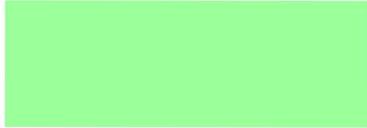




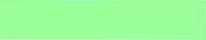
U.S. Citizenship  
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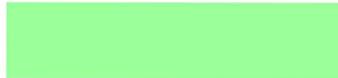


DATE: JAN 14 2013

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)

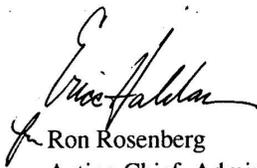
ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, is engaged in global recruitment, sales training, and the implementation of sales centers. It claims to be an affiliate of [REDACTED] located in Ireland. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States. The petitioner now seeks to extend authorization to employ the beneficiary as [REDACTED] for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the beneficiary will be employed in a qualifying managerial capacity under the extended petition and claims that the growth of the company, employment levels, and the company's business plan show that the company is of sufficient size to support the beneficiary's position. The petitioner also claims that the director miscalculated the amount paid in wages in 2010. The petitioner submits additional evidence on appeal.

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

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.

- (iii) 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.

The issue in the present matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the instant Form I-129, Petition for a Nonimmigrant Worker, on February 1, 2011. In a letter of support dated December 17, 2010, the petitioner stated that the beneficiary has been and will be employed in the position of Operations Director, and "has worked in an 'executive capacity' which has required him to direct [the petitioner], establish goals and policies relating to establishing and expanding [the petitioner] in the United States and exercise a wide latitude in discretionary decision-making." The petitioner listed the beneficiary's duties as follows:

1. Strategic Thinking: Strategic vision, ideas development, forward planning, research, analysis and evaluation, problem solving and management issues, integrated management, business objectives focused.
2. Leadership: By insisting on the highest standards of integrity and leadership across the entire operations management team, and through effective communications at all levels, motivating, encouraging, coaching, training and developing staff, facilitates and builds trust that leads to valuable employee engagement at all levels.

3. Business Development: Understanding business drivers, change management, business turnaround and creating new recruitment and business-expansion opportunities.
4. Operation and Logistics: Issue identification, feasibility studies, supply chain management, improving productivity and time efficiency, reducing costs, project management, resource measurement, improving quality standards and installing best practice.
5. Market Positioning: Strong market awareness, markets and sector analysis. Manage all company health, safety, and environmental policies.
6. Financial Planning: Forecasting, profit, and loss responsibility, budgetary control and profit improvement.
7. Innovation: Ensures that systems are in place to encourage and reward innovation at all employee levels. Listen to new ideas and after evaluating any risks willing to support creative experimentation with support staff.
8. Management: Successful recruitment, influencing and conflict management, able to identify employees' strengths and weaknesses and take decisive action when and if required. Managed all operational activity of the business, coached the next generation of [the petitioner] family in all aspects of business management. Exploiting many new and innovative management techniques including KPI's, and benchmarking.
9. Recruitment: With regular and effective communication, teams worked together to drive the business forward towards agreed common goals. Develop and coach new middle management team to ensure corporate standards and objectives are maintained. Introduce new training policies.

The Form I-129 states that four employees work for the petitioner. An organization chart submitted with the petition indicates that the beneficiary, as Global Operations Director, has the highest level authority over the U.S. entity directly overseeing a Sales Administrator, USA Sales Director, and a President. The President appears to hold positions in both the U.S. entity and the foreign entity. The chart indicates that the petitioner plans to hire two Account Managers to work under the President and two Managers to work under the USA Sales Director. The Managers under the USA Sales Director will supervise two New Business Sales positions; those positions, in turn, would be responsible for two future Account Managers and a future Graphic Designer. According to the chart, the petitioner also intends to add three Account Managers and a Researcher under the supervision of the President. The only employees identified by name on the organization chart are the beneficiary, President, USA Sales Director, and Sales Administrator.

The support letter provides position descriptions and the percentages of time allotted to each duty for the beneficiary's subordinates as follows:

**Global Sales and Marketing Director:**

- Responsible for initiating cold calls to potential clients (20%)
- Setting up and attending new and existing client business meetings (20%)
- Arranging for and interviewing candidates (20%)
- Training of global sales teams (15%)
- Managing project timelines (15%)
- Reporting to Operations Director on all aspects of corporate sales matters including team reviews (10%)

**U.S.A. Sales Director**

- Responsible for initiating cold calls to potential clients (30%)
- Setting up and attending new and existing client business meetings (25%)
- Training of global sales team (20%)
- Managing project timelines (15%)
- Reporting to Global Sales Director on all aspects of corporate sales matters, including team reviews (10%)

**Researcher/Sales Administrator**

- Take and understand verbal and written job descriptions from clients (5%)
- Compile appropriate target companies' relevant searches (25%)
- Name gather potential candidates relevant to searches (50%)
- Identify relevant names and job titles in companies for new business (10%)
- Liaise with Senior Account Manager and clients updating them on progression of their assignments (5%)
- Report results obtained in a clear, concise, and legible format (5%)

The letter of support names two additional temporary employees, [REDACTED] who were hired in 2010 but no longer employed with the company. The petitioner indicated that [REDACTED] served as a trainee account manager, while [REDACTED] served as a junior researcher.

The letter states that the beneficiary, President, and USA Sales Manager would each be paid \$60,000 annually. The petitioner submitted Wage and Tax Registers from the second, third, fourth quarters of 2010 and W-2 Preview for 2010. According to these documents, the employees paid by the U.S. entity in 2010 were the beneficiary, [REDACTED]. The letter also states that [REDACTED] will be hired as the Global Sales & Marketing Director . . . upon receipt of employment authorization in the U.S." However, it does not appear that the petitioner paid wages to [REDACTED] the individual elsewhere identified as the President, or [REDACTED] the individual identified as the former Trainee

Account Manager. Two Payroll Summaries submitted for [REDACTED] the U.K. entity, show wage payments to the beneficiary and [REDACTED] in October and November of 2010. The Wage and Tax Registers and W-2 Previews indicate the U.S. entity paid \$8,000 in wages during the second quarter of 2010; \$26,929 in the third quarter; and \$8,000 in the fourth quarter.<sup>1</sup>

On April 26, 2011, the director issued a request for additional evidence (RFE) in which he requested, *inter alia*, additional evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Specifically, the director requested: (1) a comprehensive description of the beneficiary's duties demonstrating the beneficiary functions at a senior level in the organizational hierarchy or that the beneficiary has been and will be managing a subordinate staff of professional, managerial, or supervisory personnel, who will relieve him from performing non-qualifying duties; (2) a list of U.S. employees identifying each employee by name and position title with position descriptions, and a breakdown of number of hours devoted to each job duty on a weekly basis; (3) education credentials for the beneficiary and his subordinate employees; (4) copies of IRS Form 941, Employer's Quarterly Tax Return, for all four quarters of 2010 and the first quarter of 2011; (5) a copy of the 2010 U.S. income tax return filed by the U.S. entity to include all schedules; and (6) all IRS Forms W-2 and 1099 issued by the U.S. entity in 2010.

In response to the RFE, the petitioner provided: (1) the 2010 IRS 1120, U.S. Corporation Income Tax Return showing \$76,313 paid in salaries and wages during 2010 and accompanying Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in U.S. Trade or Business showing \$13,250 paid from the foreign entity; (2) an Employee Summary for the second quarter of 2011; (3) an updated organization chart for the U.S. entity; and (4) a letter from the petitioner dated June 7, 2011, further describing the duties and percentages of time per week dedicated to each duty for the beneficiary and his subordinates.

The revised organization chart submitted in response to the RFE places the beneficiary at the top of the U.S., U.K., and Australian entities as the Global Operations Director. Information provided for the U.S. entity shows the President/Sr. Account Manager and USA Sales Director are directly subordinate to the beneficiary. The Sales Administrator, previously indicated as being directly subordinate to the beneficiary, is under the supervision of the USA Sales Director in the revised chart. The chart also added Account Manager and Candidate Coordinator positions subordinate to the President. The record reflects that these positions were not filled at the time the petition was filed.

The petitioner's letter, dated June 7, 2011, provided further description of the beneficiary's duties and stated, in part, that the beneficiary is "responsible for the development and delivery of Customer Solutions for [the petitioner's] clientele, including the management of our customer contracts, vendor management and the delivery of globally consistent service experience for our clients." The petitioner stated that the beneficiary's

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<sup>1</sup> It appears that the fourth quarter documents were printed before the end of the end of the quarter, and are incomplete.

duties include: assessing, recruiting, training, and developing talents; establishing targets and managing functional level financial performance across core financial metrics; leading global and payroll and benefits team; developing and refining tools and information systems; identifying, planning, and implementing business improvement initiatives; leading complex projects; establishing practice with HR and counsel for different brands and regions, collaborating with managers and functional teams to create and evaluate recommendations to improve process design; and effectively representing global HR operation and collaborating with HR leadership to ensure consistency. The petitioner provided the following time allotments for the beneficiary's duties:

No.	Activity	% per day
1	Managing teams and department heads a. Staff Development b. Daily Figures c. Manage project time lines d. Give technical support on high profile positions	35%
2	Legal- Write Contracts for New business-Lease with counsel	5%
3	Financial- Accounting- leasing with Accountants & Bookkeepers	10%
4	Performance reviews	5%
5	Analyzes operations metrics (revenue, gross margin...), making and driving process improvements	20%
6	Develops short and long term operations strategies goals and initiatives	10%
7	Set team Key Performance indicators (KPI's) for example the number of appointments/new business wins/cold calls/sector specific wins. And from the team KPI's set individual KPI's.	10%

The letter also provides position descriptions and time allotments for the beneficiary's subordinates, in relevant part:

No.	Activity	% per day
1	Project manage each assignment working quickly and effectively within the deadlines given on each job.	20%
2	Arranging for and interviewing candidates	20%
3	Work closely with the Global Operations Director to agree realistic yet challenging sales targets for the team and individuals	10%
4	Managing project timelines & Maintain team motivation and morale	10%
5	Reporting to Operations Director on all aspects of client management matters, & team reviews and client updating them on progression of their assignments	20%
6	Produce and write Client job specifications	10%

7	Attend client meetings	5%
8	Liaising with the Operations Director to look at incentive schemes that motivate members of the team to reach or exceed sales targets	5%

No.	Activity	% per day
1	Initiating cold calls to potential clients	30%
2	Setting up and attending new and existing client business meetings	30%
3	Training of global sales team	15%
4	Managing sale timelines	15%
5	Reporting to Operations Director on all aspects of corporate sales matters, including team review	10%

No.	Activity	% per day
1	Supporting the organization's sales team includes managing schedules, creating sales documents and proposals, generating reports related to sales activities and revenue data, as well as handling customer and prioritizing customer requests while the sales team is out of the office.	30%
2	Processes invoices, printing edit, reviewing for accuracy; forwarding totals to Finance Director daily; distributing invoices	10%
3	Answering phones; receiving facsimiles; inputting information into database; printing, copying, filling and mailing customers.	15%
4	Resolves service problems by researching the situation; identifying alternate means of filing customer needs; recommending solutions	15%
5	Pays bills by verifying amounts; selecting account numbers; processing for payment.	10%
6	Generates Sales Leads, Supports customers, and sales managers by processing orders, invoices, sample requests, and trade promotions	10%
7	Distributing promotion information to Clients and potential clients	10%

Position description and time allotments were also provided for [REDACTED] Researcher/Candidate Coordinator, and [REDACTED] Account Manager. The Employee Summary indicates that [REDACTED] and [REDACTED] were hired February 1, 2011, subsequent to the filing of the petition.

The petitioner also submitted its 2010 IRS Form 1120, U.S. Corporation Income Tax Return, showing it paid \$76,313 in wages and other compensation.

The director denied the petition on June 29, 2011, concluding that the petitioner failed to establish that the beneficiary has been or will be employed in a position that is primarily executive or managerial in nature. The director found that the size and scope of the proposed business activity does not support an executive or managerial level position and that no major components or functions were identified which would require a separate "function" manager. The director specifically found that the beneficiary's claimed annual salary of \$60,000 when considered with the 2010 Form 1120 showing the U.S. entity paid \$76,313 in salary and wages, indicates the petitioner does not employ a sufficient staff to relieve the beneficiary from performing the day-to-day operations of the U.S. entity. The director also noted that the petitioner failed to submit requested evidence including educational credentials for the beneficiary's subordinate employees; complete copies of the Employer's Quarterly Federal Tax Returns for all four quarters of 2010, and the first quarter of 2011; or Form W-2's, W-3's, or 1099's for [REDACTED], the employees claimed to be working for the petitioner in 2010.

On appeal, the petitioner asserts that the beneficiary is and will be employed in a managerial or executive capacity. The petitioner restates the beneficiary's job duties and claims the director misinterpreted the salary and wage report from the Form 1120, underestimating the amount of wages paid in 2010. The petitioner claims the U.K. entity, [REDACTED] subsidized the U.S. entity's wages for the first five months of 2010 and paid the beneficiary a \$12,000 bonus to make up for the "shortfall" in his salary to avoid creating a deficit in the U.S. entity's revenue and provide for the entity's growth, resulting in an "end of the year financial report" showing only seven months of the wages paid during 2010.

For the first time on appeal, the petitioner submits education credentials for [REDACTED] and Wage and Tax Registers for the first and second quarters of 2011. The petitioner also resubmits the second, third, and fourth quarter Wage and Tax Registers for 2010 and 2010 W-2 Preview.

Upon review, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial capacity.

As a preliminary matter, the petitioner attempts to submit, for the first time, tax documents for the first and second quarters of 2011, complete quarterly tax returns for 2010, and education credentials for the beneficiary's subordinates. Though specifically requested by the director, the petitioner failed to submit this evidence in response to the RFE. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533

(BIA 1988). If the petitioner had wanted this evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

Even if the AAO were to consider the Wage and Tax Registers and W-2 Previews provided on appeal, the documents contain inconsistencies from the current record, undermining the probative value of the evidence. The Wage and Tax Registers and the 2010 W-2 Preview submitted concurrently with the instant petition did not list [REDACTED] as an employee of the petitioner or include [REDACTED] wage information; whereas, Wage and Tax Registers and W-2 Previews submitted on appeal for the same time frames show quarterly payments to [REDACTED]. The reported amounts of individual wages to other employees also differ from the previously submitted documents. The Wage and Tax Register submitted in February 2011 shows \$4,000 was paid to [REDACTED] in the second quarter of 2011, whereas the amount is \$2,350 in the newly submitted documents. The reported total wages paid by the petitioner for that time period has changed from the originally reported \$8,000 to \$10,285. The third quarter 2010 Wage and Tax Registers submitted on appeal also differs from the third quarter Wage and Tax Registers submitted on appeal in that [REDACTED] third quarter wages have been decreased from \$12,000 to \$8,600, [REDACTED] wages changed from \$8,600 to \$12,000, and the total company's total wages paid in the third quarter was changed from \$26,922 to \$33,777. The petitioner has not provided any evidence to clarify the inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. 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. *Id.* at 591.

As the petitioner failed to provide the evidence to the district director though specifically requested and due to the numerous inconsistencies casting doubt on the reliability of the documents, the AAO will not consider the evidence submitted on appeal.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner may not claim the beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions; 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.

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

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Though the petitioner provided a lengthy position description for the beneficiary, much of the description fails to provide a clear description of the duties and tasks to be performed by the beneficiary on a daily basis. Portions of the position description merely paraphrase the statutory definitions of managerial and executive capacity, stating the beneficiary "primarily, directs the management of the organization and establishes the goals and policies of the organization," "manages the organization, supervises and controls the work of other supervisory, professional, and managerial employees," "manages an essential function within the organization and a department of the organization." See section 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). "

Other duties are broadly described and lack the specifics necessary to clearly convey an understanding of the beneficiary's daily activities. For example, the petitioner indicates that the beneficiary's duties include: "creating new recruitment and business expansion opportunities," "integrated management," "manag[ing] all operational activity of the business," "exploiting many new and innovative management techniques..." "analyz[ing] operations metrics (revenue, gross margin...), making and driving process improvements," and "develop[ing] short and long term operations strategies goals and initiatives." The petitioner did not define any specific tasks associated with these general responsibilities. Specifics are particularly important because the description includes several tasks that do not fall directly under traditional managerial duties as defined in the statute. The petitioner states that the beneficiary spends 10% of his time on finance and 5% on legal duties, but does not clearly identify the managerial or executive duties to be performed with respect to these operations. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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. at 1108.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The position description states the beneficiary is responsible for "the development and delivery of [redacted]" and "the management of our customer contracts, vendor management and the delivery of globally consistent service experience for our clients," and that he "assess[es], recruits, trains, and develops talents." These activities suggest the beneficiary's involvement with the day-to-day operations of the company, but have been omitted from chart quantifying the amount of time

the beneficiary spends on each of his duties. 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; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9<sup>th</sup> Cir. 2008). The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The petitioner claims beneficiary spends 35% of his time "Managing teams and department heads." 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). Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve the supervision of employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The job descriptions submitted by the petitioner do not establish that any of the employees working for the beneficiary are professional-level employees.<sup>2</sup>

At the time of filing, the petitioner stated on the Form I-129 that it had four employees. An organization chart submitted with the petition shows the beneficiary, as Global Operations Director, supervised a President, a USA Sales Director, and a Researcher/Sales Administrator. The chart indicates the President, also referred to as the Global Sales and Marketing Director in the letter of support, also works for the foreign entity, supervising the only named foreign employee, a U.K. Manager. None of the beneficiary's subordinates supervise other employees within the U.S. entity.

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<sup>2</sup> In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is required for any of the positions subordinate to the beneficiary's.

Due to inconsistencies in the employment and wage information provided, the exact staffing of the U.S. entity is unclear. As noted by the director, the support letter claims the beneficiary, President, and USA Sales Director each earn \$60,000 annually and payroll documents show wages were paid to two additional employees; however, the Form 1120 states that the U.S. entity paid only \$76,313 in wages and compensation during 2010. As discussed above, the Wage and Tax Registers submitted with the original petition and third quarter Statement of Deposits and Earning filed by [REDACTED] do not indicate the U.S. entity paid wages to the Global Sales and Marketing Director/President/Sr. Account Manager, [REDACTED] and documents provided on appeal contain inconsistent wages for individual employees and the company as a whole. The petitioner's letter dated December 17, 2010, claimed that [REDACTED] "will be hired as the Global Sales and Marketing Director ...upon receipt of employment authorization in the United States," and the record does not support the conclusion that she was employed by the U.S. entity at the time the petition was filed. The lack of evidence of wages paid along with the job descriptions and specific duties provided for the beneficiary's subordinates raises doubts about the number of employees currently supporting the beneficiary and their actual job duties. 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). 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*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner claims the discrepancies in the financial documents were a result of payments made by the U.K. entity to subsidize wages for the U.S. employees the first five months of operation and provide a \$12,000 bonus to the beneficiary to prevent a deficit in the U.S. entity and allow growth; however, the financial information provided for the foreign entity is insufficient to support the claim. The petitioner has provided two Payroll Summaries from the foreign entity, showing payments totaling 1908.34 made to [REDACTED] in October and November of 2010, and the 2010 IRS Form 5472, stating that \$13,250 was provided by the foreign related party as consideration received for technical, managerial, engineering, construction, or like services.<sup>3</sup> No other payroll records, financial statements, or tax documents, have been provided to show the foreign entity paid the claimed amounts for the first five months of the year. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not provided sufficient evidence to overcome the inconsistencies in the record.

Due to the inconsistencies, the record does not sufficiently demonstrate that the beneficiary had any full-time subordinate employees as of the date of filing. The lack of payments and underpayments to beneficiary's subordinate employees suggest insufficient staffing to relieve the beneficiary of performing non-qualifying duties.

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<sup>3</sup> The currency used in the Payroll Summary is not indicated on the document.

Even assuming *arguendo* that the petitioner had submitted sufficient documentation of its staffing levels, the petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. The original organization chart indicated the beneficiary directly supervised the President, USA Sales Director, and Researcher/Sales Administrator. Notwithstanding the job titles assigned to the USA Sales Director, or the Global Sales and Marketing Director/President/Sr. Account Manager, the job descriptions submitted for these employees indicates that they are directly providing the company's recruitment services, rather than primarily supervising other employees or performing managerial duties. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*Cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)).

The petitioner submitted a revised organization chart in response to the RFE. The most recent chart includes a Candidate Coordinator and Account Manager subordinate to the President, and moves the Sales Administrator under the supervision of the USA Sales Director. The Employee Summary indicates that the Candidate Coordinator and Account Manager were hired subsequent to the filing of the instant petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). For these reasons, the AAO will not consider evidence of new employees hired subsequent to the filing of the petition.

Additionally, by moving the Sales Administrator subordinate to the USA Sales Director, the most recent organization chart depicts a more complex organization structure with additional levels of authority even when the employees hired after the filing of the petition are not considered. On appeal, or in response to an RFE, 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 the 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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 clearly describes the duties to be

performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(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. Here, the petitioner has not articulated a claim that the beneficiary manages an essential function of the petitioning company.

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. 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. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. As explained above, the beneficiary appears to be the first-line supervisor of two to three employees. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

The AAO does not doubt that the beneficiary exercises discretion over the petitioning entity and has the appropriate level of authority as Global Operations Director and co-owner of the organization, however, the petitioner has failed to show that his actual day-to-day duties, as of the time of filing, were primarily managerial or executive in nature. The fact that the beneficiary owns and 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").

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 1313 (9th Cir. 2006); *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.

The petitioner claims to be engaged primarily in the provision of global recruitment and outsourced sales development services, and it further states that it has expanded its services to include marketing, consultancy and training. The petitioner's initial organizational chart indicates that the company is organized into "sales center," "consultancy," "marketing" and "recruitment" components or divisions. However, to the limited extent that the company has been staffed, the petitioner indicates its USA Sales Director is solely responsible for the "sales center" and "consultancy" aspects of the business, while the president is solely responsible for "marketing" and "recruitment" departments or divisions. The petitioner indicated that the sales administrator reports directly to the beneficiary, outside of the rest of the hierarchy. The petitioner did not explain how a president and a sales director alone are able to perform all of the day-to-day activities associated with their respective components of the petitioner's service-oriented business, or how the business is able to operate with three managers or executives and no one to actually provide the claimed services 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 global operations director and two to three other employees. The petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. For this reason, the appeal will be dismissed.

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.