

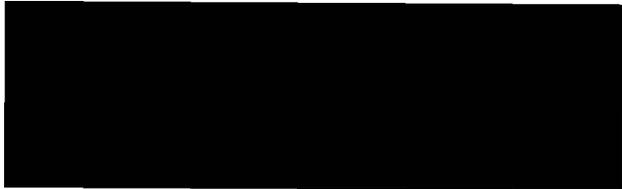
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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File: EAC 08 128 50514 Office: VERMONT SERVICE CENTER Date:

NOV 30 2009

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Puerto Rico corporation, is engaged in the sale and service of electric generators. It claims to have an affiliate relationship with Pramac Caribe C. por A., the beneficiary's foreign employer, located in the Dominican Republic. The petitioner seeks to employ the beneficiary as its accountant manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The director also noted for the record that it was unclear whether the U.S. company had been doing business for one full year at the time the petition was filed.

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 responsible for all essential financial, accounting and administrative functions for the U.S. company, performing in the role of a chief financial officer. Counsel emphasizes that the beneficiary will oversee the petitioner's managerial staff and will be charged with reported directly to the petitioner's Italian parent company on all financial and operational matters. The petitioner submits additional evidence in support of the appeal.

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.

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

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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 1, 2008. On the L Classification Supplement to Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated: "General Accounting, Financial Statements, Taxes, Prepare all accounting reports, Accounts Payable and receivables."

In a letter dated March 24, 2008, the petitioner stated that the beneficiary's experience as an accountant and supervisor with its affiliate "will give her responsibility for participation in the development of strategies and programs to improve [the petitioner's] sales and accounting areas." The petitioner further noted that the beneficiary's "experience with all the programs used in our company, financial reports, and procedures related to our accounting department" would be applied to the petitioner's own accounting department.

The director issued a request for additional evidence (RFE) on April 29, 2008. The director observed that the beneficiary's duties did not appear to be primarily managerial or executive in nature, and therefore instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's proposed duties; (2) an organizational chart for the U.S. entity; and (3) a list of all U.S. employees that identifies each employee by name and job title, as well as complete position descriptions for all employees; and (4) a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including a breakdown for the beneficiary.

The petitioner's response to the RFE was submitted on June 26, 2008, and included the following description of the beneficiary's proposed duties:

- a) Examine, analyze and supervise the preparation of accounting records, financial statements, or other financial reports to assess accuracy, completeness and conformance to reporting and procedural standards with [the petitioner's parent company]
- b) Assistance to external auditors for the preparation of tax returns, ensuring compliance with payment, reporting or other tax requirements
- c) Supervise employees performing financial reporting, accounting, billing, collections, payroll and budgeting duties
- d) Maintain current knowledge of all organizational policies and procedures, federal and state policies and directives, and current accounting standards
- e) Prepare or direct preparation of financial statements, business activity reports, financial position forecasts, annual budgets, and/or reports required by regulatory agencies
- f) Evaluate audits of company accounts and financial transactions to ensure compliance with state and federal requirements
- g) Analyze business operations, trends, costs, revenues, financial commitments and obligations to project future revenues and expenses or to provide advice
- h) Report to General Manager regarding the finances of the establishment
- i) Develop, maintain, and analyze budgets, prepare or supervise the preparation of periodic reports that compare budgeted costs to actual costs
- j) Develop, implement, modify and document recordkeeping and accounting systems
- k) Prepare forms and manuals for accounting and bookkeeping personnel, and direct their work activities

- l) Survey operations to ascertain accounting needs and to recommend, develop or maintain solutions to business and financial problems
- m) Advice [*sic*] General Manager about issues such as resource utilization, tax strategies and the assumptions underlying budget forecasts.

The petitioner submitted an organizational chart for the U.S. company, which indicates that the beneficiary will report directly to the general manager and oversee an accounting assistant, who in turn supervises an office assistant and a maintenance employee. The chart reflects that the beneficiary and the general manager would have joint supervisory authority over the sales manager/executive, warehouse manager, and service and parts manager. These managers supervise the company's secretary, sales staff, warehouse clerk/delivery person, and technicians.

The petitioner submitted the requested names, job titles and position descriptions, with English translations, for the other employees working in the U.S. company. The petitioner did not submit position descriptions for the office assistant or maintenance employee depicted on the organizational chart. According to a separate employee list submitted with the response, these positions are vacant.

The petitioner indicated that the accounting assistant "compiles, classifies, reviews documents and verification of numeric data for accounting purposes." The accounting assistant's specific duties include the following:

1. Compiles and raffles [*sic*] documents such as invoices and/or checks for accounting purposes. (20%)
2. Audits invoices against purchase orders and documents of receipt, investigates differences and transfers invoices for approval of payment. (15%)
3. Entry of information related to the process of payment to the suppliers; such as information for creating suppliers, invoices, among others. Copes with calls from suppliers related to the status of payments, investigates information and communicates such to the supplier. (15%)
4. Carries out courier services such as delivering and collecting mail, checks and other documents. Make deposits at bank. (10%)
5. Review inventories in the system and communicate to the supervisor those articles that are under the required level or in excess to help maintain adequate inventories that allow providing services to the clients and maintain costs. (5%)
6. Filing correspondence and documents related to the accounting transactions (10%)
7. Make collection efforts through telephone calls to the clients (15%)
8. Substitute office personnel as required by operational needs (5%)
9. Assist employees, suppliers and clients with information related with accounts, payments, procedures and services. (5%)

The petitioner indicates that the position requires an associate degree in accounting or office administration.

The director denied the petition on July 10, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director acknowledged the position description provided and determined that the duties appear to be primarily those of an accountant rather than a manager. The director further noted that, while the organizational chart indicates that the

beneficiary supervises the accounting assistant, who in turn supervises two positions, those two positions are apparently vacant. In addition, the director observed that the organizational chart submitted indicates that the beneficiary will supervise the sales, warehouse, and service and parts managers, but emphasized that the beneficiary's responsibility for supervising these employees was not delineated in the proposed job description for the beneficiary's position, and that such duties appear to be atypical for the position. Finally, the director noted that, in order to qualify as a manager based on her supervisory functions, the beneficiary must be shown to have the authority to hire and fire or recommend those and other personnel actions. The director concluded that the evidence submitted did not demonstrate that the beneficiary would have such authority.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity and addresses the each of the director's adverse findings. Counsel states that with respect to the positions of accounting assistant, maintenance and office assistant positions, the beneficiary will have sole responsibility for personnel actions. Counsel acknowledges that the maintenance and office assistant positions were vacant as of April 2008 due to economic reasons, but states that the petitioner hired a part-time office assistant in July 2008. The petitioner submits additional evidence to establish that these positions have been occupied in the past.

Counsel contends that the beneficiary's position is comparable to that of a chief financial officer, and further describes her proposed responsibilities as follows:

Beneficiary shall be in charge of all financial and operational reporting directly to the parent company headquarters in Italy; including, but not limited to, inventory, sales, services and parts. As a result, she would daily interact and have oversight over the Sales Manager, Warehouse Manager, and the Service and Parts manager.

To that effect, Beneficiary shall have the authority and obligation to investigate, and take disciplinary measures with respect to said managerial personnel in the event they deviate and/or do not comply with the internal control reporting requirements.

Beneficiary will be also primarily in charge of overseeing all personnel of Petitioner, make all decisions, and take any disciplinary actions, if required, with respect to approval of vacation and sick leave, overtime, absences, payroll, etc. . . .

In a nutshell, the Beneficiary would be in charge of all financial, accounting and administrative functions within the Petitioner's structure; although in some occasions admittedly with the advice and consent of the General Manager, but most of the time individually.

Those functions are essential, not only to the structure of the Petitioner, but with respect to any business in our jurisdiction regardless of its size. It is a position of trust which, in the case of the Petitioner, its parent company, as a matter of employee experience enhancement, and more importantly, as a part of its internal controls, routinely chooses to rotate.

More importantly, she will not be in charge of performing the accounting and financial functions herself. The Accounting Assistant is in charge of that. The Beneficiary's main priority would be

to oversee and direct the financial, accounting and bookkeeping functions being presently performed by the Accounting Assistant. In the existing company hierarchy, the Accounting Manager would be the second most senior position.

Finally, counsel asserts that the beneficiary's role is "not in any way, shape or form inconsistent with the traditional structures of medium and small sized businesses in the United States."

In support of the appeal, the petitioner submits a letter from [REDACTED] chief financial officer of Pramac S.p.A., the parent company of the petitioner's international group. [REDACTED] states that the group "routinely rotates and transfers key employees through our worldwide network in order to nourish our subsidiaries with their knowledge and experience." He further states that "said transfers, specifically in the accounting and financial areas, seek to strengthen internal controls by standardizing and improving our reporting procedures directly to our headquarters." Finally, [REDACTED] indicates that the rotation policy "serves as a professional incentive to our best committed personnel since it allows them to progress laterally in an international market." [REDACTED] notes that the "the company's objectives will be well-served" by the beneficiary's temporary transfer to the Puerto Rican entity.

Upon review, and for the reasons discussed herein, the AAO concurs with the director's determination. The petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or executive position.

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 either in an executive or 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 functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

At the time of filing, the petitioner stated on Form I-129 that the beneficiary's proposed duties as accountant manager for the U.S. entity will include "General Accounting, Financial Statements, Taxes, Prepare all accounting reports, Payroll, Accounts payable and receivables." While this short description was presumably not meant to provide an exhaustive account of the beneficiary's proposed duties, it is evident based on these representations that the beneficiary would be performing the day-to-day accounting and financial activities for the U.S. company. It is also reasonable to believe that such duties would be her primary duties, as no other functions were mentioned. Counsel's assertion on appeal that the beneficiary "will not be in charge of performing the accounting and financial functions herself" is belied by the petitioner's own statements. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and

(B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner's letter in support of the petition provided little insight into the nature of the proposed position and failed to describe any specific duties the beneficiary would perform in her role as accountant manager. For example, the petitioner stated that the beneficiary would participate in the development of strategies and programs to improve the U.S. entity's sales and accounting areas and utilize her experience with financial reports and procedures in the accounting area. 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In response to the RFE, the petitioner provided a more detailed position description of the beneficiary's proposed position. Whereas the petitioner initially indicated on Form I-129 that the beneficiary will be performing general accounting, payroll, accounts payable and receivable and other non-managerial accounting functions, the petitioner indicated in response to the RFE that the beneficiary will "supervise the preparation of accounting records financial statements or other financial reports," "supervise employees performing financial reporting, accounting, billing, collections, payroll and budgeting duties," and "direct preparation of financial statements, business activity reports. . . ." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities.

Moreover, the director requested that the petitioner provide a complete position description, including the number of hours devoted to each employee's duties on a weekly basis, for all employees, including the beneficiary. The petitioner failed to provide the requested breakdown of duties for the beneficiary. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). While performing non-qualifying tasks necessary to produce a product or service or other non-qualifying duties 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. Section 101(a)(44) of the Act. Whether the beneficiary is a "personnel" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial.

In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall

directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, while the petitioner indicated in response to the RFE that the beneficiary will supervise accounting and financial activities, the position description provided for the only other accounting department employee, the accounting assistant, does not establish that this employee would relieve the beneficiary from performing the duties of an accountant or financial analyst. The accounting assistant's duties include compiling checks and invoices for accounting purposes, auditing invoices against purchase orders, processing payments to suppliers, handling customer and supplier billing and payment questions, collecting mail, making bank deposits, filing documents related to accounting transactions, and making collection efforts. This employee is not responsible for general accounting, preparing any type of accounting, budget, business or financial reports, or payroll functions, and it is reasonable to conclude that such duties would fall under the beneficiary's responsibility.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. As noted by the director, the petitioner failed to provide critical information regarding the nature of the positions held by the petitioner's current employees, and failed to identify the placement of the beneficiary's proposed position within the company's existing organizational structure. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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).

The petitioner has not established that the beneficiary would qualify as a personnel manager. According to the beneficiary's job description, her supervisory duties would be limited to accounting and bookkeeping staff, while the petitioner's organizational chart shows that she will have joint authority with the general manager over the sales manager, warehouse manager and service and parts manager. While counsel further describes the beneficiary's duties in this regard on appeal, she does not offer an explanation as to why such supervisory authority over all company personnel was not mentioned in any prior position description. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The AAO does not doubt that the beneficiary would interact with the heads of the other departments in the company, but her supervisory authority over such employees has not been established. Furthermore, counsel concedes that the beneficiary's duties will not include authority to hire and fire managerial employees or recommend these and other personnel actions. Counsel does claim on appeal that the beneficiary will have the authority to hire and fire accounting department staff; however, once again, she does not explain why such responsibilities were omitted from earlier versions of the beneficiary's job description. 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 Obaighena*, 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).

Therefore, the record establishes that the beneficiary will supervise one employee, the accounting assistant. While this position is depicted on the organizational chart as a supervisory position, the record does not establish that this employee is a supervisor or manager. First, the position description for the accounting assistant does not include any supervisory duties. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. In order to be a supervisor, the employee must be shown to possess some significant degree of control or authority over the employment of a subordinate. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*Cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Furthermore, the two positions depicted as subordinate to this position on the petitioner's organizational chart, office assistant and "maintenance," appear to have been vacant at the time the petition was filed. Although the petitioner indicates that one position has since been filled, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is

defined above. In the instant case, the petitioner requires its accounting assistant to possess an associate-level degree and the position has not been demonstrated to be a professional position. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial.

On appeal, counsel indicates that the beneficiary will manage one or more essential functions of the petitioning company. 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 job description that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(1)(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.

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner has not clearly or consistently identified the beneficiary's actual duties or her level of authority, much less established that she will perform primarily managerial duties related to the accounting or finance function. The AAO acknowledges the claim on appeal that the beneficiary's position is comparable to that of a chief financial officer within a larger company. However, the fact that the beneficiary is the titular head of the accounting department is insufficient to establish that she is primarily engaged in managing that function. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

As discussed above, the beneficiary's proposed duties as described at the time of filing do not fall under the definition of managerial or executive capacity and are primarily related to general accounting, financial analysis and administration, rather than managing the finance, administration or any other functions of the company.

Based on the petitioner's failure to provide a detailed, consistent description of the beneficiary's proposed position and level of authority within the U.S. company, the AAO concurs that it has failed to support its claim that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

The remaining issue addressed by the director was whether the petitioner had been doing business in the United States for a full year at the time the petition was filed. Referring to the definitions of "new office" and "doing business" at 8 C.F.R. 214.2(l)(1)(ii)(F) and (H), the director noted for the record that there was insufficient evidence to establish that the petitioning company had offered the regular, systematic and continuous provision of goods or services during the year preceding the filing of the petition.

Upon review of the initial evidence and additional evidence submitted on appeal, the AAO will withdraw the director's observation. The petitioner has submitted sufficient documentation to establish that it has been doing business in the United States for over one year as of the date of filing, and the director's observations in this regard will be withdrawn.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.