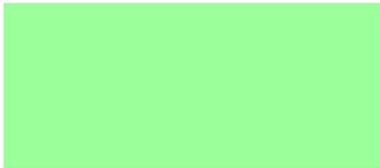


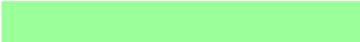


U.S. Citizenship
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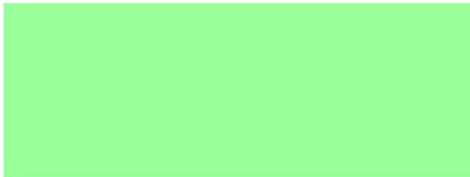


DATE: **JUN 13 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to 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 Minnesota limited liability company established in 2002, engages in biotechnology research and development, and wholesale of medical and pharmaceutical products. It is an affiliate of [REDACTED] (the foreign entity), located in the United Arab Emirates. The petitioner seeks to employ the beneficiary as its Regional Director in the United States for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been and will 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, counsel for the petitioner asserts that the beneficiary has been and will be employed in a primarily managerial capacity. Counsel submits a brief and additional evidence 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.

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 Issues on Appeal

The issues to be addressed are whether the petitioner established that the beneficiary has been employed in a primarily managerial or executive capacity abroad, and whether she will be employed in a primarily managerial or executive capacity in the United States.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on November 28, 2012. On Form I-129, the petitioner indicated that it was established in 2002 and currently employs two employees. The

petitioner specifically indicated that the beneficiary will not be coming to the United States to open a new office.

In a letter submitted with the initial petition, the petitioner described the nature of its business as being a biopharmaceutical company focused on the development, commercialization, marketing, and distribution of specialized and proprietary biopharmaceutical products under exclusive licensing arrangements. The petitioner asserted that it employs 25 employees worldwide, including two full-time employees within the United States.

Regarding the beneficiary's job duties, the petitioner asserted that the beneficiary is and has been employed in an executive position abroad as the Business Development Manager, and will be employed in an executive capacity in the United States as the Regional Manager. In particular, the petitioner asserted that the beneficiary spends, and will spend, "100% of her time" performing duties that are executive in nature. The petitioner listed the beneficiary's job duties abroad as including the following:

- Managing [the company's] business in the Biotechnology sector, identify and appoint licenses for the technology transfer of Biopharmaceuticals such as recombinant human Insulin, Alpha Interferon and GCSF;
- Establish joint research & development projects between [the company] and Biotech companies and Universities;
- Completing marketing projects on behalf of [the company] through appointed distributors;
- Developing business plans on behalf of [the foreign entity] for the Middle East and Gulf countries and overseeing its implementation;
- Working with the CEO of [the foreign entity] to develop business strategy in the Gulf countries and Middle East;
- Preparing the annual budget for [the foreign entity];
- Identifying marketing opportunities for [the company].

The petitioner listed the beneficiary's proposed job duties in the United States as including the following:

- Managing [the company's] business in the Biotechnology sector;
- Identifying and appointing licenses for the technology transfer of Biopharmaceuticals such as recombinant human Insulin, Alpha Interferon and GCSF in the US and International markets;
- Promoting joint research & development of Biosimilars and Biobetter with US Biotech companies, US Universities and US research institutions;
- Develop business plan and oversee its implementation;
- Prepare the annual budget for the business development;
- Identify marketing opportunities for both in the US and overseas; and
- Attend national and international meetings in the Biopharmaceutical sector.

In support of the petition, the petitioner submitted, *inter alia*, its 2011 IRS Schedule C (Form 1040), Profit or Loss from Business, showing that the petitioner reported no income and wages in the amount of \$5,327. The petitioner also submitted copies of several technology transfer agreements, made between the U.S. entity and various foreign companies over the span of several years, including one as early as December 6, 2009.

The director issued a request for evidence ("RFE"), in which she instructed the petitioner to submit, *inter alia*: (1) evidence that the U.S. company is doing business; (2) a more detailed specific description of the beneficiary's duties in the United States, identifying the percentage of time required to perform the duties of the managerial or executive position; (3) a detailed copy of the U.S. company's line and block organizational chart, including a list of all employees in the beneficiary's immediate division/department/team by name, job title, detailed summary of duties, educational level, and salary; (4) state quarterly wage reports for the first, second, and third quarters of 2012; (5) a more detailed specific description of the beneficiary's duties abroad, identifying the percentage of time required to perform the duties of the managerial or executive position; and (6) a detailed copy of the foreign entity's line and block organizational chart, including a list of all employees in the beneficiary's immediate division/department/team by name, job title, detailed summary of duties, educational level, and salary.

In response to the director's RFE, the petitioner submitted a letter reaffirming that the beneficiary's current and proposed employment "is clearly executive in nature and requires her to spend 100% of her time performing duties which are executive in nature." With respect to the director's request for evidence that the U.S. company is doing business, the petitioner asserted that the U.S. company has been doing business for at least one year prior to the filing of the instant petition. The petitioner referenced the several technology transfer agreements submitted previously and pointed out that the petitioning company is party to the contracts. The petitioner explained that the company's \$12 million in gross revenue is not included in the U.S. entity's tax records because the payment of funds was received by [REDACTED] the petitioner's Singapore affiliate. The petitioner also asserted that, at the present time, its only U.S. employee is [REDACTED] the Corporate Coordinator and Administrator. The petitioner asserted that [REDACTED] is employed as an independent contractor and receives a Form 1099, as opposed to a Form W-2, and thus is not reflected on the petitioner's payroll or tax records. The petitioner then requested that, in the alternative, USCIS treat the instant petition as a new office petition. The petitioner explained that recent developments affecting Biosimilar products in the United States will "lead to wide expansion in the U.S. market" and that the beneficiary will enter the United States to lead the company's U.S. business expansion.

In response to the RFE, the petitioner submitted more detailed job descriptions for the beneficiary. Regarding the beneficiary's employment abroad, the petitioner asserted that the beneficiary strategizes and manages the business development of the foreign entity in the Gulf countries and in the Middle East. The petitioner listed her specific duties abroad as follows:

- Identifying marketing opportunities for [the company] and managing business development of [the foreign entity] in the Middle East and Gulf countries. 30% of Time – Within this area, the Business Development Manager performs the following specific duties:
 - Identifying biopharmaceutical manufacturing companies in the Middle East and the Gulf countries that are committed to diversify their production into the Biosimilar [*sic*] sector – a key target client base of [the company] worldwide;
 - Presenting information on [the company's] capabilities, expertise and successful track record in the development of BioSimilar in general and Insulin in particular;
 - Present the scientific data indicating Biosimilarity of generics produced by [the company] to gold standard brand name products, such as [REDACTED] and its analogues such as [REDACTED]

- Show the independent laboratory testing performed by [REDACTED] in Scotland, a laboratory approved by the FDA and EMA in Europe, of products manufactured using our technology;
- Offer potential clients [the company's] services for turn-key manufacturing facilities including engineering and technology transfer in close collaboration with [REDACTED], a global design and construction provider of manufacturing facilities and systems for Biotechnology, specialty API and Pharmaceutical manufacturers;
- Completing marketing projects on behalf of [the company] through appointed distributors.
- Managing [the company's] business in the Middle East and Gulf countries in the Biotechnology sector. (30% of Time) Within this area, the Business Development Manager performs the following specific duties:
 - Conducting negotiations on behalf of [the foreign entity] with company clients related to budget, technology transfer fees, technical services and royalty payments;
 - Together with the Chairman and the technical staff negotiate the terms of the license agreement on behalf of [the foreign entity];
 - Act as the liaison between [the company] and the licensee/client on all matters requiring input from [the company's] technical staff during the construction of the biopharmaceutical manufacturing facility and the technology transfer;
 - Ensure timely payment by the licensee/client to [the company] based upon completion of project milestones;
 - Keep record of all meetings and development of the project completed by [the company] to ensure milestones and timelines are met;
 - Once the facility is completed, validated and the product licensed by [the company] is approved by the regulatory agencies, the Business Development Manager then identifies pharmaceutical companies interested in distributing the product in a given country outside the licensee exclusive territory and negotiates a standard commercialization agreement with the distributor.
- Establish joint research & development projects between [the company] and Biotech companies and Universities (10% of Time);
- Developing business plans on behalf of [the foreign entity] for the Middle East and Gulf countries and overseeing its implementation (10% of Time);
- Working with the CEO of [the foreign entity] to develop business strategy in the Gulf countries and Middle East (10% of Time);
- Preparing the annual budget for [the foreign entity] (10% of Time);

Regarding the beneficiary's proposed job duties in the United States, the petitioner asserted that the beneficiary will expand the company into the emerging U.S. biosimilar market. The petitioner listed the beneficiary's specific duties in the United States as follows:

- Identifying and appointing licenses for the technology transfer of Biopharmaceuticals such as recombinant human Insulin, Alpha Interferon and GCSF in the US and International markets (30% of her time). [The beneficiary] will perform [sic] the following specific duties:

- Initially, spend the majority of her time identifying biopharmaceutical manufacturing companies in the US committed to diversifying into the Biosimilar [sic] sector – the target clients for [the petitioner’s] expanded operations in the U.S.;
 - Develop a database of medium and large size generic pharmaceutical companies [sic] in the US and identify medium to large size generic pharmaceutical companies with the resources to enter the Biopharmaceutical sector;
 - Contact generic pharmaceutical companies to discuss possible business collaboration with [the petitioner] on technology transfer, manufacturing and distribution of Biosimilars;
 - Presenting information on [the company’s] capabilities, expertise and successful track record in the development of BioSimilars;
 - Present the scientific data on recombinant human Insulin indicating Biosimilarity to the gold standard brand name products, such as [redacted] and its analogues such as [redacted];
 - Show the testing by independent laboratory performed by Bioreliance in Scotland, a laboratory approved by the FDA and EMA in Europe, of manufactured products using our technology;
 - Offer potential clients [the company’s] services for turn-key manufacturing facilities including engineering and technology transfer in close collaboration with [redacted] a global design and construction provider of manufacturing facilities and systems for Biotechnology, specialty API and Pharmaceutical manufacturers;
 - Identifying marketing opportunities for [the company] in the U.S. (30% of Time)
 - Conducting negotiations on behalf of [the petitioner] with company clients related to budget, technology transfer fees, technical services and royalty payments;
 - Together with the Chairman and the technical staff negotiate the terms of the license agreement on behalf of [the petitioner];
 - Act as the liaison between [the company] and the licensee/client on all matters requiring input from [the company’s] technical staff during the construction of the biopharmaceutical manufacturing facility and the technology transfer;
 - Ensure timely payment by the licensee/client to [the company] based upon completion of project milestones;
 - Keep record of all meetings and development of the project completed by [the company] to ensure milestones and timelines are met;
 - Once the facility is completed, validated and the product licensed by [the company] is approved by the regulatory agencies, the Business Development Manager then identifies pharmaceutical companies interested in distributing the product in a given country outside the licensee exclusive territory and negotiates a standard commercialization agreement with the distributor.
- Promoting joint research & development of Biosimilars and Biobetter with US Biotech companies, US Universities and US research institutions (10% of Time);
 - Develop business plan for [the petitioner] and oversee its implementation (10% of Time);

- Assist in the development of business strategy for [the petitioner] for International markets (5% of Time);
- Prepare the annual budget for the business development (5% of Time); and
- Attend national and international meetings in the Biopharmaceutical sector (10% of Time).

The petitioner submitted the U.S. entity's organizational chart, depicting [redacted] at the top as Chairman. The next tier below consist of four positions: (1) US Regional Director [the beneficiary]- 2013; (2) Business DVLP East Coast- Projected 2014; (3) Business DVLP West Coast- Projected 2015; (4) Corporate Coordinator & Admin- [redacted]. The beneficiary is depicted as supervising one position: UAE Regional Manager To be appointed.

The petitioner submitted the company's worldwide organizational chart, depicting the company as having four affiliate offices around the world that are directly managed by [redacted] Chairman: (1) [redacted] (Singapore); (2) the foreign entity; (3) [redacted] (Israel); and (4) the U.S. petitioner.¹ The petitioner submitted separate organizational charts for [redacted] (Singapore), [redacted] - India Office, and [redacted] (Israel) detailing their staffing and organizational structure. No separate organizational chart was submitted for the foreign entity; in the company's worldwide organizational chart, the beneficiary is depicted as being the foreign entity's sole employee.

The petitioner submitted its "US Business Strategy and Business Plan," dated December 2012, describing the beneficiary's primary duty in the first year [presumably beginning in 2013] as to "seed the market" and "pave the way for establishing a solid presence in the US market and secure the first contract for technology transfer" with the support of the Chairman. The business plan indicated that the petitioner intends to expand its management to three employees in the second year, and to increase its staff to eight employees, with three managers and five scientists, in the third year. The business plan stated: "Until then, the personnel in Israel will fulfill those responsibilities."

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Regarding the beneficiary's job duties abroad and in the United States, the director concluded that the beneficiary's job duties are more indicative of an employee who performs the necessary tasks to provide a service or to produce a product. The director also found that the beneficiary does not have any subordinates abroad and will not have any subordinates in the United States. The director thus concluded that the beneficiary's current and proposed positions will likely be primarily assisting in the performance of day to day non-supervisory duties.

On appeal, counsel for the petitioner asserts that the beneficiary has been and will be employed in a managerial position. Counsel asserts that the director "imposed an overly restrictive" definition of the term "manager," and asserts that the beneficiary should not be disqualified from consideration as a manager because of the mere fact that she is engaged in "a multiplicity of duties." Counsel asserts that the standard for an L-1A manager does not require the beneficiary to be engaged exclusively or nearly exclusively in managerial level duties; the law only requires that the beneficiary devote more than half of her time to

¹ The organizational chart depicts another foreign affiliate, [redacted] - India Office, as being directly supervised by Co-Chairman [redacted]

managerial duties. Furthermore, counsel asserts that the beneficiary can qualify as a manager if she manages an essential function, even if she does not have subordinate employees.

Counsel also asserts that the director failed to recognize the beneficiary's level of managerial-level authority to commit the petitioning company to a course of action and expenditure of funds, and that she is and will continue to function at a senior level in the petitioner's operations. Counsel asserts that the beneficiary will not be performing ministerial or low-level activities; rather, she will have a wide level of authority to develop and establish the essential goals of the company, undertake appropriate actions to attain the goals, interface with senior-level management of business clients and partners, and work with their senior scientific personnel. Counsel also asserts the beneficiary will have "wide-ranging authority to conclude agreements and to commit [the petitioner] to obligations and course of action that reflect her senior-level position with the organization."

In support the appeal, the petitioner submits a letter describing the beneficiary's managerial-level position within the foreign entity, where she manages a portfolio of business valued at over USD \$20 million. The petitioner emphasizes that the beneficiary's current and proposed duties can only be carried out by a senior manager, as she is required to meet with senior executives of the company's partner companies and heads of research and development on matters that of vital importance to the company. The petitioner asserts that the beneficiary has "major authority to commit [the] company to various obligations and she then manages the development of various large-scale projects related to new biopharmaceutical products." On appeal, the petitioner submits additional technical services agreements between the petitioner and various companies.

Upon review of the petition and the evidence, 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 executive capacity.

As a preliminary matter, the AAO concludes that the petitioner does not, and cannot, qualify as a new office for any purpose. The evidence in the record – particularly the petitioner's own statements and its technology transfer agreements – establishes that the petitioner has been doing business in the United States for more than one year at the time of filing. Therefore, the record shows that the petitioner cannot qualify as a new office as defined by the regulations. See 8 C.F.R. § 214.2(l)(1)(ii)(F) (defining a "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year (emphasis added)"); 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining "doing business" as the "regular, systematic, and continuous provision of goods and/or services"). Moreover, the petitioner specifically indicated on Form I-129 that the beneficiary is not coming to the United States to open a new office. 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 AAO will withdraw the portions of the director's decision finding or suggesting that the petitioner qualifies as a new office.

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 either in an executive or managerial capacity. *Id.* 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 (if any), 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.

In the instant matter, the petitioner has failed to establish that the beneficiary's duties abroad and her proposed duties in the United States will be in a primarily executive capacity. Based upon the petitioner's descriptions of the beneficiary's current and proposed job duties, the record reflects that the beneficiary will be engaged in performing the tasks necessary to produce a product or to provide services. The beneficiary's duties abroad include a variety of non-qualifying, operational tasks such as: identifying biopharmaceutical manufacturing companies, presenting information and scientific data to these companies, offering potential clients the company's services, completing marketing projects, ensuring timely payment by the licensee/client to the company based upon completion of project milestones, and keeping record of all meetings and development of the project completed by the company. Similarly, the beneficiary's proposed duties in the United States include a variety of non-qualifying, operational tasks such as: identifying biopharmaceutical manufacturing companies in the US, developing a database of medium and large size generic pharmaceutical companies, contacting generic pharmaceutical companies to discuss possible business collaboration, presenting information and scientific data to potential clients, and offering potential clients the company's services. These types of duties do not fall directly under traditional executive duties as defined in the statute; rather, they are better classified as non-qualifying, operational duties similar to direct marketing and sales duties.

The petitioner's descriptions of the beneficiary's current and proposed duties indicate that she also performs qualifying duties, such as conducting negotiations on behalf of the company with clients related to budget, technology transfer fees, technical services and royalty payments, negotiating the terms of license agreements, developing business plans and strategies, and preparing an annual budget. However, the petitioner failed to sufficiently document what proportion of the beneficiary's duties would be qualifying, and what proportion would be non-qualifying. For example, the petitioner asserted broadly that the beneficiary spends 30% of her time "[m]anaging [the company's] business in the Middle East and Gulf countries." Within this broad range, however, the petitioner listed a variety of both qualifying duties (e.g., conducting negotiations) and non-qualifying duties (e.g., keeping record of all meetings and development), but failed to specifically quantify how much time the beneficiary spends on each particular duty. This failure of documentation is important because whether the beneficiary is an executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" executive or qualifying in nature. See section 101(a)(44)(B) of the Act (requiring that one "primarily" perform the enumerated executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988) (an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial capacity). Without specific information on how much time the beneficiary spends on each particular job duty, the AAO cannot determine whether the beneficiary is primarily performing qualifying or non-qualifying duties.

Furthermore, the evidence in the record indicates that the beneficiary is the foreign entity's sole employee. Moreover, while the petitioner asserts that the U.S. petitioning entity has one full-time employee, [REDACTED] (independent contractor), the petitioner submitted no evidence to support its claimed full-time

employment of [REDACTED].² Without such evidence, the petitioner failed to establish that the U.S. entity will employ any employee other than the beneficiary. In addition, the petitioner has inconsistently described the U.S. entity's staffing; according to Form I-129 and the initial evidence, the petitioner claimed that it has two U.S. employees, while in response to the RFE, the petitioner asserted that it has only one employee, [REDACTED]. The petitioner provided no explanation for this discrepancy. Based on the above, the petitioner has failed to establish that the foreign and U.S. entities have sufficient organizational structures to relieve the beneficiary from primarily performing non-qualifying duties.³

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. *Id.*

On appeal, the petitioner emphasizes the beneficiary's senior level and wide-ranging authority in the foreign entity and the U.S. entity. The AAO does not dispute the beneficiary's level of authority, particularly since she appears to be the sole employee of the foreign and U.S. entities. Nevertheless, the beneficiary's level of authority is not the sole factor in determining whether the beneficiary's employment meets the definition of "executive capacity." The definition of executive capacity has two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definition. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of 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 failed to establish this second essential element of eligibility.

On appeal, the petitioner asserts for the first time that the beneficiary has been and will be employed in a primarily managerial capacity. However, the AAO will not consider the beneficiary's employment in a managerial capacity. With the initial petition and with the petitioner's response to the RFE, the petitioner asserted only that the beneficiary has been and will be employed in an executive capacity; the petitioner did not state nor suggest that the beneficiary has been or will be employed in a managerial capacity. On appeal, a

² The petitioner claimed to have submitted a copy of Form 1099 issued to [REDACTED] for the year 2012. However, a review of the record fails to reflect that the petitioner submitted this document as claimed. Furthermore, while the petitioner's 2011 federal tax return shows \$5,237 paid in wages to an undisclosed employee, the petitioner specifically stated that [REDACTED] is an independent contractor and thus her salary is not reflected on the petitioner's tax records.

³ The AAO observes that a company's size alone 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 and the absence of employees who would perform the non-managerial or non-executive operations of the company. 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). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

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. at 176.

Finally, the AAO will address the petitioner's assertion on appeal that the beneficiary need only spend more than half of her time on qualifying duties. The petitioner's assertion on appeal is inconsistent with the petitioner's prior assertions that the beneficiary will spend "100% of her time" on qualifying duties. Again, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *Id.* 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. at 591-92. 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.*

Overall, the petitioner has failed to meet its burden of proof in establishing that the beneficiary has been employed in a primarily executive or managerial capacity abroad, or that she will be employed in a primarily executive or managerial capacity in the United States. Accordingly, the appeal will be dismissed.

The petition will be denied and the appeal dismissed for the above stated reasons. 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.