



U.S. Citizenship
and Immigration
Services

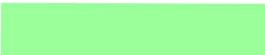
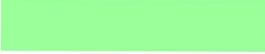
(b)(6)



DATE: FEB 01 2013

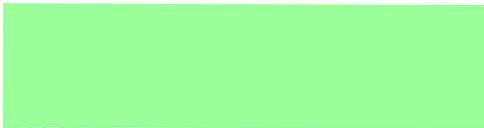
Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

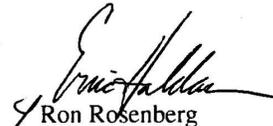


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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, 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 extend the beneficiary's status as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California limited liability company established in October 2010, states that it operates a diamond and gold jewelry business. The petitioner claims to be a branch of [REDACTED]. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend his employment in the position of CEO/general manager for three additional years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying 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 for review. On appeal, counsel for the petitioner asserts that "duties . . . carried out by [the beneficiary] exceeded those of a simple operational role " and that the beneficiary is an executive at the U.S. company. Counsel submits a brief and additional evidence on appeal.

I. THE LAW

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

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

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

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by 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.

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 sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 1, 2011. The petitioner stated on the Form I-129 that the beneficiary will continue to be employed as CEO/general manager of the U.S. company. Where asked to describe his proposed duties in the United States, the petitioner stated, "continue to oversee and direct professional employees in the company's diamond and gold production activities in the United States, and will continue to be responsible for the overall organization and management of the U.S. company." The petitioner indicated that it operates a "diamond and gold jewelry business," but failed to indicate the number of current employees or its gross annual income.

The petitioner submitted a letter dated October 31, 2011, in which it described the beneficiary's position as follows:

[The beneficiary] will continue to be the General Manager of [the petitioner], which position entails the daily managing and directing of the whole company in the U.S. In this managerial/executive position, he is responsible for the establishment and management of the company in this first year of operation. He will continue to hire professional employees and continue to oversee the business operations of the office. He will continue to manage the essential functions of Sales and Marketing and International Business Development. He will report directly to the Board of Directors of the foreign company, will implement and supervise the policies, and he will direct the goals established by the board. He will continue to meet with potential customers, manage the sales staff in following up with potential leads, and will implement the goals established by the foreign company in expanding the U.S. business operations.

On December 13, 2011, the director issued a request for evidence ("RFE") in which she instructed the petitioner to provide, *inter alia*, the following: (1) a more detailed, specific description of the beneficiary's duties, identifying the percentage of time required to perform the duties of the managerial or executive position; (2) a detailed organizational chart outlining all employees by name, job title, summary of duties, educational level, and salary; and (3) a copy of its state quarterly wage reports for the first three quarters of 2011.

In response to the RFE, former counsel for the petitioner submitted a letter describing the beneficiary's duties as follows:

He will continue to oversee and direct professional employees in the company's diamond and gold production and sales activities in the United States, and will continue to be responsible for the overall organization and management of the U.S. company which demonstrates that his position qualifies as a managerial or executive position in that the majority of duties are managerial in nature and are not operational or day to day duties, which are carried out by the other employees working under the direct supervision of the CEO/President.

* * *

.... He will manage and control not only the entire function of the company, but also the entire operation of both companies in their entirety. He will have the utmost decision-making power and will serve as the brain and the heart of the entire company. He will have the discretionary power to hire or fire employees within the company, to create a new department within the corporation or to completely shut down the entire operation. He will have the discretionary power over day-to-day operations of [the petitioner], and the ability to make decisions of utmost importance in relation to the company and its proper functioning. He will have the power to deny any and all suggestions or decisions by other managerial or professional personnel of the company if inappropriate or not feasible for the company's ultimate success.

His duties in Armenia and the US also include the following:

1. Act as Chief Executive Officer / President to plan, develop and establish policies and objectives of the company;
2. Oversee and direct managers and other professional employees in the company's sales, diamond, and gold production activities;
3. Continue to be responsible for the overall organization and management of the U.S. company;
4. Continue to be responsible for the overall organization and management of the Armenian company;
5. Oversee and the coordinate [sic] of functions and operations of the company to establish responsibilities and procedures to attain objectives;
6. Review activity reports and financial statements prepared by the management to determine progress towards goals;
7. Revise objectives and plans in accordance with current market condition;
8. Oversee, plan and develop production, sale and manufacturing deals, schedules, needed labor, and public relations/promotional policies designed to improve company image and relations with customers and employees;
9. Direct and coordinate all activities of the management involved with manufacturing, promotion, and sales of services offered;
10. Analyze and determine projects to be undertaken by the managerial personnel based on demand and industry reaction to past projects and current market conditions;

11. Oversee management's negotiations for equipment, labor and other needed products for smooth and successful business operation;
12. Through subordinate managerial personnel, establish policies to utilize human resources, equipment and materials productively;
13. Oversee, coordinate, handle, and manage all manufacturing and sales activities conducted by the managerial personnel;
14. Supervise preparation and revision of manufacturing offers and orders;
15. Oversee, analyze, review and approve all projects, manufacturing and designing plans, schedules, and other materials developed by managerial staff prior to final implementation.

Former counsel went on to list the beneficiary's subordinates and a brief description of their job duties. The employees listed were [REDACTED] – general manager [REDACTED] – jewelry section manager, [REDACTED] – commodity / goods manager, and [REDACTED] – senior sales consultant of the jewelry section. The petitioner submitted detailed job descriptions for the senior sales consultant, jewelry section manager, and commodity / goods manager. The petitioner did not submit a detailed job description for the general manager or any additional details about the beneficiary's position.

The petitioner submitted an organizational chart depicting the beneficiary as chief executive officer/president supervising a general manager, [REDACTED]. According to the chart, the general manager supervises the commodity/goods manager, jewelry section manager, and senior sales consultant.

The petitioner submitted its Form DE-9, California Quarterly Contribution Return and Report of Wages for the third and fourth quarters of 2011. The Form DE-6 for the third quarter of 2011 indicates \$866.67 paid to Lilit Grigoryan and \$1,733.34 paid to [REDACTED]. According to the Form DE-9, the company had "0" employees prior to September 2011. The Form DE-9 for the fourth quarter of 2011 indicates \$1,733.34 paid to [REDACTED] and \$5,200.02 paid to [REDACTED]. The petitioner reported two employees for the month of October 2011, but only one employee for the months of November and December. As such, it appears that [REDACTED] was the company's sole payroll employee at the time the petition was filed.

The individuals identified as holding the positions of general manager and commodity/goods manager do not appear on the Forms DE-9. The director had requested that the petitioner provide an explanation for any employees listed on the organizational chart who did not also appear on the company's state quarterly wage reports; however, the petitioner provided no explanation or other evidence of payments made to these two claimed employees.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director found that three of the beneficiary's subordinates listed on the organizational chart were not listed in the quarterly wage reports, and based on the organizational structure provided, it appears that the beneficiary is primarily assisting with the day-to-day non-supervisory duties of the business. The director further found that the detailed job descriptions provided for the beneficiary's subordinates do not establish that a bachelor's degree or higher is actually necessary to perform the functions of any of the subordinate positions. The director observed that the petitioner has not established that it has an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

(b)(6)

On appeal, counsel for the petitioner contends that the beneficiary has performed numerous executive duties, such as:

[The beneficiary], as both an executive officer of [the foreign entity] and in the managing of the operations in the United States, has made many decisions that are beyond mere management. He has relocated the store which involves making an executive decision. He has given instructions to alter the color of the gold and the gold contents of items to be marketed in the United States, an executive decision. He has given instructions to ship jewelry without the center stones to that these stones can be bought and mounted here, thereby changing the manner of marketing, an executive decision. He has authorized exploration of possible stores in San Francisco, an executive decision.

* * *

It [the foreign entity] has assigned [the beneficiary] as its representative in the United States to make both managerial and executive decisions so that the objectives of the parent corporation may be achieved.

Counsel also addressed the issue of the employees listed on the organizational chart and not on the quarterly reports as follows:

The USCIS noted . . . that three of the employees are not drawing salaries from the Los Angeles operations. This is correct. . . they are being paid by the parent corporation in Armenia. It was anticipated that in order to build the business structure in the United States the parent company would have to invest time and money.

The petitioner submitted a letter from the foreign entity dated January 1, 2012 and signed by [redacted] General Director. The letter states:

This is to certify that while [the beneficiary] is establishing retail and wholesale outlets for [the foreign entity], the Armenian corporation will financially assist him by maintaining the following persons on the Armenian payroll:

[redacted] Executive, [redacted]	\$7000/month
[redacted] (General Manager, [redacted])	\$3000/month
[redacted] (Commodity/Goods Manager, [redacted])	\$2500/month

III. DISCUSSION

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

As discussed above, the petitioner has requested the extension of a petition that involved a new office. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation that allows for a more lenient treatment of managers or executives that are entering the

United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, neither counsel for the petitioner nor the petitioner clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. In fact, throughout the record, counsel for the petitioner and the petitioner refer to the beneficiary as both an executive and a manager. A beneficiary may not claim employment 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 each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

On appeal, counsel contends that the beneficiary has shown to be carrying out executive decisions for the U.S. company, thus qualifying him as an executive. However, the petitioner provided a description of the beneficiary's job duties and failed to provide substantive details about each of the beneficiary's duties and allocate either a percentage of time or actual time dedicated to each of the duties performed by the beneficiary. Throughout the record, the petitioner describes the beneficiary's duties in very broad terms, noting that he will "continue to be responsible for the overall organization and management of the U.S. company"; "manage and control not only the entire function of the company, but also the entire operation of both companies in their entirety"; "have the utmost decision-making power and will serve as the brain and the heart of the entire company"; and "have the discretionary power over day-to-day operations of [the petitioner], and the ability to make decisions of utmost importance in relation to the company and its proper functioning."

Although the petitioner lists additional responsibilities for the beneficiary, it does not provide a breakdown of the amount of time the beneficiary devotes to each task. This failure of documentation is important because some of the beneficiary's assigned tasks do not fall directly under traditional managerial or executive duties as defined in the statute. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties are managerial or executive in nature, and what proportion are actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its president and CEO, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of 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 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).

As a preliminary matter, the AAO notes that, while the petitioner consistently claims that the beneficiary will be responsible for supervising subordinate professionals and managers, it has not met its burden to provide evidence of wages paid to employees, as required by 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner failed to indicate the number of employees on the Form I-129 and provided no information regarding the staffing of

the company at the time of filing. In response to the RFE, the petitioner provided an organizational chart depicting five employees, including the beneficiary, accompanied by a California Form DE-9 indicating that the petitioner paid only one employee as of November 2011, the month in which the petition was filed. Although the director explicitly requested that the petitioner explain any discrepancies between the organizational chart and the state quarterly wage reports when responding to the RFE, the petitioner failed to do so. 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). Therefore, the record before the director contained evidence that the petitioner employed only one employee, the jewelry section manager, at the time of filing.

The petitioner now submits a letter from the foreign entity indicating that it pays the salaries of the beneficiary, the petitioner's general manager, and its commodity/goods manager. The letter is not accompanied by any evidence of actual wages paid to these employees, such as paystubs, deposit slips, tax documentation or bank statements. 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)). Further, the AAO notes that the petitioner indicated the beneficiary's title as "CEO/general manager" at the time of filing, which raises questions as to whether the claimed general manager was working for the company as of November 2011. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Regardless, 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 Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence of wages paid to its employees to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

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

Here, although the petitioner states that all of the beneficiary's subordinates hold a "college degree," the job duties provided by the petitioner for each of the positions (except the general manager, which was not provided) demonstrate that the positions themselves do not require a professional degree. The petitioner has

not established that any of the beneficiary's claimed subordinates require a bachelor's degree, such that they could be classified as professional. The organizational chart lists the "general manager" as the beneficiary's direct subordinate. However, the petitioner did not provide a position description or list of job duties for the general manager to support a finding that this employee holds a professional, managerial, or supervisory position. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. In the instant matter, the petitioner failed to submit a position description for the beneficiary's direct subordinate and has not provided credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

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

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

Here, the petitioner made an unsupported claim that the beneficiary will "continue to manage the essential functions of Sales and Marketing and International Business Development." However, the petitioner failed to provide a breakdown of the beneficiary's job duties to support such a claim and failed to demonstrate that the beneficiary will allocate at least 51% of his time to managing an essential function of the U.S. company. In fact, neither counsel nor the petitioner claimed that the beneficiary is a function manager in response to the RFE or on appeal.

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

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

Here, the petitioner has not demonstrated that the beneficiary's duties will primarily focus on the broad goals and policies of the organization. Although the petitioner states that the beneficiary is an executive and on appeal, counsel for the petitioner indicates that the beneficiary has been carrying out executive duties, the petitioner has not provided sufficient information about the beneficiary's duties to establish that he is an executive at the U.S. company. The list of duties provided by the petitioner merely reiterates the definition of executive capacity and does not provide sufficient detail to determine that he is an executive. In addition, as discussed, the petitioner documented the employment of only one subordinate employee as of the date of filing, and thus failed to support a claim that the beneficiary is relieved from involvement in the day-to-day operations of the company.

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

Furthermore, in the present matter, 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.

While the petitioner claimed in response to the RFE that it has hired a general manager, jewelry section manager, commodity/goods manager and a senior sales consultant, it reported only one employee on its Form DE-9 for the month in which the petition was filed. Even if the AAO accepted the letter from the foreign entity indicating that it is paying wages to the beneficiary and the remaining claimed employees, the letter is not accompanied by evidence that such employees were working for the petitioner as of November 1, 2011. Thus, it remains unclear that the beneficiary has sufficient subordinates to relieve him from performing non-qualifying administrative, operational, and sales duties.

(b)(6)

The petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity or as a function manager. The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

IV. CONCLUSION

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.