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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 2 6 2013 Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

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 Florida limited liability company established in 2010, engages in the business of aircraft parts supply and sales. It claims to be a subsidiary of , located in Buenos Aires, Argentina. The petitioner seeks to employ the beneficiary as its executive manager for a period of two years.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial capacity in the United States. 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.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

II. The Issues on Appeal

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 18, 2012. In a letter accompanying the initial petition, the petitioner described its business as devoted to the sale of aircraft parts. The petitioner explained that it has been conducting its business through the services of an independent contractor, and now seeks to expand its reach and focus to include the export of locally purchased aircraft parts to Argentina and other Latin American countries. The petitioner explained that the U.S. entity currently has no employees, as it is waiting for the approval of the instant petition on behalf of the beneficiary in order to begin the hiring of additional personnel.

The petitioner described the beneficiary's proposed job duties in the United States as including the following: directing and coordinating the company's financial activities; overseeing the day-to-day operation and executive functioning of the company; the determination of the direction of the company; the coordination of corporate activities/investments; the review and implementation of corporate objectives; coordinating the activities involving the parent company that currently utilizes aircraft parts purchased in the U.S. for resale to clients in Argentina; reviewing and implementing corporate objectives and conduct new strategies to expand business to other Latin American countries; and presiding over and evaluating all potential purchases for profitability for re-sale to clients.

The director issued a request for additional evidence ("RFE"), in which he instructed the petitioner to submit, *inter alia,* the following: a description of the beneficiary's managerial duties abroad and in the United States; an explanation of how many subordinate supervisors were and will be under the beneficiary's management; the job titles and duties of the employees managed and to be managed; a list of the U.S. employees that identifies each employee by name and position title; and complete position descriptions for all U.S. employees.

In response to the RFE, the petitioner asserted that the beneficiary supervised four individuals abroad: a customer service representative, a purchasing and accounting representative, a supplies and technical service representative, and a regional sales representative. The petitioner described the beneficiary's duties abroad as including: overseeing four subordinates; having complete discretion to make discounts to clients, establish sales margins, give credit for defective parts and finalize contracts for sale; implementation of business policies; hiring and firing of employees; and negotiating of contracts. The petitioner provided the names and brief position descriptions for each of the beneficiary's four subordinates abroad.

The petitioner asserted that, in the United States, the beneficiary will be in charge of hiring qualified individuals to duplicate the petitioner's staffing model abroad. The petitioner also indicated that the beneficiary will be in charge of hiring the independent contractor to head the sales department, and a part-time employee for warehouse related duties. The petitioner indicated that the beneficiary will spend 80% of his time on executive work, and 20% of his time on non-executive work. Finally, the petitioner provided the following breakdown of the beneficiary's proposed duties in the United States:

> <u>Weekly distribution of activities for our Legal Representative:</u>
>
> - Management and customer contact — 17 hours
> - Market analysis and research — 6 hours
> - Training — 3 hours
> - Sales Meetings — 10 hours
> - Marketing and commercial strategies — 2 hours
> - Other administrative tasks — 2 hours
>
> [The beneficiary] will organize and supervise on a weekly basis the tasks according to the following schedule:
> On a weekly basis, he distributed his work according to the following schedule:

a.	Finding new customers	10 hours
b.	Inventory Control and Logistic procedures	4 hours
c.	Customer satisfaction analysis	2 hours
d.	Contracts with suppliers	3 hours
e.	Training and quality control	3 hours
f.	Coordination of tasks of the employees he supervises	10 hours
g.	Budget control (sales-resources-expenses)	4 hours
h.	Non-executive tasks	9 hours

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director observed that the petitioner was established in February 2010, and has no direct employees. The director found that the petitioner had not sufficiently established that it had any subordinate executives, managers, or professional employees to relieve the beneficiary from performing non-executive/managerial duties or functions. The director also found that the petitioner failed to establish that the beneficiary was employed in a primarily managerial or executive capacity abroad, as the petitioner provided insufficient information to indicate whether the beneficiary's subordinates were professionals or acting in a managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary has been, and will be, employed in a managerial capacity. Counsel asserts that the evidence submitted establishes that the beneficiary was employed in a managerial capacity abroad as the Parts Manager, as he had the authority to hire, fire and recommend personnel actions, exercise discretion over day-to-day operations of the corporation, and manage the parts division. Counsel explains that the foreign entity decided to transfer the beneficiary and expand its operations in the United States because "the independent contractor can no longer meet the parent company's growth expectations." Counsel disputes the director's finding that the beneficiary does not supervise any professionals, and asserts that the beneficiary qualifies as a functional manager in the United States. Counsel also asserts that "[w]hether the company is in the first year or third year of its existence is of no consequence in this matter, as [the beneficiary] will be managing an essential function."

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 by the United States entity in a 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 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, 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 the business. The petitioner's evidence should demonstrate, by a preponderance of the evidence, that the petitioner will employ the beneficiary in a primarily managerial or executive capacity.

In the instant matter, the petitioner has repeatedly described the beneficiary's position abroad and in the United States in very broad terms, such as "directing and coordinating the company's financial activities," "overseeing the day-to-day operation and executive functioning of the company," "the determination of the direction of the company," "reviewing and implementing corporate objectives and conduct new strategies to expand business," and "presiding over and evaluating all potential purchases for profitability for re-sale to clients." USCIS cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 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.).

Accordingly, the director properly issued a RFE requesting an additional description of the beneficiary's duties abroad and in the United States. In response, the petitioner again described the beneficiary's duties abroad in broad terms, including "overseeing four subordinates," "implementation of business policies," "hiring and firing of employees," and "negotiating of contracts." These descriptions fail to give sufficient detail as to the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.*

In response to the director's request for an additional description of the beneficiary's proposed job duties in the United States, the petitioner confusingly provided two different lists of job duties, the first of which was for a "Legal Representative." The petitioner failed to explain to whom the first list of job duties pertains, since the beneficiary's proposed title in the United States is "Executive Manager" and the petitioner did not indicate it would hire a "Legal Representative" position in the United States.

Assuming that both lists pertain to the beneficiary, the listed job duties, such as "management and customer contact," "market analysis and research," and "marketing and commercial strategies," are still too broad and vague to give any meaningful insight into the beneficiary's daily activities. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.*

Moreover, the listed job duties indicate that the beneficiary would spend the majority of his time on non-qualifying duties, such as customer contact (unspecified number of hours), market analysis and research (6 hours), other administrative tasks (2 hours), finding new customers (10 hours), inventory control and logistic procedures (4 hours), contracts with suppliers (3 hours), and non-executive tasks (9 hours). In contrast, the few duties that could possibly be classified as managerial or executive make up less than half of the beneficiary's total time, such as management (unspecified number of hours), training (3 hours), customer satisfaction analysis (2 hours), coordination of tasks of the employees he supervises (10 hours), and budget control (4 hours). As such, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

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 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Critically, at the time of filing, the U.S. petitioner had no direct employees and only one subcontractor who performed sales activities. The petitioner indicated that the beneficiary will be responsible for hiring additional U.S. employees, specifically, a customer service representative, a purchasing and accounting representative, a supply and technical service representative, a sales representative, and a part-time warehouse worker, as well as the existing subcontractor to serve as a sales manager, once he receives his L-1A visa.

Considering the petitioner's staffing level at the time of filing, the petitioner failed to establish that it had a sufficient organizational structure to relieve the beneficiary from primarily performing managerial or executive duties. The petitioner claimed that it will hire employees to perform various duties related to sales, customer service, purchasing, accounting, supplies and technical service, and warehousing. The petitioner also expressed its desire to start exporting products. However, at the time of filing, the petitioner had not yet hired any employees in the United States, and utilized only one subcontractor who "can no longer meet the parent company's growth expectations." The petitioner failed to establish who, if not the beneficiary, would be performing all other duties related to expanding sales, customer service, purchasing, accounting, supplies and technical service, warehouse service, and exports. Therefore, the petitioner failed to establish that the beneficiary will not be primarily performing these non-qualifying duties himself.

The AAO emphasizes that the petitioner is not a new office, as it has been doing business in the United States for several years at the time of filing. Although counsel asserts on appeal that "[w]hether the company is in the first year or third year of its existence is of no consequence in this matter," the fact that the petitioner is not a new office is critical to this matter. The provision related to a "new office" is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position. *See generally* 8 C.F.R. § 214.2(l)(3)(v). Here, however, the petitioner is not a new office and therefore cannot qualify for the more lenient provision afforded to new offices. The petitioner must establish eligibility at the time of filing, i.e., establish that at the time the petition was filed, the petitioner had sufficient employees and/or contractors to relieve the beneficiary from performing non-qualifying duties. The petitioner's intent to hire additional employees in the future cannot be considered in determining eligibility at the time of filing.

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).

To the extent that the director discussed the petitioner's lack of subordinate executives, managers, or professional employees to relieve the beneficiary from performing non-executive/managerial duties or

functions, the director's comments are withdrawn. The issue is whether the petitioner, at the time of filing, had *any* employees or contractors to relieve the beneficiary from primarily performing non-qualifying duties, regardless of whether these employees or contractors are managers, executives, or professionals. The qualifications of the employees or contractors relate to another but separate issue of whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees under section 101(a)(44)(A)(ii). Because the petitioner failed to make the threshold showing that the beneficiary will be employed in a primarily managerial or executive capacity as required by sections 101(a)(44)(A), (B) of the Act, USCIS need not examine whether the beneficiary meets the requirements of 101(a)(44)(A)(ii).[1]

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its executive manager. However, 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 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 failed to establish this second element of eligibility.

For the foregoing reasons, the petitioner failed to establish that the beneficiary has been, and will be, employed in a primarily managerial or executive position. Accordingly, the appeal will be dismissed.

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

The petitioner claims to be a subsidiary of the beneficiary's foreign employer, . ("the foreign entity"), asserting that "the same four owners of the foreign entity own in equal shares 100% of [the petitioner]."[2] On Form I-129, the petitioner listed its four owners as: (1) (25%); (2) (25%); (3) (25%); and (4) (25%).

In support of the petition, the petitioner submitted evidence establishing it is equally owned by four owners, However, the petitioner also

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[1] On appeal, counsel submits evidence that the subcontractor has a bachelor's degree in international business. However, counsel submits no evidence to establish that the sales representative position requires a professional degree. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate position requires a baccalaureate degree as a minimum for entry into the field of endeavor. *See* Section 101(a)(32) of the Act. Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the 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.

[2] Assuming all facts are true, it appears the petitioner is better defined as an affiliate, rather than a subsidiary, of the foreign entity.

submitted evidence establishing that the foreign entity is owned by five owners in different proportions, as follows: (1) , owning 390,180 shares [21%]; (2) , owning 390,180 shares [21%]; (3) , owning 390,180 shares [21%]; (4) , owning 390,180 shares [21%]; and , owning 297,280 shares [16%]. The petitioner submitted no evidence to reconcile the discrepancies regarding the foreign entity's claimed ownership.

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.*

As the petitioner failed to establish that it and foreign entity are owned and controlled by the same parent, individual, or group of individuals each owning and controlling approximately the same share or proportion of each entity, the petitioner failed to establish that it and the foreign entity qualify as "affiliates" as defined in 8 C.F.R. § 214.2(l)(1)(ii)(L), or otherwise share a qualifying relationship. For this additional reason, the appeal will be dismissed.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.