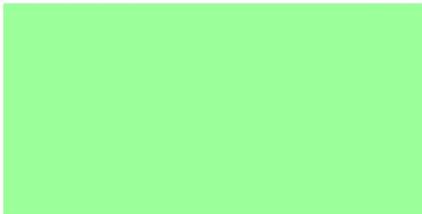




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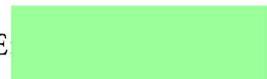
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DATE: **JUN 02 2014**

OFFICE: VERMONT SERVICE CENTER

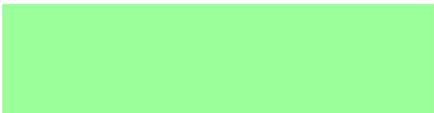
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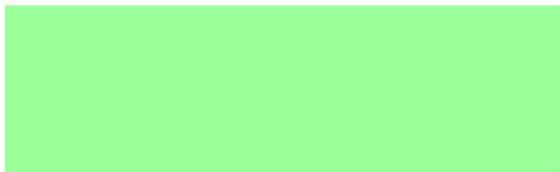
Petitioner:

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 AAO will dismiss the appeal.

The petitioner filed the Form I-129, 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 Virginia limited liability company established in October 2011, states that it engages in the production and sale of jewelry. The petitioner claims to be an affiliate of [REDACTED] located in Moscow, Russia. The petitioner seeks to employ the beneficiary as its president for a period of three years.

The director denied the petition on two alternative grounds, concluding that the petitioner failed to establish that the beneficiary (1) will be primarily employed in either a managerial or an executive capacity; and (2) had at least one year of full-time employment with a qualifying entity within the three years preceding the time of her application for admission into the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the beneficiary has been employed full-time by the qualifying foreign entity since its inception in April 2010 and will be employed in the United States "primarily in the capacity of an executive and/or a manager." Counsel submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. THE ISSUES ON APPEAL

A. U.S. Employment in a Managerial or Executive Capacity

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

On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated:

As the President of [the petitioner], [the beneficiary] will supervise and support the senior employees of [the petitioner] in their functions of Marketing, Finance, and Logistics. Due to her diverse experience in the jewelry business, from jewelry design, production, marketing and experience as an executive, she is uniquely qualified to set up and run [the petitioner], which is in the business of marketing/sales of [redacted] jewelry, currently manufactured in Russia and Ukraine. The primary company functions are currently run by the company's 3 full-time senior employees, with assistance from a junior, part-time employee. Business permitting, [the beneficiary] will oversee the hiring and training of more staff to assist in all aspects of the company, as detailed in the accompanying [petitioner's business plan]. As majority owner of [the petitioner], she is the decision maker of last resort in all matters.

At the time of filing, the petitioner submitted a business plan clearly stating that the beneficiary "personally creates all jewelry designs, and to date has created over 2,000 unique models. All jewelry manufactured by [redacted] and sold by [the petitioner] is based solely on [the beneficiary's] designs."

The petitioner submitted a document titled, [redacted] s Intended Duties as President of [redacted] LLC, and listed the beneficiary's tasks and accompanying percentages of time devoted to each task as follows:

15% - Supervise and train Director of Marketing to conduct USA market research to determine local customers' preferences for jewelry designs, materials, sizes, colors, coordinating sets versus individual items, etc.

15% - Strategic planning of the company's activities: overseeing employees who conduct sales at jewelry shows, direct marketing to retail businesses, sales at the companies at special events, on-line sales, etc.

11% - Supervise and train Director of Marketing to conduct feasibility research work and planning of future production facilities in the USA: commercial real estate rent versus purchase, suppliers, workforce availability, and cost analysis of the above.

10% - Overseeing all the financial processes: [redacted], company's financial director reports to the President, and coordinates all that is involved in his area of work with the President: bookkeeping, day to day managing of financial side of sales, banking, payroll, etc., as well as control of the software/hardware involved in the operations.

9% - Working with the Director of Marketing to coordinate website design and development companies in implementing company website for the purpose of both best internet presentation of the company, as well as on-line sales in the near future.

8% - Overseeing the Director of Marketing in training of the sales associate, in adherence to customer relations standards set forth in the company, artistic presentation required for the best showcasing of the products.

7% - Overseeing and training the Logistics Coordinator to schedule the company work at jewelry shows, decision making about where to go and when, and what to showcase where and how.

7% - Controlling the final artistic look of all photographic material: all jewelry presentation in the company electronic inventory database and on the website does not go live until the President's approval.

7% - Overseeing the Director of Marketing in research of future markets: South East Asia, Canada, the Caribbean countries, etc.

6% - Overseeing and training the Logistics Coordinator to control accuracy and efficiency of inventory management and proper and timely reporting of orders of new inventory, custom orders and shipments, and sales at the jewelry shows by the sales associate.

5% - Selecting jewelry models to manufacture and order for import to the USA, as needed for [the petitioner's] sales.

The petitioner submitted Employment Agreements for each of its four current employees: [redacted] as Logistics Coordinator, dated June 1, 2012; [redacted] as Director of Marketing, dated January 1, 2012; [redacted] as Director of Finance, dated June 1, 2012; and [redacted] as Sales Associate, dated May 1, 2012. Each of the Employment Agreements includes a brief list of five duties to be performed by the subordinate, except for that of [redacted] which only lists two duties.

The petitioner also submitted its IRS Forms W-2, Wage and Tax Statement, for [redacted] and [redacted] in 2012, indicating that it paid [redacted] \$16,167.00 and [redacted] \$2,278.00 in wages, tips, and other compensation. The petitioner explained that IRS law requires that [redacted] and [redacted] report their earnings as employees of the U.S. company on IRS Schedule K-1, Partner's Share of Income, Deductions, Credits, etc., as they are shareholders of the U.S. company, which they completed and submitted. The petitioner also submitted payroll records and pay stubs demonstrating that all four of the beneficiary's subordinates were employed by the U.S. company at the time of filing the petition.

The director issued a request for evidence ("RFE") on May 28, 2013, instructing the petitioner to submit, *inter alia*, evidence to establish that the proposed position in the United States will be primarily managerial or executive.

In response to the RFE, counsel for the petitioner states that the beneficiary's duties at the U.S. company are executive and managerial in nature. Counsel described the beneficiary's proposed duties at the U.S. company as follows:

Given that the purpose of [the petitioner] is to market jewelry, the central decisions of the company involve marketing strategies and presentation, as well as finance. The detailed list of duties for the position include[s] supervising and training the financial director, the director of marketing, and the logistics coordinator. While the director of finance has direct supervision over the employee who works at sales shows, the president has been involved in establishing the company organization, planning the company's goals and activities, activities [sic], training the managers, overseeing all financial processes. . . . These are usual executive activities, and [the beneficiary] has been handling these activities in order for [the petitioner] to progress to its present position in the process of starting up. She has handled similar duties at [the foreign entity] since 2010.

The petitioner submitted the same list of job duties with accompanying percentages previously provided in support of the petition and as stated above.

The petitioner also submitted an organizational chart for the U.S. company, dated July 2, 2013, depicting the beneficiary as president and describing her position as "general management and strategic planning." The chart depicts the beneficiary supervising [redacted] director of finance. The chart describes the director of finance position as a "bookkeeping and jewelry import, general finance management" position. The chart shows the beneficiary also supervising [redacted] director of marketing, and describes the director of marketing position as an "all marketing, on-line and off line, social media, website, product photography, advertising" position. The chart depicts the director of finance as supervising [redacted] the logistics coordinator, and describes the duties of the position as "planning of shows, including travel, accommodation, and booth equipment." The chart also shows the director of finance supervising [redacted] the sales associate, and describes her duties as "sales and customer care, barcoding, packing/unpacking jewelry."

The petitioner also submitted a brief description for each of the positions in the organizational chart, and described the beneficiary's position as follows:

General strategic planning for company development and coordination of efforts of the company management.

Hiring and training of staff.

Because the company is marketing jewelry, all models and collections of which were and continue to be designed by or in collaboration with [the beneficiary], she is not only overseeing the business aspects of the corporation, but also the artistic directions the company is taking.

To that end, visiting the key trade shows to promote the company product, as well as stay on top of the newest trends presented by competition, is one of the most important duties of the president of this corporation. Also, it is the jewelry industry standard to go to such events, as the company principal, which underlines the importance of it.

The petitioner submitted the beneficiary's subordinates' resumes and copies of their academic degrees indicating that [redacted] received a Master's Degree on March 5, 1986. [redacted] received an Associate

of Arts Degree December 20, 2009, and [REDACTED] received a Doctor of Medicine Degree on June 20, 1984. According to [REDACTED]'s resume, she received an Associate's Degree, but does not indicate when she received the degree and the record does not include a copy of her degree certificate.

The director denied the petition on July 22, 2013, concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the list of proposed job duties for the beneficiary indicates that the majority of her time will be spent overseeing and training all other positions in the company, and as such, the position does not qualify as an executive position. The director further found that the beneficiary's subordinates do not qualify as professionals as two employees' degrees are unrelated to their positions and the other two employees do not have bachelor's degrees or higher. The director also found that the beneficiary does not qualify as a manager as she does not appear to supervise other managerial, supervisory, or professional employees, or a clear function of the organization. The director finally found that the beneficiary will be performing other non-qualifying duties, such as designing jewelry and other duties listed by the petitioner, and it remains unclear how she will be relieved from performing other non-qualifying functions.

On appeal, counsel for the petitioner asserts that the beneficiary's proposed position in the United States meets the requirements for executive capacity. Counsel addressed some of the director's conclusions in the decision and stated that "overseeing those reporting directly to the Beneficiary qualifies as directing the management of the company." Counsel describes the beneficiary's role at the U.S. company as follows:

The Beneficiary will serve primarily to guide the company by setting policy goals and deepening the understanding of the U.S. market. When required, she will also pass her experience and knowledge to her employees. This will be a minimal function of the position but will be necessary given the beginning stage of development of this company. . . . Currently, the focus of the company is building their brand among the U.S. audience and industry leaders. In order to do so, the Beneficiary will apply her professional expertise and guidance, in limited circumstances, to assist with a problem. As the company grows the Petitioner will further minimize any non-qualifying executive duties.

Counsel goes on to specifically address each of the requirements for executive capacity identified in the statute and explains how the beneficiary carries out such duties. Counsel also addresses the beneficiary's design of jewelry products by stating that she does this on an ad hoc basis and this role is separate and distinct from her proposed position as president of the U.S. company. Counsel also stated that the beneficiary will not attend trade shows in a retail capacity, but instead to represent the company as a whole.

Counsel submits copies of the same list of job duties with accompanying percentages for the beneficiary, the same organizational chart for the U.S. company, including the brief list of job duties for the beneficiary and her subordinates, and the same business plan on appeal.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary has been and will be employed in a primarily managerial or executive capacity in the United States.

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

duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The 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").

The petitioner first characterized the beneficiary's role as president and described her duties in very broad terms, noting that she will spend 15% of her time supervising and training the director of marketing to conduct U.S. market research, 15% of her time on strategic planning of the company's activities, 11% of her time supervising and training the director of marketing to conduct feasibility research and planning of future production facilities in the U.S., 10% of her time overseeing all the financial processes, 9% of her time working with the director of marketing to coordinate website design and development, 8% of her time overseeing the director of marketing in training of the sales associate, 7% of her time overseeing and training the logistics coordinator to schedule the company work at jewelry shows, 7% of her time controlling the final artistic look of all photographic material, 7% of her time overseeing the director of marketing in research of future markets, 6% of her time overseeing and training the logistics coordinator to control accuracy and efficiency of inventory management, and 5% of her time selecting jewelry models to manufacture and order for import to the U.S. The initial description indicated that the beneficiary would perform a combination of qualifying and non-qualifying tasks compiled within each of the listed duties.

In response to the RFE, the petitioner provided a list of job duties for all of its employees on the organizational chart, including the beneficiary. The additional duties listed for the beneficiary with the organizational chart were equally broad and vague and also included a combination of qualifying and non-qualifying duties, such as the "general strategic planning for company development and coordination of efforts of the company management," hiring and training of staff, overseeing the artistic direction of the U.S. company, and visiting key trade shows to promote the company's products and keep up with the newest trends presented by the competition.

The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its majority owner and president, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify her as a manager or executive. 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 her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*.

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. See 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 or her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

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 indicated that the beneficiary will devote 63% of her time to supervising, overseeing, and/or training the director of marketing and the logistics coordinator combined. The job duties provided by the petitioner for each of the positions listed in the organizational chart demonstrate that the positions themselves do not require a professional degree. Although the petitioner submitted evidence that two of the beneficiary's subordinates have acquired advanced degrees, the petitioner has not established that any of the positions subordinate to the beneficiary require a bachelor's degree, such that they could be classified as professional. The organizational chart lists a director of finance, director of marketing, logistics coordinator, and a sales associate as the beneficiary's subordinates; however, the lists of job duties for the subordinate positions do not support a finding that these duties comprise the duties of a professional, managerial, or supervisory position. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and her proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. In the instant matter, the petitioner failed to submit 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. Furthermore, the petitioner has failed to submit evidence that the beneficiary's subordinate employees relieve her from performing non-qualifying operational and administrative duties.

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

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. *See* Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial. As discussed herein, the petitioner's description of the beneficiary's proposed duties fails to establish that such duties would be primarily managerial in nature.

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

comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, counsel for the petitioner contends that the beneficiary will be employed at the U.S. company in an executive capacity. However, 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 counsel and the petitioner state that the beneficiary will be an executive, none of the beneficiary's listed duties, presented at the time of filing and in response to the RFE, include duties that correspond to the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. It is only on appeal that counsel for the petitioner specifically identifies the beneficiary's duties as they correspond to the definition of executive capacity. In addition, the petitioner has not established that the beneficiary's subordinate employees would relieve her from performing non-qualifying operational and administrative duties. The job duties provided for the beneficiary fail to demonstrate that the beneficiary will focus the majority of her time on executive duties rather than the day-to-day operations of the business.

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). The AAO recognizes that the petitioner currently has three full-time employees and one part-time sales associate. However, the vague job duties provided for the beneficiary and the very brief job duties provided for her subordinates fails to establish that the beneficiary's subordinates will relieve her from performing non-qualifying operational and administrative duties.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity or as a function manager. Accordingly, the appeal will be dismissed.

B. Employment Abroad in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner established that the beneficiary had at least one year of full-time employment with a qualifying entity within the three years preceding the time of her application for admission into the United States.

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign entity in March 2011. Where asked to describe the beneficiary's duties abroad for the 3 years preceding the filing of the petition, the petitioner stated the following:

Beneficiary . . . has been President of [the foreign entity] since March 2010. She established this business solely for the purpose of marketing the jewelry produced by her husband's affiliated company, [REDACTED]

As President of [the foreign entity], [the beneficiary] hires and trains all staff and currently manages 8 employees. She is in charge of product (jewelry) selection, marketing and public relations. In this role, she also participates in trade shows, and presides over set-up of the company's American venture, [the petitioner].

Until August 2012, [the beneficiary] worked as Vice President and Marketing Director at her husband's company [REDACTED] . . . a jewelry design and production company. While there, she oversaw the search for suppliers of different jewelry inserts, and oversaw the design of and development of manufacturing technologies for [REDACTED]'s own jewelry models. [The beneficiary] was personally responsible for creating all of [REDACTED]'s jewelry designs.

As the President of [the foreign entity], [the beneficiary] has spent her recent time in setting up [REDACTED]'s new U.S. affiliate, [the petitioner]. She has travelled to and spent time in the U.S., setting up the U.S. company, including finding and retaining a business attorney for substantial legal paperwork, obtaining appropriate legal clearances, finding and entering into a lease for business premises, hiring preliminary staff, etc., as further detailed in petitioner's supporting letter.

In support of the petition, the petitioner submitted a letter describing the beneficiary's employment abroad as follows:

[The beneficiary] has been the President of [the foreign entity] since March 2010. There, she has been responsible for establishing the business of marketing [REDACTED]' jewelry produced by her husband's company, [REDACTED]. She hires and trains all staff, currently managing all 9 employees. She also has overall supervisory responsibility for managing product selection, trade shows, marketing, and public relations.

As the President, [the beneficiary] has spent her recent time setting up [REDACTED]'s new U.S. affiliate, [the petitioner]. . . . At the same time, [the beneficiary] has continued with her normal duties in Russia as [the foreign entity's] President.

* * *

. . . during times overlapping her experience as President of [the foreign entity], she has been in progressively senior management positions (Marketing Director and Vice President) for over 12 years at her husband's company, [REDACTED]. There, she oversaw the search for suppliers of different jewelry inserts (made of semi-precious stones) in Russia and for other countries, oversaw processing orders for jewelry inserts, and design of and development of manufacturing technologies for the company's own jewelry models. Furthermore, [the beneficiary] has been and remains personally responsible for creating all of [REDACTED]'s jewelry designs.

The petitioner submitted the beneficiary's resume indicating that she was employed from November 2000 to August 2012 by "[REDACTED]", which became [REDACTED] as its "Marketing Director, Vice President" and lists her duties in that position as follows:

- Receiving of finished products at the jewelry warehouse
- Organization and managing of outreach sales
- Managing of sales of company jewelry in department stores, as well as its own jewelry store
- Managing orders for jewelry manufacturing at company owned factories in Russia and Ukraine
- Planning purchases of materials for future designs, research of new vendors in Russia and abroad for gemstones, as well as new manufacturing equipment and techniques
- Contract negotiations
- Processing orders for jewelry inserts (with stone cutting businesses)
- Design and development of manufacturing technologies of the company's own models with regards to gemstone choices, quantities of jewelry manufactured, time of manufacture, etc.
- Design of new jewelry lines in collaboration with the jewelry artist and master model maker
- Strategic planning of which collections and models are put in production – depending on seasonal variations in demand, gemstones availability, and fashion trends, etc.
- Overseeing the work of two managers for wholesale affairs and customer relations
- Overseeing the work of the gemstone warehouse manager as she handles the timely supply of gemstones as needed for production

The resume also indicates that the beneficiary was employed from March 2010 to the present by the foreign entity as its president. Her duties for this position are listed as follows:

- Established the new business solely for marketing of [REDACTED] jewelry in the "brick and mortar" store
- Hires and trains staff, currently manages 8 employees
- Manages product selection
- Trade shows participation
- Marketing
- Public relations campaigns and control over the PR manager, as it pertains to marketing, campaign planning, supporting literature editing and publications, photography and website updates
- Presides over the new venture – [the petitioner] – with the goal of promoting company jewelry in the United States

The petitioner did not submit any additional details about the beneficiary's duties abroad.

The director issued an RFE instructing the petitioner to submit, *inter alia*, evidence to establish that the beneficiary's position abroad at the qualifying foreign entity was managerial or executive.

In response to the RFE, the petitioner submitted a letter from [REDACTED] dated June 22, 2013, clarifying the beneficiary's employment abroad. According to the letter, the legal document used by the Russian government to specifically identify an individual's actual employment can only list a single employment at a time. Therefore, the document states that the beneficiary began her employment with the qualifying foreign entity on November 1, 2012 after she quit working at [REDACTED] on October 31, 2012. However, the petitioner claims that the beneficiary actually began working at the qualifying foreign entity in April 2010. The letter specifically states: "[the beneficiary] worked full time at [REDACTED] and [the foreign entity] from April 2010 till November 2012, and from November 2012 – only in [the foreign entity]."

The petitioner submitted a translation of the beneficiary's "Employment Record" referenced by [REDACTED]'s letter. The employment record indicates that the beneficiary was employed by [REDACTED] from April 1, 2010 to October 31, 2012, and then by the qualifying foreign entity from November 1, 2012 through the present.

The petitioner submitted a letter from the foreign entity, dated July 1, 2013, stating that the beneficiary has been employed as general director from April 8, 2010 through the present. The letter states that the beneficiary's income from April 8, 2010 to June 30, 2013 was 2,035,800 rubles. The petitioner also submitted payroll records from the foreign entity for the beneficiary's employment from April 1-30, 2010, March 1-31, 2011, February 1-29, 2012, and January 1-31, 2013, each stating that she received 52,200 rubles in compensation as general director.

The petitioner finally submitted a letter from [REDACTED] dated June 3, 2013, listing all of the beneficiary's past "experience in management positions." The last entry on the list states that the beneficiary was employed as "deputy general director" of [REDACTED] from April 1, 2010 to October 31, 2012.

The petitioner submitted an organizational chart for the foreign entity, dated July 2, 2013, which included the statement "[b]efore [the beneficiary] left for the U.S." This chart depicted the beneficiary as "general director" and described her position as "general company management and strategic planning." The chart showed that the beneficiary supervised: a "chief accountant" position which is described as "accounts for profit and loss balance, makes payroll, manages benefits;" a "warehouse manager" position which is described as "in charge of safekeeping and movements of the inventory, including at the jewelry shows;" and a "head of sales department" position which is described as "in charge of sales in general, including advertising discount policy." The chief accountant is depicted as supervising a "deputy chief accountant" whose duties are described as "manages and documents inventory, quality control." The head of sales department is shown as supervising a "senior manager," whose duties are described as "in charge of marketing, sales contracts, negotiations, including while at the shows," as well as four "sales associates," whose duties are described as "sales, customer service." Two of the sales associates positions are listed as vacant. The petitioner also submitted an updated organizational chart for the foreign entity indicating that the chief accountant would assume the beneficiary's duties as general director upon her transfer to the United States.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary had at least one year of full-time employment with a qualifying entity within the three years preceding the time of her application for admission into the United States. In denying the petition, the director found that given the beneficiary's employment at two separate companies at the same time, it could not determine that

the beneficiary was employed full-time at the qualifying foreign entity. The director acknowledged the letter from [REDACTED] stating that the beneficiary "worked full time at [REDACTED] and [REDACTED] from April 2010 till November 2012, and from November 2012 – only in [REDACTED]" but found that it remained unclear if the beneficiary worked full-time at each entity, or part-time at each entity, constituting a full 40 hour work week. The director further found that the letter of employment from the foreign entity stated that the beneficiary was employed from April 8, 2010 to June 30, 2013, but failed to state the number of hours worked or whether the beneficiary was a full-time employee. The director also noted that USCIS records indicate that the beneficiary has spent more than 11 months in the United States since September 2, 2011 as a B1/B2 visitor, and that such time spent in the United States is not time that can be counted as time working abroad.

On appeal, counsel for the petitioner asserts that [REDACTED]'s statement about the beneficiary's full-time employment at the foreign entity indicates "that the [b]eneficiary was employed full-time at two entities separately and distinctly, not in total." Counsel contends that this is supported by reference letters from the foreign entity, the organizational chart of the foreign entity, and the pay stubs submitted by the foreign entity. Counsel also addressed the director's observation of the beneficiary's travel to the U.S. for 11 months, and contested that during the three-year period, the beneficiary was still working full-time at the qualifying organization for 25 months.

Counsel submits copies of the same reference letters from the foreign entity, the same organizational chart for the foreign entity, the same pay stubs for the beneficiary from the foreign entity, and the same resume for the beneficiary.

Upon review, counsel's assertions are not persuasive. Although the petitioner submitted pay stubs from the foreign entity indicating that the beneficiary was paid for April 1-30, 2010, March 1-31, 2011, February 1-29, 2012, and January 1-31, 2013, the petitioner has not shown that said payment was for the beneficiary's employment at the foreign entity, rather than contracted work, jewelry design work, or dividends paid as a shareholder. Ultimately, even though the pay stubs state "general director" as the beneficiary's position, the petitioner has not submitted sufficient evidence to establish the beneficiary's actual full-time employment abroad.

Here, the petitioner concedes that the beneficiary was employed by her husband's company abroad as its deputy general director from April 1, 2010 to October 31, 2012, the same period of time the petitioner claims she was employed by the qualifying foreign entity. The petitioner provided a list of job duties performed by the beneficiary at the foreign entity but failed to indicate her job duties at her husband's company abroad during the same period. The beneficiary's resume, however, lists numerous duties for the beneficiary's employment at her husband's company abroad, which cast doubt on her ability to work full-time at two separate entities during the same period, as claimed by counsel on appeal. Counsel clearly states on appeal that the letter referencing the beneficiary's full-time employment establishes that she was employed full-time at each entity separately and distinctly, but counsel fails to submit any additional evidence supporting this claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

Due to the lack of information supporting the assertions that the beneficiary was employed full-time at each foreign entity separately and distinctly during the same period, the petitioner failed to establish that the beneficiary had at least one year of full-time employment with a qualifying foreign entity within the three-year period preceding the filing of the petition. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv).

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary may exercise discretion over the foreign entity's day-to-day operations as its general director, the petitioner has failed to show that the beneficiary's actual duties are primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *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).

Here, the petitioner provided a vague listing of the beneficiary's job duties abroad and failed to indicate how any subordinates would relieve her from performing non-qualifying duties. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocated her time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

III. CONCLUSION

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

ORDER: The appeal is dismissed.