

(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

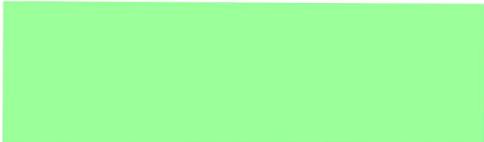


DATE: **FEB 01 2013** Office: VERMONT SERVICE CENTER FILE: 

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg

Acting Chief, Administrative Appeals Office

[www.uscis.gov](http://www.uscis.gov)

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation established in March 2010, states that it operates as an importer of handicrafts, clothing, jewelry, furniture, and other household goods. The petitioner claims to be an affiliate of [REDACTED], located in India. The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend her status so that she may continue her employment as Chief Executive Officer.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the petitioner has established that the beneficiary is employed in a primarily managerial capacity. Counsel submits a brief in support of the appeal.

#### I. THE LAW

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

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

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

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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 the beneficiary will be employed in a primarily managerial or an executive capacity in the United States.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 24, 2011. The petitioner indicated on Form I-129 that it operates an importer of handicrafts, clothing, jewelry, furniture, and other household goods business with three current employees and a gross annual income of \$82,285. On the Form I-129 Supplement L, the petitioner described the beneficiary's proposed duties as "to oversee operations of sales and marketing[;] act as lead of business development[;] hiring and training of employees[;] expanding operations and quantity of clients[;] supervising and coordinating shipping of goods and quality control."

In its letter of support, the petitioner described the beneficiary's job duties as follows:

Beneficiary shall be working in the US in a managerial capacity whereby she shall be responsible for managing [the petitioner's] operations in the US. Beneficiary shall have wide discretion to take decisions necessary for running the business in the US, including responsibility for all hiring/firing decisions as well. [The beneficiary] fills the position of chief executive (CEO) in the U.S. office of [the petitioner]. Her responsibilities include (i) manage financial and budget activities to fund operations, and maximize investments; (ii) manage and coordinate activities concerned with pricing, sales, and distribution of products; (iii) analyze 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; (iv) negotiate or approve contracts and agreements with suppliers, distributors, federal and state agencies, and other organizational entities; (v) develop, build and oversee strategic partnerships and relationships with other businesses; (vi) manage ongoing client relationships in terms of interfacing with key stakeholders at the client end and coordinating with India operations; and (vii) manage and supervise over a Sales Department to evolve a longer-term business strategy for the company and build quarterly action plans; (viii) supervise ongoing accounts and administration in the US and be the interface between [the petitioner] and [the foreign entity].

The petitioner further discussed the staffing of the company as follows:

[The beneficiary] hired two employees to run the operations of the company so that she can concentrate more on broad strategy and management of the company as opposed to directing the day to day functions. [REDACTED] was hired as Warehouse Supervisor to supervise all operations at the warehouse. [REDACTED] duties include leading the warehouse team to support all departments in the facility with a focus on maximizing utilization, labor and resources. This includes managing the flow of freight, materials and finished goods between warehouse and the operations floor and seeing that internal customers' requirements are met and transactions are done in an accurate, efficient, and timely manner. She has to also manage the development, direction, and activities of all warehouse functions and processes, maintain accurate inventories, and direct storage at both on-site and off-site warehouses. She also maintains systems for monitoring and tracking material requests, and delivery of product to the operations floor.

[REDACTED] is also responsible for directing the inventory cycle count activity and reporting requirements. Keeps storage and warehouse areas in neat, well-stocked, clean, organized manner. She regularly inspects warehouse and personnel for safety issues, including but not limited to proper stacking heights, clearance below sprinkler heads, condition and operation of mobile equipment and material handling equipment, safety PPE worn correctly, safety audits, etc. She works with production staff to ensure that material issues are delivered in a timely manner and that proper follow-through is complete. Lastly, she ensures adherence to company safety standards, policies and procedures.

[REDACTED], Category Head and Supervisor of Purchasing, is in charge of carrying out the day to day operations of business through guidance from [the beneficiary]. Her job is to make each component productive and contributive to the goal of a highly profitable relationship with customers. She handles a wide range of responsibilities to ensure the smooth functioning of the office. Her work encompasses streamlining the office and multitasking as head of purchasing. She brokers purchase orders and is responsible for handling all the client's orders after a sale has commenced. She designs filing systems and makes sure these systems are up to date. She maintains the office budget and expense records. She supports new client acquisition effort by engaging with prospective clients and articulating the value proposition. She maintains constant contact with client to ensure that their custom handmade design meets their specifications at every stage. She is involved in the key components of customer focus, strategic positioning, and market timing. She maintains the vision to the client that we are a family owned and operated business, with low overhead costs, a great distribution team, and distinctive, original, and quality designs.

The petitioner submitted pay stubs for the beneficiary for the period August 2, 2011 to September 30, 2011, indicating that she had been paid \$12,500 through September 30, 2011. The pay stubs submitted for [REDACTED] were for the period from July 1, 2011 to July 30, 2011 only and indicate that she had been paid \$2,625 through July 30, 2011, with a bi-weekly salary of \$375. The pay stubs submitted for [REDACTED] for the period July 31, 2011 to September 30, 2011 indicate that she had been paid \$6,000 through September 30, 2011, with a bi-weekly salary of \$500.

The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the second and third quarters of 2011 indicating that the petitioner had three employees for the second quarter and two employees for the third quarter. The petitioner also submitted its Form NYS-45, New York State Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return, for the second and third quarters of 2011. The Form NYS-45 for the second quarter of 2011 indicates that the petitioner had three employees (each of the previously listed employees), one the first month and three the second and third months. The Form NYS-45 for the third quarter of 2011 indicates that the petitioner had three employees the first month and two employees the second and third months.

On November 3, 2011, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to provide the following to establish that the beneficiary will be performing the duties of a manager or executive: (1) a comprehensive description of the beneficiary's duties at the U.S. company; and (2) a list of all U.S. employees identified by name, position title, educational credentials, and a complete description of each of the employees' duties, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis.

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

As chief executive (CEO) of the Petitioner Company, Beneficiary is responsible for developing, managing and expanding the company's operations in the United States, hiring/firing of employees, and assessing and creating new business opportunities. Beneficiary's job responsibilities includes [sic] the following: manage and coordinate activities concerned with pricing, sales, and distribution of products; manage the financial and budget activities of U.S. entity to fund operations, and maximize investments; plan and implement procedures, policies and activities to ensure continuing operations, to maximize returns on investments, and to increase productivity; analyze 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; negotiate or approve contracts and agreements with suppliers, distributors, and other organizational entities; direct human resources activities, including the approval of human resource plans and activities, the hiring and firing of employees, and establishment and organization of major departments; develop, build and oversee strategic partnerships and relationships with other businesses; be involved in the key components of customer focus, strategic positioning, market timing manage ongoing client relationships in terms of interfacing with key stakeholders at the client end and coordinating with India operations; supervise and support new client acquisition effort by engaging with prospective clients and articulating the petitioner's value proposition; hire sales representatives and manage and supervise over the Sales Department to evolve a longer-term business strategy for the company and build quarterly action plans; supervise ongoing accounts and administration in the US and be the interface between the foreign and U.S. affiliates.

\* \* \*

The Beneficiary will continue to be responsible for such duties, including, responsible for hiring and firing managers; supervising subordinate employees, overseeing preparation of sales and marketing reports; reviewing and analyzing sales data; establishing and

implementing policies to manage and achieve marketing goals; reviewing financial reports, budgets and expense reports prepared by subordinate employees; managing the company; overseeing marketing campaigns developed by subordinate managers.

By overseeing the marketing campaign developed by subordinate managers through sales and marketing reports, reviewing and analyzing sales data and establishing and implementing policies to manage and achieve marketing goals, the Beneficiary will primarily be responsible for managing the Marketing "department, function or component" of the Petitioner. The beneficiary had been performing some of these supervisory marketing functions, but she is currently seeking a manager to oversee the day-to-day operations of the marketing department. The Beneficiary has and will have the authority to recommend personnel actions, such as hiring and firing of supervisory personnel and she has and will continue to have wide authority and discretion over the marketing department, which will be a major component and function of the Petitioner.

The Beneficiary is responsible for seeking additional business locations for the Petitioner, thus the Beneficiary directs the major component or function of the Petitioner's efforts to expand its operations. The Beneficiary does not have time to perform day-to-day activities therefore she will hire a manager to run the new retail store established in Massapequa, NY. Furthermore, by reviewing financial reports, and reviewing budgets and expense reports prepared by subordinate employees; managing the company, and as well as supervising the retail location, the Beneficiary will primarily supervise and control other managerial or professional employees, including the Warehouse Manager, [REDACTED] and Head of Purchasing, [REDACTED].

The petitioner submitted the same job duties for the warehouse supervisor and the category head and supervisor of purchasing previously submitted and added percentages of time spent on each duty. The petitioner also indicated that the warehouse supervisor has a bachelor's degree in commerce but failed to submit evidence of said degree.

On January 20, 2012, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity under the extended petition. In denying the petition, the director found that the petitioner's IRS Forms 941 were inconsistent with the petitioner's claims of the number of employees currently on staff. The director further found that the beneficiary's subordinates are not employed in professional, managerial, or supervisory positions, thus the beneficiary is not employed in a primarily managerial position. The director observed that the evidence indicates that the beneficiary has been and will be primarily engaged in providing sales and services to the organization's clients, rather than primarily managing the organization.

On appeal, counsel for the petitioner submits a brief addressing the beneficiary's role as follows:

Contrary to the Director's conclusions, there is sufficient evidence in the record to conclude that the Beneficiary more likely than not is employed primarily as a manager. . . . Here, even if it is concluded that the Beneficiary performs some non-managerial work, the job descriptions of the Beneficiary and the two subordinate employees, taken as a whole,

sufficiently demonstrate that the Beneficiary more likely than not, works primarily in a managerial capacity.

\* \* \*

... the two employees working under the Beneficiary's direction perform virtually all day-to-day tasks necessary to acquire, stock, and sell the Petitioner's products. Although the Beneficiary inevitably work with, and actively participates in facilitating the procurement and sales of physical inventory, and the documenting of the same, the actual related day-to-day tasks are performed by the employees. Accordingly, there are only a minimal amount of day-to-day tasks remaining for the Beneficiary to perform.

\* \* \*

Here, one of the two employees referred to in the Extension, [REDACTED] does have a bachelor's degree, which in and of itself is not conclusive, but is probative of the level of work required to be performed in her position. Moreover, the specific duties she performs, albeit some day-to-day tasks, require knowledge of accounting, sales, and marketing. Moreover, it is reasonable that the current stage of development of the Petitioner necessitates no more than a part-time warehouse supervisor. The demand for a warehouse supervisor is highest when a shipment is received. Once the goods are stocked and labeled and categorized, the Petitioner's other full-time employee, [REDACTED] is able to coordinate the shipping of those goods. As sales continue to increase, and the Petitioner receives additional shipments, the warehouse supervisor role will be expanded to a full-time position. Indeed, the Petitioner is actively seeking another full-time employee to operate the recently acquired retail space for Petitioner in Massapequa, N.Y.

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

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, the petitioner initially stated that the beneficiary will be employed in a managerial capacity and in response to the RFE, the petitioner stated that the beneficiary will manage the essential functions of marketing and business expansion. On appeal, counsel for the petitioner refers to the beneficiary as primarily a manager.

The petitioner has provided a lengthy, but general, description of the beneficiary's job duties; however, the petitioner 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. In response to the RFE, the petitioner described the beneficiary's duties in very broad terms, noting that she is responsible for "developing, managing and expanding the company's operations in the United States," "hiring/firing of employees," and "assessing and creating new business opportunities." 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. Additionally, some of the duties listed indicate that the beneficiary will spend time on non-qualifying tasks, such as "supervis[ing] and support[ing] new client acquisition effort by engaging with prospective clients and articulating the petitioner's value proposition"; "supervis[ing] ongoing accounts and administration in the US"; and "negotiat[ing] or approv[ing] contracts and agreements with suppliers, distributors, and other organizational entities." As such, the petitioner indicated that the beneficiary will spend a substantial portion of her time directly involved in promoting and providing services to U.S. customers and clients.

Therefore, the petitioner's failure to provide the requested breakdown of the beneficiary's duties is important because several of the beneficiary's assigned tasks, such as those listed above, 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). The actual duties themselves 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).

While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its owner 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 her as a manager. Although the petitioner submitted lengthy listings of job duties for the beneficiary throughout the record, the petitioner failed to provide detailed explanations of the beneficiary's duties and failed to provide information concerning the amount of time the beneficiary devotes to each specific duty. As such, the position descriptions provided little insight into what the beneficiary primarily does on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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).

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, 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 the beneficiary's claimed subordinate, the part-time warehouse supervisor, holds a bachelor's degree, the position description provided suggests that the position itself does not require such degree. The position description for the warehouse supervisor includes tasks that are not indicative of a managerial, supervisory, or otherwise professional position, such as "maintain accurate inventories," "direct storage at both on-site and off-site warehouses," "maintain systems for monitoring and tracking material requests, and delivery of product to the operations floor," "keep storage and warehouse areas in neat, well-stocked, clean, organized manner," and "regularly inspect warehouse and personnel for safety issues." The petitioner has not established that the warehouse supervisor position requires a bachelor's degree, such that the employee could be classified as professional. Nor has the petitioner shown that this employee or the beneficiary's other subordinate supervises subordinate staff members, such that either could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

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

Further, the AAO notes that the record does not support the petitioner's claim that the part-time warehouse supervisor was employed by the petitioner at the time of filing. The petitioner provided paystubs for this employee for the month of July 2011 only. Further, the petitioner's IRS Forms 941 and New York state quarterly wage reports indicate that the petitioner had three employees during the months of May, June and July 2011, but only two employees in August and September 2011. There is no evidence of any wages paid to the warehouse supervisor after July 30, 2011, and thus it is unclear whether this employee was actually working for the petitioner at the time the petition was filed on October 24, 2011. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The 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(1)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

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 briefly claimed that the beneficiary will manage the essential functions of marketing and expanding business operations. 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 her time to managing these functions. In its response to the director's request for further evidence, the petitioner expanded the beneficiary's duties, adding that "by overseeing the marketing campaign developed by subordinate managers through sales and marketing reports, reviewing and analyzing sales data and establishing and implementing policies to manage and achieve marketing goals, the Beneficiary will primarily be responsible for managing the Marketing 'department, function or component' of the Petitioner." The petitioner went to state that "[t]he Beneficiary is responsible for seeking additional business locations for the Petitioner, thus the Beneficiary directs the major component or function of the Petitioner's efforts to expand its operations." On appeal, neither counsel nor the petitioner claims that the beneficiary is a function manager. In fact, counsel clearly contends that the beneficiary is primarily a personnel manager at the U.S. company. In sum, the initial description appeared to have the beneficiary doing more of the actual work, the second iteration of the job has the beneficiary managing an essential function, and the third position description has the beneficiary back to focusing on more managerial responsibilities.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description and materially changed the nature of the beneficiary's position. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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 rather than on its day-to-day operations. In fact, the petitioner has not established that the beneficiary has sufficient subordinate employees to relieve her from performing non-qualifying operational and sales duties.

Counsel correctly observes 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 (9<sup>th</sup> 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)). 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. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7; 15 (D.D.C. 2001).

Further, 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.

Here, the petitioner indicates that it has hired a part-time warehouse supervisor and a head of purchasing, however, it has not hired sales persons or a manager of its recently acquired retail store. Further, the evidence of record does not fully support the petitioner's claim that the beneficiary had more than one subordinate at the time the petition was filed. Thus, it remains unclear how the subordinates will relieve the beneficiary from performing other non-qualifying administrative, operational, and sales duties. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity or as a function manager. Accordingly, the appeal will be dismissed.

### III. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner stated on the Form I-129 that it has an affiliate relationship with the foreign entity based on the "same stock ownership and managerial control." Throughout the record, the petitioner claims that the beneficiary owns 50% of the U.S. company and [REDACTED] owns the remaining 50% of the U.S. company. The petitioner submitted two stock certificates, both undated, and a copy of a Resolution Adopted by Shareholders of [the petitioner] dated April 1, 2010, indicating that the beneficiary and [REDACTED] each own 100 shares of the total 200 shares of the U.S. company.

The petitioner also submitted three member certificates for the foreign entity. Certificate 1 states that the beneficiary owns 2,500 shares, certificate 2 states that the beneficiary owns another 2,500 shares, and certificate 3 states that [REDACTED] owns 2,500 shares. In response to the RFE, the petitioner submitted copies of the same member certificates for the foreign entity along with its Memorandum of Association of [the foreign entity] dated February 2, 2008, indicating that the foreign entity is authorized to issue 10,000 total shares. The Memorandum of Association of [the foreign entity] specifically states that the beneficiary owns 5,000 shares and [REDACTED] owns the remaining 5,000 shares of the foreign entity.

The petitioner submitted its 2010 IRS Form 1120, U.S. Corporation Income Tax Return. The Form 1120 at Schedule G, which includes questions related to the petitioner's ownership and control, indicates that the beneficiary owns 100% of the company's stock. In this case, the record fails to demonstrate the actual ownership of the petitioner. 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).

Due to the inconsistencies detailed above, the petitioner has not met its burden to corroborate its claimed qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9<sup>th</sup> Cir. 2003).

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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.