purchasing the Mexican restaurant, [the petitioner] will also be acquiring a retail sector management company that will employ 1-3 people over the next 3 years. The employee count for all three businesses under [the petitioner] control will be approximately 23-25 by the year ending 2017 [*sic*].

The petitioner's updated business plan summarized the beneficiary's responsibilities and duties as follows:

> President & CEO
>
> - Serve as the executive leader of the U.S. affiliate company to provide control and direction to the overall business[;]
> - Provide top-down leadership and maintain a rigorous approach to management via metrics throughout the company[;]
> - Serve as the key U.S. contact for the partners of the parent company, [the foreign entity], in planning and developing the organizational policies and objectives of the U.S. subsidiary[;]
> - Consult with the partners of the parent company to ensure the investment in the U.S. based operation is performing to set goals and standards[;]
> - Hold monthly conference calls with the partners of the parent company to update them on the status of the U.S. investment[;]
> - Evaluate organizational efficiencies for profitable operation, developing the organization to its full potential and keeping personnel motivated and productive[;]
> - Study market research and trends to determine consumer demand, potential sales volumes and effect of competitors' operations on sales[;]
> - Responsible for the overall executive control of the business, providing leadership and direction to the managers and guiding them in their supervision and decision making regarding the other employees[;]
> - Directly supervise the management level staff such as the Operations Manager, Sales Manager, Sales & Marketing Manager, Production Manager, Graphic Designer and Accountant[;]
> - Ensure the Sales & Marketing Manager is promoting the business through advertising, marketing and social media to ensure maximum exposure to customers[;]
> - Work with the Operations Manager and Sales & Marketing Manager to formulate strategies for the acquisition of new customer accounts[;]
> - Recruit, hire and fire management staff and other staff as new positions open or replacements of staff are needed[;]
> - Advise managers on how to deal with customer issues and any employee issues such as disciplinary actions or termination of staff[;]

- Ensure the company is in compliance with local, state and Federal regulations and standards of safety[;]
- Utilize outside resources in order to monitor issues and concerns in employment law, communicating potential changes to the parent company[;]
- Work with outside professionals such the [*sic*] CPA to file quarterly payroll and annual corporate taxes[;]
- Represent [the petitioner] at networking events, trade shows and any other community/civic functions[;]
- Establish and enforce standard operating procedures and work processes that will ensure adequate efficiency and safety for all employees and customers[;]
- Review and analyze financial statements and make decisions in the best interest of the company to correct any deficiencies[;]
- Identify opportunities and explore new ideas for the company and implement them to increase overall sales and profitability[;]
- Meet with managers each month to discuss past 30 days activities [sic], review goals and objectives and encourage feedback and ideas for future growth and productivity[;]
- Meet with management on an annual basis to review their performance and discuss expectations and personal /company goals[;]
- Set vacation periods and salary scales for managers and have standard policies in place for the remaining staff members[; and]
- Perform any other executive job function as necessary, and delegate responsibilities as necessary to ensure smooth operation of the business[.]

The business plan also includes a brief list of job duties for the operations manager, sales & marketing manager, sign production manager, and accountant. It also includes a chart indicating that the petitioner has six employees in 2013: the president & CEO – the beneficiary, the operations manager – the sales & marketing manager – a graphic designer – the sign production manager – and a sign manufacturer/installer – eight employees in 2014, adding one sales executive and one sign manufacturer/installer; nine employees in 2015, adding a second sales executive; 10 employees in 2016, adding an accountant; and the same 10 employees in 2017.

The petitioner also submitted an organizational chart for the U.S. company depicting the beneficiary as president & CEO, reporting to the foreign entity's partners, and directly supervising the operations manager, The operations manager then supervises a "sales & manager [*sic*]," , a sign production manager, , a graphic designer, and an accountant, unnamed and listed as 2016. The "sales & manager [*sic*]" supervises two sales executives, both unnamed and one listed as 2014 and the other as 2015; and the sign production manager supervises three sign manufacturer & installer, Jamil Shaid, and two unnamed persons, one listed as 2013 and other as 2014.

The petitioner submitted a letter describing the U.S. company's organizational structure as follows:

> [The petitioner] is looking to immediately fill 7 positions including:
>
> - President/CEO – [Beneficiary]
> - Operations Manager

- Sales Manager –
- Sign Production Manager
- Graphic Designer -
- Sign Manufacturer & Installer
- Sign Manufacturer & Installer – hiring immediately

The petitioner's letter went on to describe the beneficiary's duties at the U.S. company as described above by the petitioner and counsel and added other duties with a percentage of time allocated to completing those duties as follows:

Duty #1: 30% of time spent
President/CEO is responsible for setting strategy and vision for the company. . . .

- Serve as the executive leader of the U.S. subsidiary company to provide control and direction to the overall business by working with the Directors and using past work experience in [the foreign entity] to promote the goals of [the petitioner][.]
- Develop short/long term company and product roadmap.
- Continue open communications with the board of directors.
- Establish and implement short and long term goals, objectives, policies, and operating procedures.
- Create and revise all content while building a world-class content development team.
- Ensure company and its business comply with all applicable legal and regulatory requirements and, where appropriate, best practices.
- Establish, achieve, and report on milestones to the Board of Directors.
- Develop a plan to ensure that company will be performing in par with the sales goals set by the Directors[.]
- Serve as the key U.S. contact for the shareholders and directors of the Indian company[.]
- Plan and develop the organizational policies and objectives of the U.S. investment[.]
- Consult with the shareholders of the India subsidiary company to ensure the investment in the U.S. based operation is performing to set goals and standards[.]
- Hold monthly conference calls with the shareholders of the subsidiary company to update them on the status of the U.S. investment[.]

Duty #2: 25% of time spent
The CEO's second duty is organizational development. . . .

* * *

- Build and lead an effective and cohesive executive management team to include all company employees, while establishing a basic personnel policy, initiating and monitoring policies relating to personnel actions and training and professional development programs.
- Responsible for the overall executive control of the business, providing leadership and direction to the managers and guiding them in their supervision and decision making regarding the employees beneath them[.]

Duty #3: 25% of time spent
Team Building. The CEO hires, fires, and leads the senior management team. . . . He sets direction by communicating the strategy and vision of where the company is going. . . .

- Provide top-down leadership and maintain a rigorous approach to management via metrics throughout the company[.]
- Build and motivate a world-class sales and marketing team.
- Develop and lead execution of product development, sales, and marketing.
- Ensure company objectives and standards of performance are not only understood but owned by management and employees.
- Work with outside professionals such the [*sic*] CPA who files quarterly payroll and annual corporate taxes[.]
- Directly supervise the management level staff such as the Sales Manager, Marketing Manager, Project Manager and Administration Manager, make decisions as necessary[.]
- Ensure the Sales Manager is promoting the business through advertising, marketing and social media to ensure maximum exposure to customers[.]

Duty #4: 20% of time spent
Capital allocation. The CEO sets budgets within the firm. . . .

- Evaluate organizational efficiencies for profitable operation, developing the organization to its full potential and keeping personnel motivated and productive[.]
- Oversee operating plan, budget, cash flow, and company finances.
- Study market research and trends to determine consumer demand, potential sales volumes and effect of competitors' BPO offering on sales and profitability[.]
- Work with the Sales manager to formulate strategies for the acquisition of new customer accounts[.]
- Analyze sales statistics to formulate policies and to assist promoting and gaining more business[.]
- Review financial statements and cash flow statements and make decisions accordingly[.]

* * *

[The beneficiary's] employment as President/CEO will afford him complete authority to establish goals and policies and exercise discretionary decision-making authority based upon policies and procedures developed by shareholders. He will further assume sole responsibility of all discretionary actions regarding profitable operations taken by the U.S.-based entity. [The beneficiary] will also supervise other professional and managerial employees, establish goals and policies for investment in the United States, and exercise wide latitude in discretionary decision-making under the mentoring of directors and shareholders of the Foreign Company.

The petitioner's letter also provided additional duties that the beneficiary would perform at the end of the U.S. company's first 12 months of operation.

The petitioner submitted a proposed organizational chart including "the basic start up employees of the Restaurant and Retail Management Operations" which it claims will commence upon L-1A approval. The proposed organizational chart changes the previously submitted chart as follows: the operations manager will supervise "sign production," to include the "sales & manager," the sign production manager and the graphic designer; an accountant; the "restaurant division," to include a "front house manager," supervising wait staff and bussing staff, and a kitchen manager, supervising cooks and sous chefs, line cooks, bakery staff, cleaning crew, dishwasher, and janitorial; and the "retail management division," to include a general manager, supervising assistant managers who supervise "store clerks for each retail management contract."

The petitioner also provided a separate list of job duties for the president/CEO, the operations manager, the sales & marketing manager, the sign production manager, and the accountant, identical to those in the original business plan.

The director denied the petition on August 21, 2013, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive position within one year. In denying the petition, the director found that the petitioner failed to demonstrate that the beneficiary's subordinates will be employed in professional, managerial, or supervisory positions. The director further found that the record does not demonstrate that the beneficiary would be relieved from performing non-qualifying duties within one year of approval of the petition.

On appeal, counsel for the petitioner reiterates the same description of the beneficiary's position provided with the petition and in response to the RFE, and asserts that the evidence of record establishes that the beneficiary will be employed in an executive capacity.

> [The beneficiary] is responsible for all our planning, expansion, banking, budgeting, and marketing. In addition, he hires and trains other managers and employees and is in charge of expanding the investments of the U.S. enterprise. He is employed at the highest executive level and has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] assumes sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation.
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> [The beneficiary] is responsible for the success or failure of the company. Operations, marketing, strategy, financing, creation of company culture, human resources, hiring, firing, compliance with safety regulations, sales, PR [*sic*], etc. – it falls on the his [*sic*] shoulders. [The beneficiary's] duties are what he actually does, the responsibilities he doesn't delegate. Some things can't be delegated. Creating culture, building the senior management team can be done only by the President.
>
> The senior management team can help develop strategy. Investors can approve a business plan. But the President ultimately sets the direction. . . . [The beneficiary] decides, sets budgets, forms partnerships, and hires a team to steer the company accordingly.
>
> [The beneficiary] hires, fires, and leads the senior management team. They, in turn, hire, fire, and lead the rest of the organization. He must resolve differences between senior team

> members, and keep them working together in a common direction. He sets direction by communicating the strategy and vision of where the company is going. Strategy sets a direction [*sic*]. With clear direction, the team can rally together and make it happen. Work gets done through people, and people are profoundly affected by culture. . . .
>
> [The beneficiary] sets budgets within the firm. He funds projects that support the strategy, and ramps down projects that lose money or don't support the strategy. He considers carefully the company's major expenditures, and manages the firm's capital. . . .
>
> As a President/CEO of [the petitioner], [the beneficiary] is the key U.S. contact for the shareholders and directors of the parent company. [The beneficiary] is employed at an executive position within the U.S. Company, and oversees supervises [*sic*] managers who supervise employees running day-to-day operations. [The beneficiary] plans and directs the management of the Petitioner through its own employees, as well as outside contract employees who perform the legal and accounting duties. The beneficiary is the individual responsible for establishing goals and policies and exercising wide latitude in discretionary decisions making [*sic*] duties, which includes supervising managerial level employees. In sum, [the beneficiary], has the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, supervising all financial aspects of the company and developing policies and objectives for the company.
>
> . . . At [the petitioner], [the beneficiary] will supervise and control the work of other supervisory, professional, or managerial employees.

On appeal, the petitioner submits its IRS Form 941 for the second quarter of 2013 indicating that it had four employees: (paid $2,800), (paid $4,900), (paid $5,000), and (paid $1,200).

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a managerial or executive position within one year of the beginning of operations for the United States business entity.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

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").

On review, it appears that the beneficiary's job duties have evolved throughout the record. At the time of filing, the beneficiary's job duties were described as directing the overall organization; planning and developing the U.S. investments; developing organizational policies and objectives; liaising between the subsidiary and the foreign company; placing a management team to run the operations; determining the petitioner's future investments; supervising all financial aspects of the U.S. company; preparing and presenting a yearly business plan, including financial statements and budgeting plans, to corporate executives; and hiring and supervising subordinate managers who will supervise lower level employees in running day-to-day operations. In response to the RFE, the petitioner submitted an updated business plan and expanded the beneficiary's duties, stating that the beneficiary will "serve as the executive leader of the U.S. subsidiary company to provide control and direction to the overall business;" "hold monthly conference calls with the shareholders of the subsidiary company to update them on the status of the U.S. investment;" "provide top-down leadership and maintain a rigorous approach to management via metrics throughout the company;" "evaluate organizational efficiencies for profitable operation, developing the organization to its full potential and keeping personnel motivated and productive;" "study market research and trends to determine consumer demand, potential sales volumes and effect of competitors' BPO offering on sales and profitability;" "directly supervise the management level staff such as the Sales Manager, Marketing Manager, Project Manager and Administration Manager, make decisions as necessary;" "ensure the Sales Manager is promoting the business through advertising, marketing and social media to ensure maximum exposure to customers;" "work with the Sales manager to formulate strategies for the acquisition of new customer accounts;" "analyze sales statistics to formulate policies and to assist promoting and gaining more business;" and "review financial statements and cash flow statements and make decisions accordingly." The petitioner

also provided a breakdown of the percentage of time the beneficiary allocates to sets of duties, such as, setting strategy and vision for the company-30%; organizational development-25%; team building-25%; and capital allocation-20%. The breakdown categorized the previously submitted duties under one of the sets of duties allocated a percentage.

The expanded job duties fail to establish that the beneficiary will be engaged in a primarily managerial or primarily executive position. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its president and CEO, the petitioner has not provided sufficient consistent information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or an executive. Although the petitioner submitted multiple position descriptions and lists of job duties for the beneficiary throughout the record, the petitioner failed to provide detailed explanations of the beneficiary's actual duties and failed to provide information concerning the amount of time the beneficiary would devote to each specific duty. In fact, the percentage breakdown provided by the petitioner broadens the beneficiary's duties more so than the position descriptions themselves. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Where the petitioner did attempt to clarify the beneficiary's duties, it simply paraphrased the statute for executive and managerial capacity at sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

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

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See* generally, 8 C.F.R. § 214.2(l)(3)(v)(C). In that regard, the record is insufficient to establish that

the petitioner will actually develop in such a way that it will require the beneficiary to perform primarily managerial or executive duties within one year.

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

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, although the petitioner submits evidence of an advanced degree[2] obtained by listed on the organizational chart as the operations manager, the list of job duties submitted for this position (and others) does not demonstrate that the position itself requires a professional degree. Thus, the petitioner has not established that the beneficiary's subordinates require a bachelor's degree or higher, such that they could be classified as professional. The list of duties submitted for the operations manager does, however, indicate that he allocates some time to specific technical functions and some time to supervising lower-level staff. Although the beneficiary is shown to have one subordinate with some supervisory duties, he has not been shown to *primarily* supervise and control the work of other supervisory, professional, or managerial employees. The fact that one of his subordinates may supervise lower-level employees is not sufficient to elevate the beneficiary to a position that is managerial in nature. The petitioner has failed to demonstrate that the beneficiary's duties will primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the petitioner. As noted above, all of the subordinate employees are charged with

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[2] In response to the RFE, and again on appeal, the petitioner submits a document from the for indicating that she has passed an examination or course work. It is unclear from this document that has obtained a degree of any sort from an institution which grants the equivalent of U.S. bachelor's degrees.

technical duties while the beneficiary would reasonably be responsible for all other aspects of the day-to-day operation of the company.

Moreover, the petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted an organizational chart depicting the beneficiary as president and CEO directly supervising an operations manager, who supervises a sales and marketing manager, sign production manager, graphic designer, and future accountant, the petitioner has not shown how the subordinate employees would free the beneficiary from performing non-qualifying operational duties.[3] The petitioner has not provided credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees within one year of approval of the petition.

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

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* 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

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[3] The petitioner's IRS Form 941, for the first quarter of 2013 indicates that it paid only two employees (the graphic designer – and whose name does not appear on the petitioner's organizational charts). The petitioner's IRS Form 941 for the second quarter of 2013 indicates that the petitioner had four part-time employees (the operations manager, the graphic designer, the sales and "manager," and whose position again is not designated on the petitioner's organizational charts). The record does not establish that these employees, even with the claimed potential employees, and even if working full-time, would relieve the beneficiary from primarily performing non-qualifying duties (such as sales, marketing, and first-line supervisory duties) within one-year of the approval of the petition.

managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although the petitioner claims that the beneficiary is an executive at the U.S. company, the only executive duties listed for the beneficiary merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Again, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Here, although counsel and the petitioner indicate that the beneficiary will be an executive at the U.S. company, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. Furthermore, the petitioner has not demonstrated that the beneficiary's subordinates will relieve him from performing non-qualifying operational duties.

Based on the deficiencies discussed above, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition. Accordingly, the appeal will be dismissed.

III. 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.