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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

D7

[redacted]

DATE: FEB 02 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director, California 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 this nonimmigrant petition seeking to employ the beneficiary as a 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, an Illinois corporation established in March 2009, states that it is a wholly-owned subsidiary of , located in China. It indicates that it intends to engage in the wholesale and retail sale of caps and hats. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a period of three years.[1]

The director denied the petition based on two independent and alternative grounds, concluding that the petitioner failed to establish: (1) that the United States and foreign companies have a qualifying relationship; and (2) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity.

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 disagrees with the grounds for denial and asserts that the petitioner submitted sufficient evidence to meet all eligibility requirements for the requested classification. Counsel submits a statement 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.

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[1] Pursuant to 8 C.F.R. § 214.2(l)(7)(3) if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

(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 regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 involves executive or 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.

II. The Issues on Appeal

A. Qualifying Relationship

The first issue to be addressed is whether the petitioner has established that the United States and foreign entities are qualifying organizations. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(*2*) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the U.S. company is a wholly-owned subsidiary of the beneficiary's foreign employer, [redacted] located in China. The petitioner submitted the following evidence pertaining to the formation of the U.S. company:

- Articles of Incorporation for the U.S. company filed with the Illinois Secretary of State on March 19, 2009. The articles indicate that the petitioner issued 10,000 of its 1,000,000 authorized shares in exchange for consideration of $10,000.

- By-laws for the U.S. company. The by-laws state at Article VI that "[n]o certificate shall be issued for any shares until such shares are fully paid."

- The U.S. company's stock certificate #1 indicating that 10,000 shares were been issued to on March 20, 2009.

- An undated letter from a personal banker at a Chicago, Illinois branch of Citibank, N.A., confirming that the U.S. company "had received the wire with amount $28,975 on 08/19/2009 from

The director issued a request for additional evidence ("RFE") on October 28, 2009, in which she requested, *inter alia*, additional evidence to establish the ownership of the U.S. and foreign entities. With respect to the U.S. entity, the director instructed the petitioner to submit: (1) a copy of the U.S. company's stock ledger showing all stock certificates issued to date including the total shares of stock sold, names of shareholders, and purchase price; (2) a detailed list of owners of the U.S. company; and (3) proof of stock purchase. With respect to the proof of stock purchase, the director further instructed the petitioner as follows:

> Submit evidence to show that the foreign parent company has, in fact, paid for the U.S. entity. The evidence should include bank-certified copies of the original wire transfers from the parent company. Also bank-certified copies of cancelled checks, deposit receipts, etc., detailing monetary amounts for the stock purchase should be submitted. Provide the account holder names and affiliation to the foreign entity for all persons making purchases and the bank accounts that were used. The originator(s) of the monies deposited or wired must be clearly shown and verifiable by name with full address and phone/fax number. For all funds not originating with the foreign company, explain the source and reason for receiving such funds, and provide the names of all account holders depositing these funds, and their affiliation to the foreign or U.S. company.

In a letter dated December 8, 2009, former counsel for the petitioner stated that the U.S. entity is wholly owned by The petitioner resubmitted its stock certificate #1 and counsel stated that there is no stock ledger, as there have been no further stock transactions. Counsel indicated that the petitioner received a wire in the amount of $28,975 on August 19, 2009 and that "$10,000 from that amount was used for purchasing the stock."

The petitioner's response included a letter from the foreign entity, which stated: " For the first year, will invest $800,000, including $600,000 cash and $200,000 real investment. $10,000 from $600,000 is for purchasing the stock; the rest of $590,000 is for operating expenses and employees['] salaries." The letter indicates that the "first year" investment would occur in 2010.

The petitioner also submitted a letter dated November 24, 2009 on the foreign entity's letterhead which states the following: " This is to certify that [the petitioner] had received the wire with amount of $28,795 on August 19, 2009 from ,000 from $28,975 was used for purchasing [the U.S. company's] stock."

The director denied the petition on December 29, 2009, concluding that the petitioner failed to establish that the petitioner and the foreign entity have a qualifying relationship. In denying the petition, the director emphasized that the petitioner failed to provide evidence of a transfer of funds from the foreign entity to pay for its claimed stock ownership in the U.S. company. Specifically, the director noted that the petitioner failed to provide a certified copy of the original wire transfer from the foreign entity or other evidence that the foreign entity supplied the initial capital for the U.S. company. The director found the bank letter and letter from the foreign entity insufficient as it was not supported by any direct and independent corroborating evidence.

On appeal, counsel lists the documentation already submitted, and asserts that "to further substantiate that the foreign entity did indeed transfer its own funds to purchase [the petitioner's] stocks, attached as Exhibit A is a certified copy of the original wire transfer from Citibank showing again the amount of $28,975.00 wired to [the U.S. company] from on August 18, 2009."

The attached exhibit is a transaction journal for the petitioner's checking account, which was opened on August 6, 2009. The journal has been stamped by a teller at the bank's branch and reflects an incoming wire in the amount of $28,975.00 on August 19, 2009.

Upon review, and for the reasons discussed below, the AAO concurs with the director's determination.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual

control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The petitioner has not provided direct evidence of the transfer of $10,000 from the foreign entity to the U.S. entity as payment for the 10,000 shares of stock issued on March 20, 2009. The petitioner's bylaws provide that "no certificate shall be issued for any shares until such shares are fully paid." The claimed transfer of funds took place five months after the issuance of the share certificate. Furthermore, while the petitioner has provided additional evidence on appeal indicating that the U.S. company received a wire transfer in the amount of $28,975.00 on August 19, 2009, the record remains devoid of any direct, objective evidence that [redacted] provided this money or that it was intended to pay for the shares of stock issued in March of that year.

The director specifically requested documentary evidence in the form of "bank-certified copies of the original wire transfers from the parent company" rather than a transaction record from the U.S. company's bank showing a wire transfer from an unidentified source. The record contains no wire transfer receipts or bank statements to document the withdrawal of funds from the foreign entity's account for the purpose of purchasing stock.

In addition, the petitioner submitted a letter from the foreign entity in November 2009 which indicates that it would invest $800,000 in the U.S. company in 2010, and that this amount would include $10,000 for the purchase of stock. As noted above, the stock certificate was issued in March 2009 and the petitioner claims that the foreign entity paid for its stock purchase in August 2009. Therefore, the foreign entity's implication that it has not yet purchased the stock raises questions regarding the other evidence in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

It would be incorrect to state that there is no evidence of a relationship between the U.S. and foreign companies. However, the petitioner will not be excused from submitting the requested direct evidence of the financial transaction through which it claims the foreign entity purchased the U.S. company's stock, and therefore has not fully corroborated its claim that it is a qualifying subsidiary of the foreign entity. The 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). Further, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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 submitted evidence that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

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.

On the Form I-129, the petitioner indicated that the beneficiary has been employed by since August 2003. In a letter dated August 27, 2009, the petitioner stated that the beneficiary was employed "in sales" through June 2006, as a sales manager from June 2006 to January 2007, and as vice president since January 2007. The petitioner indicated that the beneficiary has been leading the sales department and supervising approximately 20 employees. The petitioner described the beneficiary's duties as follows:

1. Overseeing sales department, keeping President informed about the sales situation and providing timely market information to Vice President of Production; 20%
2. In charge of marketing research and forecasting, adjusting sales strategies based on changing market situation, and establishing sales channels in order to increase market shares; 20%
3. Making sure the long term and short term sales plans are created, feasible and implemented on a regular basis; 15%
4. Coordinating with sales agents in order to establish a broad and complete sales network; providing incentives for sales agents accounting to their performance; 15%
5. In charge of reviewing, adjusting and signing sales contracts; making sure contracts are executed effectively in order to establish good credibility for the company; 15%
6. In charge of customer services and leading the sales department to collect market feedbacks; 5%
7. Controlling sales costs and making strategies to decrease sales costs gradually; 5%
8. Making sure sales receivables are collected on time in order to keep smooth cash flow. 5%

The petitioner submitted an organizational chart which depicts the beneficiary as Vice President (Sales Department) reporting to the foreign entity's president. The chart indicates that the beneficiary supervises three sales departments (North American Area, South American Area, and Other Areas) and identifies the name of one direct report in each department (

In the RFE issued on October 28, 2009, the director instructed the petitioner to submit: (1) a more detailed description of the beneficiary's duties abroad, including the percentage of time the beneficiary allocates to each specific duty; (2) a more detailed organizational chart for the foreign entity that clearly identifies the beneficiary's position and all employees under the beneficiary's supervision by name and job title: (3) a description of job duties, educational level and salaries for all employees under the beneficiary's supervision; and (4) the total number of employees at the foreign location where the beneficiary is employed.

In response, counsel replied that the petitioner considered the initial position description to be sufficiently detailed. The petitioner re-submitted the same list of duties, but added the percentage of time added to each duty, as indicated above. The petitioner also re-submitted the same organizational chart for the foreign entity.

The petitioner provided a list of fourteen individuals which includes three sales managers and 11 sales employees. The petitioner identified the sales managers as

The petitioner listed the geographic responsibility of each employee but did not otherwise describe their duties. The petitioner indicated that all sales employees have either an "undergraduate degree" or "college degree."

The petitioner's response to the RFE also included a letter from the foreign entity which discusses the beneficiary's employment history with the company. The letter indicates that the beneficiary served as a business supervisor from 2003 to 2005, as a business manager from 2005 to 2008, and as vice president since 2008, at which time he was put "in charge of company's overall marketing and sales."

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. In denying the petition, the director observed that the petitioner's description of the beneficiary's duties was vague and failed to explain what he does on a day-to-day basis. Further, the director noted that approximately 50 percent of the beneficiary's duties abroad comprise non-managerial tasks associated with sales and marketing.

In addition, the director determined that the petitioner failed to demonstrate that the beneficiary primarily supervises and controls a subordinate staff comprised of managerial, professional or supervisory personnel. The director noted that the three people identified as the beneficiary's direct subordinates on the organizational chart include one sales manager and two sales staff, and found no evidence that the supervised employees qualify as professionals.

On appeal, counsel for the petitioner states that the beneficiary has served as vice president of the foreign entity since 2007 and "is focused on managing, overseeing, directing and coordinating the operations of [the foreign entity] as well as six (6) managers who report directly to [the beneficiary]." Counsel describes the beneficiary's duties as follows:

- Oversee Sales Department: [The beneficiary] analyzes and evaluates sales data and coordinates with departments concerned with production, pricing and distribution of products. Based on the sales data, [the beneficiary] would direct relevant departments to adjust the production, pricing and sales strategies.
- Marketing and Forecasting: [The beneficiary] reviews reports submitted by department managers including review of financial reports and directs certain departments in increasing efficiency and business promotion such as advertising and the production of products from factories in China.
- Contracts: [The beneficiary] negotiates and approves contracts and agreements with suppliers, distributors and other organizational entities.
- Operations: [The beneficiary] directs the activities of [redacted] human resources department including the selection of directors, managers and other high level staff.

Counsel further states that the beneficiary directly supervises six sales managers who are, in turn, responsible for specific country markets. Counsel indicates that the sales managers are college or university graduates and attaches copies of their diplomas.

Upon review, and for the reasons discussed below, the AAO concurs with the director's determination.

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).

The petitioner's initial description of the beneficiary's duties provides a list of his general responsibilities, but offered no specific information about what he actually does on a day-to-day basis. For example, the petitioner stated that the beneficiary is "in charge" of areas such as "marketing research and forecasting," "customer services," and "reviewing, adjusting and signing sales contracts," as well as "making sure" that sales plans are created and implemented and that sales receivables are collected. The petitioner did not provide any details as to what specific tasks the beneficiary performs to accomplish these objectives, such that they could be classified as managerial or executive in nature. 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).

The lack of detail is critical, as several of the beneficiary's area of responsibility, without further explanation, may involve the performance of duties that are not considered managerial or executive in nature, and the petitioner has provided little information regarding the delegation of duties within the beneficiary's area of responsibility. For example, the AAO cannot determine if the beneficiary is directly responsible for market research and forecasting, customer service, review of routine sales contracts, or collection of sales receivables, or whether non-qualifying duties associated with these areas are assigned to lower-level employees. We note that only one of the listed duties implies supervision of staff, namely the beneficiary's responsibility for "coordinating with sales agents" to establish a sales network.

Based on these deficiencies the director reasonably requested a more detailed description of the beneficiary's position and an account of how much time the beneficiary devotes to specific tasks. While the petitioner assigned a percentage to each of the eight duties provided at the time of filing, it declined to provide a more detailed description of the beneficiary's actual duties. 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). Accordingly, the

director properly determined that the submitted job description does not adequately describe the beneficiary's position with the foreign entity and does not establish that he performs primarily managerial or executive duties. The AAO cannot accept vague assertions regarding the beneficiaries' duties and general responsibilities, and then speculate as to the beneficiary's actual duties.

The AAO acknowledges that counsel has provided a revised position description for the beneficiary's position with the foreign entity in support of the appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner was granted an opportunity to expand upon the initial description of the beneficiary's duties and declined to avail itself of that opportunity. Under the circumstances, the AAO need not and does not consider the sufficiency of the new position description submitted on appeal.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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*).

Therefore, 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* section 101(a)(44)(A)(ii) of the Act. At the time of filing, the petitioner stated that the beneficiary supervises "around twenty employees." The position description mentioned the beneficiary's responsibility for "coordinating with sales agents," but did not describe any clear responsibility for supervision and control of subordinates or authority to hire and fire staff. The organizational chart submitted at the time of filing identified three sales departments under his supervision, and identified one direct subordinate in each department. In response to the RFE, the petitioner, without explanation, identified different individuals as the beneficiary's direct subordinates while re-submitting the same organizational chart. On appeal, counsel now claims that the beneficiary directly oversees six subordinate sales managers. The petitioner never provided the requested detailed organizational chart, nor has it provided the requested position descriptions for the subordinate employees beyond indicating their responsibility for "sales." Again, the 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).

Based on these discrepancies and omissions, the petitioner has not clearly defined the nature of the beneficiary's supervisory responsibilities, the amount of time he devotes to supervisory responsibilities, the number and types of employees he supervises, or the duties they perform. 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)). Thus, while the AAO does not doubt that the beneficiary coordinates sales staff in some capacity, the record does not establish that the beneficiary is primarily engaged in the supervision and control of a staff comprised of managerial, professional or supervisory employees.

On appeal, the petitioner has submitted evidence of educational credentials for the beneficiary's newly claimed staff of six sales managers, some of whom are identified as regular sales employees on the foreign entity's employee list. 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).

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. The petitioner has not described the duties performed by any of the beneficiary's subordinates and thus has not established that its sales employees perform professional duties.

Further, while the petitioner has assigned the job title of "sales manager" to different employees at different times, the AAO notes that an employee will not be considered to be a manager or 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. *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)). Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. As the petitioner has not provided job descriptions for the beneficiary's subordinates or a consistent account of their names and job titles, it has not established that the beneficiary supervises subordinate managers and supervisors.

For the foregoing reasons, the petitioner has not established that the beneficiary is primarily employed as a "personnel manager," nor has it claimed, in the alternative, that the beneficiary manages an "essential function" of the foreign entity. 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 detailed position

description that clearly 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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties, 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'r. 1988). Here, the petitioner has not furnished the required detailed position description or established the proportion of time the beneficiary devotes to managing a function of the foreign entity.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of 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 petitioner indicates that the beneficiary is employed by the foreign entity as its vice president, its conclusory assertions regarding his employment capacity are not sufficient. The evidence of record does not establish that the beneficiary devotes the majority of his time to focusing on the broad policies and goals of the organization.

Finally, even assuming, *arguendo*, that the petitioner had established that the beneficiary's position as vice president is a qualifying managerial or executive position with the foreign entity, there are discrepancies in the record with respect to his dates of employment in this position. Pursuant to 8 C.F.R. § 214.2(l)(3)(v)(B) the petitioner must establish that the beneficiary has been employed abroad in an executive or managerial capacity for one continuous year in the three-year period preceding the filing of the petition. The petitioner indicates that the beneficiary has worked as a sales employee, sales manager, and vice president with the foreign entity since joining the company in 2003, and has held the title of vice president since January 1, 2007. However, the petitioner has also submitted a letter from the foreign entity which indicates that the beneficiary served as a business supervisor from 2003 to 2005, as a business manager from 2005 to 2008, and as vice president since 2008, rather than the beginning of 2007. If the beneficiary was in fact promoted in 2008, the petitioner would need to provide the exact date so that USCIS could ensure that he held the position for a full year. 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 (BIA 1988).

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary was not employed by the foreign entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.