



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **APR 30 2013** Office: VERMONT SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Ron Rosenberg
Acting 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 seeks 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 is a Florida corporation established in 2009 in the business of "retail design, import and export of marketing supplies and machinery." The petitioner claims to be a subsidiary of [REDACTED], based in Mexico. The United States Citizenship and Immigration Services (CIS) previously granted the petitioner a visa in the L-1A classification on behalf of the beneficiary in order for him to open a new office. The petitioner applied to extend the beneficiary's status in order for him to serve an additional three years in the position of President/CEO.

The director denied the petition, finding the petitioner failed to establish that it will employ the beneficiary 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 it to the AAO. On appeal, the petitioner submits a brief and additional evidence. Counsel asserts that the job description and the other evidence in the record demonstrate that he will serve in a managerial or executive capacity.

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.

Further, the regulation at 8 C.F.R. 214.2(l)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with the following:

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

The director denied the petition, in part, based on a finding that the petitioner would not employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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 Issue on Appeal

The director denied the instant petition, finding that the petitioner failed to show that it would employ the beneficiary in a managerial or executive capacity.

The petitioner stated it is in the business of retail, design, import, and export of marketing supplies and machinery. It claimed to have three current employees, a gross annual income of \$86,983 and a net annual income of -\$2,009.

The petitioner stated that it is a wholly owned subsidiary of [REDACTED] of Mexico, a company for which the beneficiary worked as President and CEO from 1999 until his transfer to

the United States to work for the petitioner. The petitioner stated that the foreign entity is "a Mexican professional company engaged in the printing and transferring industry and specifically dedicated to the marketing and promotional products distribution and printing series provider, as well as printing equipment and machinery sales and maintenance." The petitioner indicated that, in the period from June 2010 to June 2011, the foreign entity had sales of \$750,000.

The beneficiary has worked for the petitioner in the United States for one year and the petitioner now seeks to continue to employ the beneficiary for an additional three years in the position of President/ Chief Executive Officer with an annual salary of \$60,000. The petitioner asserted that the petitioner received a Bachelor's Degree in International Commerce and a Master's Degree in International Business Administration in Mexico. The petitioner did not indicate the schools from which the beneficiary received these degrees, nor did it provide documentary evidence of the degrees.

On its Form I-129, Petition for a Nonimmigrant Worker, the petitioner listed the beneficiary's job duties both for his work abroad with the foreign entity and for the beneficiary's job duties in the proposed position with the petitioner. The duty descriptions were nearly identical¹ and provided as follows:

- Direct and coordinate the organization's financial and budget activities in order to fund operations, maximize investments and increase efficiency.
- Confer with Board Members and resolve problems.
- Analyze operations to evaluate performance of a company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change.
- Direct, plan, and implement policies, objectives, and activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, and to increase productivity.
- Prepare budgets for approval, including those for funding and implementation of programs.

¹ The duties reproduced here are taken from the list of duties for the beneficiary's position with the foreign entity. For the beneficiary's proposed duties with the petitioner, the duties are identical up until the penultimate duty, at which point the field runs out of characters and therefore cuts off mid-sentence. The petitioner did not provide an additional page to complete the list of duties for the proposed position with the petitioner.

- Direct and coordinate activities of businesses or departments concerned with production pricing, sales, or distribution of products.
- Negotiate or approve contracts and agreements with suppliers, distributors, federal and state agencies, and other organizational entities.
- Review reports submitted by staff members to recommend approval or to suggest changes.
- Appoint department heads or managers and assign or delegate responsibilities to them.
- Direct human resources activities, including the approval of human resource plans and activities, the selection of directors and other high-level staff, and establishment and organization of major departments.

In a letter accompanying the petition, counsel stated that the petitioner was formed to become the United States supplier and exporter of printing and transferring equipment, supplies, and materials for the Mexican affiliate and for all printing service providers in Mexico, Latin America, and the United States. Accompanying the petition, the petitioner submitted a business plan, which stated: "Our corporate objective is to sell, import, and export printing equipments [sic] and components, and merchandising and promotional products and materials." The petitioner listed its organizational objectives as:

1. To comply with the laws regarding the sale of printing and transferring supplies to the general public;
2. To provide customers with a diverse line of promotional and marketing products for printing and transferring equipments [sic] that generates substantial revenues for [the petitioner];
3. To contract trained sales representatives that will increase the billing of the business over the next five years;
4. To implement regularly updated marketing strategies and campaigns that will continually increase the visibility of [the petitioner] in the United States and Latin America;
5. To multiply our end-customers in Mexico and Latin America.

The petitioner listed some of its "products," stating: "From the introduction of [REDACTED] . . . designs of [REDACTED] and other innovative products and services, [the petitioner] has built a worldwide reputation by designing helpful new products before customers even know they need them." The petitioner provided brief descriptions discussing the innovativeness of the products listed, which appear to be versions of thermal garment press machines used to imprint images on clothing.²

The business plan included a bar chart labeled "Dental Sales Projection" that projects sales of approximately \$525,000 for 2009-10, approximately \$625,000 for 2010-11, and approximately \$700,000 for 2011-12. The plan also included an accounting for the years 2011 and 2012, as well as the petitioner's organizational chart. A President—General Manager is at the top of the chart. Under the President—General Manager are a Vice President and an Administrative Manager. The Vice President has four Sales Representatives below him or her and the Administrative Manager has three departments below him or her: Administrative, Billing, and Advertising. No individuals' names are provided for the positions.

The petitioner submitted additional evidence,³ which included a commercial lease beginning May 1, 2011 for property located at [REDACTED]. The petitioner submitted photographs of a store, as well as photographs of a table representing the petitioner at a convention.

In its letter submitted with the Form I-129, the petitioner stated it intends to hire an administrative manager who will be responsible for bookkeeping, controlling expense reports, time-sheets, and suppliers' invoices. The petitioner further stated it intends to hire additional sales representatives, as well as an assistant administrative consultant.

² The petitioner did not provide a general explanation of the machines, nor did it explicitly state why these machines were included in its business plan.

³ The AAO notes that many of the petitioner's documentary submissions are not in English and are not accompanied by a certified English translation. The majority of the evidence submitted regarding the foreign entity is not in English and not translated, including financial statements, bank statements, income taxes, sales invoices, service invoices, social security invoices and vehicle registration invoices. For those documents that lack a translation, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, those documents are not probative and will not be accorded any weight in this proceeding.

The petitioner submitted its 2010 federal income taxes which show gross receipts of \$86,983, total deductions of \$88,992, and a total income of -\$2,009. On its Schedule K-1, the petitioner indicated that it had one limited domestic partner. It stated that this partner is a corporation that owns 100% of the company, however it listed the partner as the beneficiary. The petitioner submitted one W-2 for the year 2010 showing the only employee as [REDACTED] who was paid \$3,480 during that year. A wage report for the fourth quarter of 2010 shows that she received this entire amount during the fourth quarter.

For the January through August 2011, the petitioner submitted self-generated earning statements for the beneficiary showing that he was paid approximately \$2,300 on a biweekly basis during that period. The petitioner also submitted self-generated earning statements for both [REDACTED] and [REDACTED] for January through August of 2011. These show that the two men were paid \$7.25 per hour and received just under \$300 each week.

The petitioner also submitted numerous invoices showing sales made by the petitioner. Sales invoices reflect the following:

Date	Customer	Product	Price
January 21, 2010	[REDACTED]	Textile paper	\$5,113.60
August 20, 2010	[REDACTED]	Machine/ink	\$32,456.00
September 21, 2010	[REDACTED]	Shipping	\$1,420.00
November 11, 2010	[REDACTED]	Sublimation Ink	\$870.00
April 22, 2011	[REDACTED]	IT consulting/printer repair	\$6,057.00
May 11, 2011	[REDACTED]	Main board/2 printheads	\$15,401.00
June 9, 2011	[REDACTED]	banner	\$94.00
June 9, 2011	[REDACTED]	Shirts, banner, caps	\$720.89
June 9, 2011	[REDACTED]	Shirts	\$1,755.00
June 9, 2011	[REDACTED]	IT consulting	\$600.00
June 14, 2011	[REDACTED]	Assembly/ trip expenses	\$6,855.00
June 22, 2011	[REDACTED]	IT consulting	\$600.00
June 29, 2011	[REDACTED]	IT consulting	\$600.00
July 7, 2011	[REDACTED]	IT consulting	\$600.00
July 25, 2011	[REDACTED]	Consulting/service fees	\$5,096.34
July 28, 2011	[REDACTED]	IT consulting	\$600.00
September 15, 2011	[REDACTED]	Printer parts	\$402.00

A credit card transaction report shows that, from September 1, 2010 to July 28, 2011, the petitioner had sales resulting in a total of 39 credit card transactions amounting to \$4,451.69 in sales.

The petitioner also submitted invoices of purchases it made.⁴ Purchase invoices reflect the following:

Date	Seller	Product	Total price
March 24, 2010		Viper supplies	\$377.00
March 26, 2010		Viper supplies	\$266.00
April 15, 2010		Printer	\$7,202.00
October 20, 2010		Ink	\$643.66
April 28, 2011		T-3 Repair package	\$2,561.81
May 2, 2011		Ink	\$643.66
May 2, 2011		Photo teller support	\$360.00
May 17, 2011		Machine supplies	\$1,614.00
May 17, 2011		Panel board supplies	\$5,589.00
May 18, 2011		Various shirts, etc.	\$140.56
May 19, 2011		Printer	\$800.00
May 26, 2011		Sales kits; crystals	\$277.56
May 31, 2011		Sample box	\$132.16
May 2011		Shirts	\$800.00
July 12, 2011		Panel board supplies	\$640.00
July 13, 2011		Print head; cable	\$4,434.00
July 21, 2011		DVDs; labels; frames	\$1,200.00

The director issued a Request for Evidence (RFE) stating that the petitioner's initial submission did not contain a sufficiently detailed description of the US entity in order to show that it is doing business and that it has grown to a sufficient size to be able to support a manager or executive. The RFE noted the lack of description regarding the US staff, including their salaries, duties, and educational credentials, as well as financial documents to show that the petitioner was doing sufficient business to support a manager or executive. The RFE specifically requested the number of employees, the wage or salary paid to each, and the educational credentials of each; the job titles and duties with the percentage of time to be dedicated to each duty for each employee; and a description of the management and personnel structures of the US office. Lastly, the director instructed the petitioner to provide information regarding any contractors that the petitioner utilized. The RFE indicated that the petitioner should provide further evidence that it is still engaged in the regular, systematic, and continuous provision of goods and services.

⁴ The petitioner submitted multiple copies of most invoices. It also submitted several seemingly irrelevant invoices, such as those between third party companies, those for childcare for the beneficiary's children, and those for personal purchases made by the beneficiary. Both tables only include invoices with obvious relevance.

In response to the RFE, the petitioner submitted a brief and additional evidence. The brief repeated that the beneficiary has an MBA degree and has attended numerous seminars. It also stated the beneficiary has extensive experience in "international strategic planning" and many other areas, which it claimed he received as President of the foreign entity.

Counsel also added the percentage of time the beneficiary will spend on each listed task:

- 10% Direct and coordinate the organization's financial and budget activities in order to fund operations, maximize investments and increase efficiency.
- 5% Confer with Board Members and resolve problems.
- 20% Analyze operations to evaluate performance of a company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change.
- 20% Direct, plan, and implement policies, objectives, and activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, and to increase productivity.
- 5% Prepare budgets for approval, including those for funding and implementation of programs.
- 15% Direct and coordinate activities of businesses or departments concerned with production pricing, sales, or distribution of products.
- 10% Negotiate or approve contracts and agreements with suppliers, distributors, federal and state agencies, and other organizational entities.
- 10% Review reports submitted by staff members to recommend approval or to suggest changes.
- 2% Appoint department heads or managers and assign or delegate responsibilities to them.
- 3% Direct human resources activities, including the approval of human resource plans and activities, the selection of directors and other high-level staff, and establishment and organization of major departments.

The response to the RFE also provided additional information regarding the petitioner's two other employees. It stated that [REDACTED] is the design manager who began working for the petitioner in January 2011. Counsel claimed that [REDACTED] has a Bachelor's in Fine Arts in Graphic

Design, which he received in Miami Florida. However, no particular school was named and no evidence of the degree was provided. Counsel also asserted that [REDACTED] took several seminars in advertising, corporate identity design, and photography. However, the petitioner similarly provided no details about these seminars or proof that [REDACTED] attended.

For [REDACTED] position of design manager, counsel listed the following duties with the percentage of time required for each:

- 10% Clerk related duties.
- 10% Create designs, concepts, and sample layouts based on knowledge of layout principles and esthetic [sic] design concepts.
- 5% Determine size and arrangement of illustrative material and copy, and select style and size of type.
- 10% Confer with clients to discuss and determine layout design.
- 15% Develop graphics and layouts for product illustrations, company logos, and Internet websites.
- 10% Review final layouts and suggest improvements as needed.
- 10% Prepare illustrations or rough sketches of material, discussing them with clients or supervisors and making necessary changes.
- 10% Use computer software to generate new images.
- 10% Key information into computer equipment to create layouts for client or supervisor.
- 5% Maintain archive of images, photos, or previous work products.
- 5% Prepare notes and instructions for workers who assemble and prepare final layouts for printing.

Counsel's letter contained similar information regarding the petitioner's sales manager, [REDACTED]. Counsel stated that [REDACTED] also began employment with the petitioner in January 2011. It claimed that [REDACTED] received a high school education in Mexico and that he has over 30 years of sales experience.

For the position of sales manager, the letter contained the following duties and percentages of time required for each:

- 10% Clerk related duties.
- 5% Resolve customer complaints regarding sales and service.
- 5% Oversee regional and local sales managers and their staffs.
- 10% Plan and direct staffing, training, and performance evaluations to develop and control sales and service programs.
- 10% Determine price schedules and discount rates.
- 10% Review operational records and reports to project sales and determine profitability.
- 5% Monitor customer preferences to determine focus of sales efforts.
- 5% Prepare budgets and approve budget expenditures.
- 10% Confer or consult with department heads to plan advertising services and to secure information on equipment and customer specifications.
- 15% Direct and coordinate activities involving sales of manufactured products, services, commodities, real estate or other subjects of sale.
- 15% Confer with potential customers regarding equipment needs and advise customers on types of equipment to purchase.

In response to the RFE, the petitioner also submitted a contract with [REDACTED] granting the petitioner a license to sell and distribute [REDACTED] products through the petitioner's website and kiosks. The contract indicated that the petitioner is the sole distributor of [REDACTED] products in Mexico for the duration of the contract. The license gives the petitioner "the right to [REDACTED] Retail Production Suite 3.0 or subsequent versions, which is a software application that allows for on-site photo-personalized DVD production at a retail location." The contract includes the rights to five different short movies with characters such as [REDACTED] and [REDACTED]

The director ultimately denied the petition, finding that the petitioner failed to show it will employ the beneficiary in a managerial or executive capacity. Specifically, the director looked to the list of job duties and concluded they were not consistent with those of a manager or executive, but

rather involved the tasks necessary to produce a product or provide a service. In addition, the director concluded that the petitioner did not provide sufficient detail regarding the beneficiary's daily activities to demonstrate that he would in fact primarily perform managerial or executive tasks.

On appeal, counsel for the petitioner submits a brief contesting the director's conclusion that the petitioner failed to establish that the beneficiary would be performing executive duties for the petitioner. Counsel emphasizes that the petitioner's two other fulltime employees and five contractors are able to sufficiently free the beneficiary from all non-managerial duties.

In addition to the brief, the petitioner submits a physical example of the finished DVD product. The petitioner also provides additional invoices. Three of the invoices it submits, invoice # 1322 dated October 21, 2011, invoice # 1323 dated October 21, 2011, and invoice # 1324 dated October 10, 2011, are identical and show the petitioner billing for two licenses to distribute the petitioner's products within Mexico at a cost of \$15,000 each for a total of \$30,000 charged per invoice. Additional sales invoices show \$680 for a vinyl banner charged to on December 29, 2011, and \$652.70 for an acrylic sign charged to a group of four businesses on December 29, 2011.

III. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary will primarily work in a managerial or executive capacity.

The petitioner does not specify whether the beneficiary will be engaged in primarily managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

When examining the managerial or executive 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(1)(3)(ii). The petitioner's description 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.* In addition, the definitions of executive and managerial capacity have two parts. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in the definitions. Second, the petitioner must prove the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

An examination of the list of the beneficiary's proposed job duties does not reveal sufficient detail regarding what the beneficiary will do on a daily basis. 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). However, the duties listed for the beneficiary are vague and fail to give a concrete description of the proposed position. The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

According to the petitioner, the beneficiary will spend 20% of his time analyzing operations to evaluate if the company and its staff are meeting its objectives, as well as determining areas of potential cost reduction, program improvement, or policy change. The petitioner provides no explanation of how the beneficiary will analyze operations or staff performance and by what metrics they will be measured. It does not explain how the beneficiary will determine areas of potential cost reduction, nor explain what kind of program it would improve or policy it would change. Similarly, the petitioner indicated that the beneficiary will spend 20% of his time directing, planning, and implementing policies, objectives, and activities. However, it provided no indication of what such directing, planning, or implementing would entail. 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. Again, it is the actual duties themselves that reveal the true nature of the employment. *Id.*

In addition to being vague, many of the duties listed by the petitioner conflict with other evidence in the record. The petitioner stated that the beneficiary will spend 15% of his time directing and coordinating activities of businesses or departments concerned with production pricing, sales or distribution of products. However, the petitioner has only two employees other than the petitioner. With three total employees, it is unclear how the petitioner has departments or businesses that could need coordination. The beneficiary will spend 10% of his time reviewing reports submitted by staff members. However, the job duties for the petitioner's two other employees did not include the preparation of reports. It is therefore unclear to which staff members or reports this duty refers. The beneficiary will spend 5% of his time conferring with Board Members and resolving problems. However, it is not clear that the petitioner has any board members, or that it intends to elect any in the near future. 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).

Other evidence provided by the petitioner contains significant inconsistencies. With its petition submitted in July of 2011, the petitioner provided a sales projection chart labeled "Dental Sales Projection." As noted in the director's denial, dental sales or equipment are not mentioned in any other portion of the petition or the evidence submitted. On appeal, the petitioner asserts that this

label was simply a typographical error. The petitioner is obligated to clarify inconsistent and conflicting information by independent and objective evidence. *Matter of Ho, supra*. Simply asserting that the label was a clerical error does not qualify as independent and objective evidence.

The petitioner also failed to provide an explanation or basis for the sales projections it produced. This is of particular note because the projections directly conflict with other evidence provided. Accompanying the petition filed in July 2011, the chart shows sales projections of approximately \$525,000 in 2009-2010 and \$625,000 in 2010-2011. However, the petitioner reported only \$86,983 in gross receipts on its 2010 income tax returns. Thus, at the time the sales "projections" were filed, they covered a time period that had partially already occurred. Despite this, the projection provided numbers that were several times the amount actually reported by the petitioner.

Given the aforementioned deficiencies with the sales projection provided, the AAO cannot consider it a reliably produced document or an accurate prediction of the petitioner's future sales. In addition, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, supra* at 591.

Similar problems exist with the accounting spreadsheet provided with the business plan. It shows the monthly accounting from January 2011 through December 2012. As the petitioner filed the instant petition in July 2011, it is unclear whether the spreadsheet is intended as an actual representation of the petitioner's accounts, or merely a prediction. From January 2011 through June 2011, the accounting shows that the petitioner had revenues of \$33,075 per month and paid \$8,820 in monthly salaries and \$7,717.50 in monthly professional fees. From July 2011 through December 2012, the accounting shows that the petitioner will have revenues of \$35,000 per month and pay \$9,261 in monthly salaries and \$8,106 in monthly professional fees.

Although the accounting show the petitioner paid \$8,820 in monthly employees' salaries for the period of January 2011 to June 2011, the internally produced payroll documents submitted by the petitioner show that the petitioner had only three employees during this time: the beneficiary, [REDACTED]. During that period, the beneficiary received \$4,614 per month and the [REDACTED] received a combined amount of less than \$2,400 per month. This amounts to a total monthly salary expenditure under \$7,014, directly contradicting the \$8,820 amount stated in the accounting spreadsheet. 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. *Id.*

Although the petitioner submitted an Employer's Quarterly Tax Return for the last quarter of 2010 showing the petitioner had one employee in [REDACTED] the petitioner failed to submit Quarterly Tax Returns for the first two quarters of 2011, even though these occurred prior to the

petitioner's filing. This is particularly relevant in that the petitioner claims he and his current two employees started collecting a salary from the company in the beginning of 2011. These later returns would therefore either corroborate or contradict this claim.

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).

To the extent that the petitioner claims the beneficiary will be employed as a personnel manager, it has failed to establish that his subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Although the petitioner calls the beneficiary's two subordinate employees managers, the petitioner has no other employees whom these individuals could manage. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an 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 manager position. As a result the petitioner's subordinates are not managers or supervisors, and he is therefore considered a first-line supervisor for purposes of the analyzing his managerial capacity.

The petitioner indicates that it plans to hire additional employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is

a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

The lists of job duties for the positions of design manager and sales manager are both vague. As with the list of job duties for the proposed position of the beneficiary, the lists of duties for the sales and design managers lack concrete details regarding the actual positions. For example, many of the duties listed for the design manager appear repetitive. The petitioner lists as separate duties: creating designs, concepts, and sample layouts; developing graphics and layouts; reviewing layouts; preparing sketches of material; and using computer software to generate new images. It is unclear how each of these duties is different from the others. While they might in fact be quite different, the petitioner failed to provide sufficient detail such that the duties can be differentiated.

Based on the lack of detail regarding these positions, the petitioner has failed to demonstrate that its position of design manager is one that generally requires a post-secondary degree in order to enter the field. According to the petitioner, the design manager has a Bachelor's degree in Fine Arts in Graphic Design which he received in Miami, Florida. However, the petitioner did not provide the name of the school from which the petitioner supposedly received this degree, nor did it provide documentary evidence that he received the degree. 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)).

Similarly, the petitioner's position of sales manager does not appear to be one which requires a post-secondary degree for entry into the field. Based on the duties listed and the evidence in the record, it appears as though the sales manager is responsible for actually providing the petitioner's service. Although the sales manager's listed duties include "overseeing regional and local sales managers and their staffs" and "planning and directing staffing, training, and performance evaluations," such duties are contradicted by the petitioner's lack of staff. The task of conferring or consulting with department heads is similarly perplexing given that the petitioner does not claim to have any department heads. Lastly, many of the sales manager's duties are so vague that the AAO cannot conclude that a degree is necessary for the position. For example, the petitioner states that the sales manager is responsible for directing and coordinating activities involving sales of manufactured products, services, commodities, real estate or other subjects of sale. With such a broad range of possible products and services, it is not clear what the sales manager will actually do on a daily basis.

The petitioner stated that its current sales manager has a high school degree from Mexico. Thus, its choice of the individual for this employment reinforces the conclusion that entry into the field does not require a professional degree.

The petitioner also claims that it employs five contractors including a lawyer, a website designer, and an accountant. Several of these individuals would be considered professionals as that term is defined under the Act. However, these positions are not included in the petitioner's organizational chart. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho, supra*. Furthermore, as stated above, the petitioner must demonstrate that the beneficiary will spend more than 50% of his time acting in a qualifying capacity. According to the petitioner's list of the beneficiary's proposed job duties, the petitioner does not claim that the beneficiary would spend more than half of his time supervising the petitioner's contractors.

Based on the above analysis, the petitioner has failed to demonstrate that the beneficiary would spend his time primarily managing supervisors, professionals, or other managers.

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 explains 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 this case, the petitioner has failed to articulate a specific function that the beneficiary will perform.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. 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.*

In the instant case, the beneficiary has a sufficient degree of authority over company operations. However, the petitioner has failed to demonstrate that the majority of the beneficiary's time will involve executive-level endeavors. This is largely due to the lack of detail and explanation provided by the petitioner. For example, the petitioner states that the beneficiary will spend 20%

of his time "[d]irect[ing], plan[ning], and implement[ing] policies, objectives, and activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, and to increase productivity." Similarly, the beneficiary will another 20% of his time "[a]nalyz[ing] operations to evaluate performance of [the] company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change." These descriptions contain insufficient detail as they fail to explain what the petitioner will actually be doing on a daily basis. 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, supra*. 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 lack of specificity is particularly a problem due to the lack of explanation regarding the petitioner's business activities in general. The descriptions provided by the petitioner are generally so vague and so broad that it is not quite clear what the petitioner actually does. For example, the petitioner stated in its business plan that its objective was to sell, import, and export printing equipment and components, as well as merchandising and promotional products and materials. Other evidence submitted fails to clarify the petitioner's actual business activities. The business plan refers to multiple machines, seeming to imply that the petitioner will sell them. However, no other concrete information is provided regarding the suppliers of the machines or the process for selling them. Furthermore, the invoices provided reflect only two sales of machines over the petitioner's initial eighteen months in business.

In the brief submitted on appeal, counsel for the petitioner touts [REDACTED] the newest product created and developed by the beneficiary." However the petitioner submits no other evidence to support the claim that this product has been created or developed by the beneficiary. 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). While the selling of a third party's creation is a perfectly legitimate business venture, the unsubstantiated claims of counsel that the product was created and developed by the beneficiary create doubt regarding the credibility of the evidence submitted. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, supra* at 591.

In addition to the problematic lack of specificity, many of the beneficiary's listed duties are not executive in nature. For example, the petitioner stated that the beneficiary will spend 20% of his time maintaining contact with major customers, sending the necessary letters to them, checking the major customers' emails, and answering their emails every day. Another 15% of his time will be spent on negotiations and formation of sales contracts. Maintaining inventory will consume 5% of the beneficiary's day. As the petitioner's business is importing and selling its parent company's

products, the above-listed tasks are necessary for the petitioner to provide its services. 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'r 1988).

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). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 103 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Reading section 101(a)(44) of the Act in its entirety, 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. However, 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 *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

At the time of filing, the petitioner was a two-year-old import and export company. The firm employed the beneficiary as president, plus a design manager and a services manager. The AAO notes that all of the employees have managerial or executive titles. The petitioner did not submit

evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president, two managerial employees, and the named contractors. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. For these reasons, the appeal is dismissed.

IV. Conclusion

The petition will be denied and the appeal dismissed due to the petitioner's failure to demonstrate that he will be employed in a primarily managerial or executive capacity. 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.