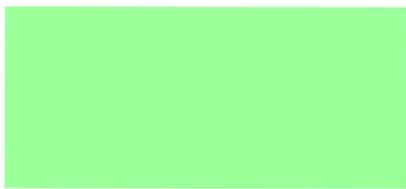


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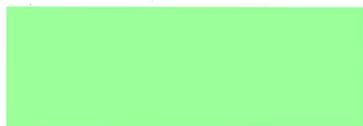
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



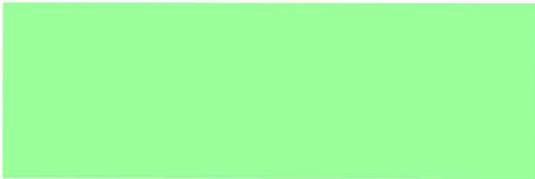
DATE: **JAN 14 2013** Office: VERMONT SERVICE CENTER



IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, 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 a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company, states that it is an importer and distributor of tarpaulins and industrial covers established in 2005. It claims to be a subsidiary of [REDACTED] located in the United Kingdom. The petitioner seeks to employ the beneficiary as Sales Manager in the United States.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the director erred in his determination that the beneficiary will not manage a department or subdivision of the company or supervise professional employees. Counsel submits a brief and additional evidence on appeal.

I. The Law

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

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

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

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a managerial capacity. The AAO notes that the petitioner does not claim that the beneficiary will be employed in an 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.

II. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 1, 2011. The petitioner indicated that it is an importer and distributor of tarpaulins and industrial covers established in 2005. The petitioner claimed it had seven employees as of the date of filing, and seeks to employ the beneficiary as its Sales Manager.

In a support letter dated March 17, 2011, the petitioner explained that a significant growth in net income has led to its request to hire the beneficiary as sales manager in the United States. The petitioner described the proposed role as follows:

Her duties include: overseeing sales coordinators including ensuring that sales calls are conducted professionally and efficiently; managing the sales order process so that it proceeds in a timely, efficient, and "one touch" fashion; ensuring that company policies are adhered to by the staff; training, assisting and supervising new sales staff; managing customer complaints and queries; acting as liaison between the sales department and warehouse and coordinating sales policies and procedures between [the foreign entity] and [the petitioner] to achieve efficient and coordinated customer sales.

The petitioner stated that in 2010 "the company paid wages of \$71,000 and over \$250,000 to independent contractors for part time labor, advertising and marketing charges." The petitioner submitted a copy of its 2010 IRS Form 941, Employer's Quarterly Federal Tax Returns, and IRS W-2, Wage and Tax Statement. These documents showed three employees working for the petitioner in 2010: [redacted] Warehouseman; [redacted] Sales Coordinator; and [redacted] Office Supervisor. The petitioner's organizational chart also included a CEO, a Financial Director, a General Manager, a Bookkeeper, and a part-time Warehouseman. The chart did not depict the beneficiary's proposed position of Sales Manager.

On August 10, 2011, the director issued a request for additional evidence (RFE). The director instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's proposed duties showing management of a senior level function or management of professional, managerial, or supervisory personnel to perform non-qualifying duties; (2) names, titles, position descriptions, and education credentials of all U.S. employees, including the beneficiary, as well as a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis; (3) IRS Form 941, Employer's Quarterly Tax Return, for the first two quarters of 2011; and (4) all 2010 tax returns including all schedules.

The petitioner responded to the RFE on September 29, 2011. The petitioner provided an organizational chart showing nine positions and the name, title, weekly hours, and job description for each position. The chart shows the CEO and Financial Director at the head of the company. A General Manager, subordinate to the CEO and Financial Director, oversees a Warehouseman, part-time Warehouseman, and the beneficiary's position as sales manager. The chart indicates that the beneficiary would have three subordinate employees described as:

Name: [redacted]
Title: Office Supervisor
Weekly Hours: 35-40

Job Description: Process orders through QuickBooks; downloads orders from our 3 websites; oversees the running of our eBay shop; answers sales calls; communicates with customers via instant messenger service; communicates with Warehousemen; communicates with Carriers (UPS and Fedex); arranges part time labor for stock arrival; produces drop-ship order requests for suppliers; alerts GM of any stock issues.

Name: [redacted]
Title: Sales Coordinator

Weekly Hours: 35-40

Job Description: Process orders through QuickBooks; responds to sales emails; answers sales calls; communicates with customers via instant messenger service; maintains the filing of sales orders and drop ship requests; updates customer orders with tracking information; communicates with Warehouseman; communicates with Office Supervisor.

Name: [REDACTED]

Title: Book Keeper & Sales Administrator

Weekly Hours: 30 hours

Job Description: Records customer payments and prepares daily banking; collates Supplier invoices into monthly payment runs and publishes payments upon receipt of authorization; records Company expenses in QuickBooks; reconciles Company bank accounts; processes employee pay and distributes pay advice slips; answer sales calls when necessary; creates customer invoices; takes sales order when necessary

The chart also lists a future sales administrator position to be filled in June 2012, which would also report to the beneficiary. While both counsel and the petitioner both stated in response to the RFE that the beneficiary would supervise four full-time employees and one part-time employee, the petitioner's organizational chart clearly depicts only three current employees reporting to the beneficiary's proposed position.

The petitioner also provided an updated position description for the beneficiary, noting the beneficiary is responsible for the following:

- Direct the intake of orders and the distribution/movement of products to the customer;
- Coordinate and expand sales territories and assign required duties to subordinate staff;
- Direct and supervise the sales division, including hiring and training sales team;
- Monitor and regulate compliance with the corporate sales policy;
- Manage and implement the sales/order process;
- Establish training programs for sales team;
- Evaluate and managing customer complaints and create and implement resolutions;
- Act as liaison between the sales department and warehouse division;
- Develop and coordinate new marketing campaign to increase market share;
- Coordinate sales policies and procedures between [the foreign entity] in the United Kingdom and [the petitioner].

The description of the beneficiary's position further states, contrary to the company hierarchy indicated on the organizational chart, that she will report directly to the CEO of the enterprise, and that the sales figures are a direct reflection of the beneficiary's "ability to train and motivate the sales staff." The petitioner emphasized the position of sales manager is important to the business to secure sales in a "strained economy, selling products that are not typical or mainstream."

The petitioner also provided the requested tax documents, including its IRS Forms 941, Employer Quarterly Tax Return, for the first and second quarters of 2011 and its IRS Form 1065, U.S. Return of Partnership Income, for 2010. The petitioner reported three employees for the quarter ended March 31, 2011 and four employees for the quarter ended June 30, 2011.

The director denied the petition on October 17, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director noted that the petitioner failed to provide evidence that it employs seven people as claimed, and failed to provide the percentage of time each employee spent per week performing each of their duties. The director further found that the position descriptions provided for the beneficiary's claimed subordinate employees did not show that they are directly involved in the company's sales, and that it thus seemed likely the beneficiary would be performing the sales duties. In addition, the director determined that the beneficiary's subordinate employees are not professionals, and though the education credentials for the subordinate employees were not provided, any degrees possessed by her subordinates would be incidental to their non-professional positions. Finally, the director found that the petitioner did not establish that company could support the newly-created managerial position, or that the beneficiary would actually function at a senior level within the organizational hierarchy, other than in position title.

On appeal, counsel for the petitioner asserts that the beneficiary is employed in a managerial capacity. Specifically, counsel asserts that the company's increasing sales volume requires a restructuring to create a sales department and that the beneficiary will be the manager of this function. Counsel disagrees with the director's determination that the structure and size of the U.S. organization do not support the position, and states that the director erred in finding that the position descriptions for the beneficiary's subordinate employees do not include sales duties. Further, counsel states that the beneficiary's position description shows that the beneficiary will not be providing the sales duties. Counsel concedes that the petitioner was unable to submit the percentages of time each employee spent performing each of the duties, but states that is because the position is newly created, and the information is not yet available.

Counsel also asserts that the beneficiary would qualify as a manager of professional employees based on the educational credentials of her subordinates. Counsel specifically objects to the director's suggestion that the low-tech nature of the petitioner's business precludes its employment of professionals.

In support of the appeal, counsel submits a letter from [REDACTED] former professor and founding dean [REDACTED], opining that the beneficiary's position is managerial in nature; a letter from the Certified Public Accountant responsible for preparing the U.S. organization's tax returns explaining the contract wages claimed on the petitioner's tax return; IRS Form 1099 for [REDACTED] resumes for the petitioner's employees; and previously submitted position descriptions and tax documents.

Finally, the petitioner submits an unsigned, undated statement explaining its need for a sales office and a sales manager position. According to this statement, the beneficiary will be responsible to: (1) maximize all current sales opportunities; (2) identify current key customers and become the main point of contact for these

customers; (3) set up a framework to target and attract more trade customers and pursue sales leads passed on by the directors; (4) improve the company's online presence including constant marketing of the product range, relying on her knowledge of the design and administration of the company's online software program; (5) improve sales to the relief market relying on her prior knowledge of this sector and rapport with suppliers; (6) driving sales of flame retardant tarps to the oil fields in the Middle East, including a pro-active sales drive and establishment of communication channels; (7) introduction of new products, including those already being sold in the United Kingdom.

III. Discussion

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

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

The petitioner has consistently used broad terms to describe the beneficiary's duties, stating the beneficiary will "direct and supervise the sales division," "monitor and regulate compliance with corporate sales policy," "coordinate sales policies and procedures between [the foreign entity] and [the petitioner]," and "manage and implement the sales/order process." Before the petitioner can establish that a beneficiary's duties are primarily managerial or executive, it must identify the beneficiary's actual duties and responsibilities beyond ambiguous terms or broadly-cast business objectives. Specifics are particularly important because the descriptions provided encompass managerial and non-managerial duties. While the duties described generally suggest that the beneficiary has authority to "direct," "manage," and "supervise," the descriptions provide little insight into how she would actually allocate her tasks on a day-to-day basis. 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 petitioner's description of the beneficiary's job duties does not establish what the beneficiary's proposed duties are, and therefore does not establish what proportion of the beneficiary's duties will be 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).

Further, several of the tasks attributed to the beneficiary do not fall directly under traditional managerial duties as defined in the statute. For example, the petitioner states the beneficiary "act[s] as a liaison between the sales department and warehouse division," "develop[s] and coordinate[s] new marketing campaign to increase market share," "direct[s] the intake of orders and the distribution/movement of products to the customer," "evaluate[s] and managing customer complaints and create and implement resolutions,"

"coordinate[s] and expand[s] sales territories....," and "manage[s] and implement[s] sale/order process." Without additional explanation, these duties suggest the beneficiary will be performing non-qualifying tasks associated with the day-to-day operations of the company. 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 (9th Cir. 2008).

Further, the petitioner's newly submitted explanation of the beneficiary's proposed responsibilities introduces additional vague and potentially non-qualifying duties into the record. Specifically, the petitioner adds general responsibilities such as "maximize all current sales opportunities" and "introduction of new products," without identifying any specific managerial duties associated with these objectives. In addition, the petitioner states for the first time that the beneficiary will be a "main point of contact" for key customers, responsible for pursuing sales leads, responsible for "constant marketing of the product range" online using her knowledge of company software, and responsible for expanding international sales using her knowledge of company products, sales channels and customer requirements. While all of these activities are undoubtedly important to the company's sales performance, the petitioner did not explain how the beneficiary will be required to perform primarily managerial duties to carry out these objectives, especially in light of the fact that the petitioner has no marketing staff and no immediate plans to increase its sales staff.

Overall, the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them, despite the director's specific request for such information. For this reason, the AAO cannot determine whether the beneficiary would be primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). While counsel indicates that the petitioner is unable to quantify the amount of time the beneficiary will spend on each of her proposed tasks, the AAO notes that the director's request for a percentage breakdown of the position and its associated duties was reasonable. 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). As noted above, the petitioner has not provided the requested percentages on appeal and has further confounded the earlier provided list of duties by introducing a new list of seven duties.

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 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).

The petitioner states the beneficiary will oversee three subordinate employees. The organization chart shows the beneficiary supervises a sales coordinator, office supervisor, and bookkeeper/sales administrator.¹ The petitioner has not provided evidence that any employee supervised by the beneficiary in turn supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such to support the subordinate's classification as a manager or supervisor. While the "office supervisor" is given a supervisory title, there is no evidence that she is truly a managerial or supervisory employee. The position description indicates that the office supervisor will be performing daily sales activities, rather than managerial or supervisory tasks. An employee will not be considered to be a supervisor simply because of a job title or 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)).

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

Counsel claims that the beneficiary supervises professional employees, and submits resumes showing the Sales Coordinator and Office Supervisor hold associate degrees and the Bookkeeper/Sales Administrator holds a bachelor degree in Information Systems Management, with an emphasis on database management. Though the AAO agrees with counsel's assertion that low-tech businesses are not precluded from having professional-level employees, in the instant matter, the petitioner has not provided evidence that a baccalaureate is typically required for any of the positions subordinate to the beneficiary.

Assuming *arguendo* that the bookkeeper qualifies as a professional level employee, the organization chart provided with initial submission of the instant petition shows the bookkeeper's position to be subordinate to

¹ Though the RFE requested evidence to demonstrate the beneficiary would be managing subordinate employees, the petitioner did not submit evidence that the U.S. organization paid the Bookkeeper/Sales Administrator. On appeal, the petitioner submits an explanation from the CPA and IRS Form 1099 to show payments were made to the Bookkeeper/Sales Administrator as a contract employee. As evidence of the payments was included in the tax forms previously submitted to the director, the AAO finds there is sufficient evidence to show the Bookkeeper/Sales Administrator was employed by the U.S. organization as a contractor.

the financial director. Further, the initial chart identified the position as "book keeper," the employee's resume identifies his role as "full charge bookkeeper," and the petitioner's CPA states that this individual "does general bookkeeping work." The revised organization chart submitted in response to the RFE changed the employee's job title from "bookkeeper" to "bookkeeper/sales administrator" and placed the position subordinate to the beneficiary's position of sales manager. The position description for the bookkeeper/sales administrator provides that in addition to financial duties, the bookkeeper also will "answer sales calls when necessary" and "[take] sales orders when necessary." The position description for the beneficiary, discussed in detail above, does not indicate that the beneficiary will manage the company's financial function, and it seems more likely that the beneficiary will be managing the bookkeeper/sales administrator only in his performance of any limited sales duties. Further, even if the beneficiary does supervise the bookkeeper as a professional employee, the evidence is insufficient to show the beneficiary would devote enough of her time to this duty to be employed in a primarily managerial capacity.

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). The petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties, is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

As discussed above, the petitioner has not provided a sufficiently detailed description of the beneficiary's duties or the percentages of time the beneficiary will spend on each duty. Therefore, the petitioner has failed to establish that the beneficiary's duties are primarily related to the essential function or that the duties are performed primarily in a managerial capacity. Absent a clear, consistent 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, and thus cannot determine 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 AAO acknowledges the submission of the advisory opinion letter from [REDACTED] offered as evidence that the beneficiary will perform in a qualifying managerial capacity. [REDACTED] concludes that the beneficiary's proposed position will be managerial. The AAO may, in its discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Based upon the statements made by [REDACTED] he has reviewed the petitioner's initial letter dated March 17, 2011, the undated statement containing seven additional duties referenced above, and a "detailed position description for the position of Sales Manager." The deficiencies of the petitioner's position descriptions for the beneficiary have been discussed in detail above. A review of the letter reveals that [REDACTED] reviewed a job description that paraphrased the statutory definitions, and concluded, based on this description, that the beneficiary meets the criteria set forth at sections 101(a)(44)(A) of the Act. [REDACTED] provides no indication that he has any additional information or documentation relating to the beneficiary's actual day-to-day duties, the nature of the petitioner's business or its actual staffing structure. [REDACTED] states that the beneficiary is a manager because she will have discretion over day-to-day activities, oversee three employees, and will have the ability to hire and make personnel decisions regarding subordinate employees. [REDACTED] opinion was primarily based on a vague and extremely limited position description that was already found by USCIS to be excessively generalized. Therefore, in this case, the expert opinion submitted is insufficient to overcome the valid objections of the director or the deficiencies discussed in detail above.

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a qualifying managerial capacity. Accordingly, the appeal will be dismissed.

IV. The Beneficiary's Employment Abroad

Beyond the decision of the director, the AAO finds the petitioner has failed to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity, as required 8 C.F.R. § 214.2(l)(3)(iv).

As with the U.S. position, the record does not establish that the beneficiary primarily performed qualifying duties in her position abroad. The description of the beneficiary's duties with the foreign entity include activities such as "overseeing customer accounts"; "making accounts related calls when necessary"; "working in communication with our warehousemen"; "compiling credit reports"; designing, publishing, and distributing marketing materials; updating the company's website; and collating marketing data and compiling graphs for key product and competitor sales. These duties suggest the beneficiary direct involvement in performing the company's day-to-day sales and marketing activities. The petitioner has not provided position descriptions for the foreign sales staff or the percentage of time the beneficiary spends on each of her duties. As mentioned above, 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. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs the non-managerial sales and marketing duties mentioned above. 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). For this additional reason, the petition cannot be approved.

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 the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir.

2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

V. 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.