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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: **MAY 23 2013** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, ("the director") denied the petitioner's nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

This nonimmigrant petition was filed 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 was organized under the laws of the State of Texas in March 2011. On the Form I-129 (Petition for a Nonimmigrant Worker), filed August 3, 2012, the petitioner claimed that it employed four individuals and had earned a gross annual income of \$648,322. The Form I-129 lists the petitioner's type of business as "wholesale, procurement distribution, and export of U.S. supplied industrial machinery." The Form I-129 Supplement L indicates that the petitioner is a subsidiary of [REDACTED] a company registered in Venezuela and operating since 2008. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in either a managerial or executive capacity. The petitioner subsequently filed an appeal which the director forwarded to the AAO. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes that the beneficiary would be employed in a primarily managerial or executive capacity.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of the foreign employer.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14) governs the requirements for the extension of a visa petition for a new office and states in pertinent part:

- (ii) New offices. A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I - 129, accompanied by the following:
 - (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
 - (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
 - (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
 - (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
 - (E) Evidence of the financial status of the United States operation.

II. The Issue on Appeal

The issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive capacity.

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

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

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

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

The petitioner filed the Form I-129 on August 3, 2012. In a letter appended to the petition, the petitioner stated that it was established to acquire and export U.S. supplied industrial machinery to its targeted market of oil and gas, mining, and petrochemical industries operating in Venezuela and other Latin American countries. The petitioner noted that its parent company has an extensive network of potential clients in Latin America and thus has the ability to quickly penetrate the market. The petitioner observed that its location in Houston, Texas, a port city, allowed for ideal positioning for quality control of the import and export of its products, materials, and equipment.

The petitioner stated that the purpose of the extension petition is for the beneficiary "to continue developing and operating the U.S. entity in the position of General Manager." The petitioner noted that the position of general manager "involves overseeing the direction of the business enterprise operations." The petitioner listed the beneficiary's duties as:

- Planning, developing and implementing policies and procedures for company operations;
- Managing all the finances;
- Overseeing the contract negotiation with vendors and others;
- Formulating pricing policies for the sale of products;
- Approving the budget for the company and determin[ing] the allocation of funds;
- Planning and implementing new operating procedures to improve efficiency and reduce costs; and
- Supervising, managing, training of U.S. employees (including hiring and firing).

The petitioner also indicated that the beneficiary would have the highest managerial level of authority to direct, manage, supervise, train, hire and fire employees and the discretionary power in order to effectively direct the business.

The petitioner submitted its current organizational chart depicting the beneficiary as general manager directly over the sales/marketing manager. The organizational chart also showed a purchasing/sales agent and a sales agent reporting to the sales/marketing manager.¹ The petitioner provided the educational credentials of its sales/marketing manager showing she received a master's of science degree in human resource management in May 2012. The record also included a copy of an untranslated psychology degree diploma issued to the sales agent. The record further included the equivalency of a Texas high school diploma issued to the purchasing/sales agent. The petitioner submitted its 2012 first quarter Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, showing the petitioner employed two individuals during this time period.

The director issued a request for evidence (RFE) instructing the petitioner to submit additional evidence establishing that the beneficiary would be employed in a primarily managerial or executive capacity with the U.S. company.

In response, the petitioner, through counsel, provided the same overview of the proffered position adding the number of hours per week the beneficiary would devote to each generally described duty as follows:

- Planning, developing and implementing policies and procedures for company operations. 10 hours
- Managing all the finances. 5 hours
- Overseeing the contract negotiation with vendors and others. 5 hours
- Formulating pricing policies for the sale of products. 5 hours
- Approving the budget for the company and determin[ing] the allocation of funds. 5 hours
- Planning and implementing new operating procedures to improve efficiency and reduce costs. 5 hours
- Supervising, managing, training of U.S. employees (including hiring and firing). 5 hours

¹ The petitioner identifies a position of sales/purchasing agent on its organizational chart but when describing the duties of this employee classifies the position as a purchasing agent.

The petitioner also provided additional information regarding the beneficiary's duties related to the petitioner's administration and finance areas, which included:

- Providing final approval of all major payments to be made by the company to the providers of products or services.
- Providing final approval to grant credit lines to customers [*sic*]. This authorization is made based on the analyzed financial reports.
- Providing final approval to pay federal and state taxes. This authorization is made based on the analysis of previous reports.
- Conducting monthly meetings with staff to review the company's financial results and establish new management strategies.
- Analyzing and providing final approval of contracts with major suppliers for the new acquisitions of products.
- Directing, supervising and monitoring the collection of debts derived from sales and developing collection strategies for overdue debts.
- Creating an investment plan to promote business growth from financial analysis, and projecting growth of infrastructure as well as introduc[ing] plans into new markets.

The petitioner noted the beneficiary's duties related to the sales department included:

- Planning and developing policies and procedures in order to successfully complete sales of products and services for the oil, gas & petrochemical industries in efficient and cost-effective bases [*sic*].
- Directing product simplification and standardization to eliminate unprofitable products from sales and purchasing.
- Establishing schedules for each sale delivery and purchasing projects and assigning tasks to subordinate professionals.
- Evaluating and providing final approval to special discounts based on the analysis of financial reports.
- Supporting the sales department by attending negotiation meetings with clients which encompass major projects.
- Making decisions and solving problems. Analyzing information and evaluating results to choose the best solution for the company.

The petitioner indicated that the beneficiary's duties related to the purchasing department included:

- Exercising discretion over the daily purchasing operations of products for the oil, gas, & petrochemical industries, including other subordinate managers and professionals.
- Planning and developing policies and procedures in order to successfully complete purchases of products for the oil, gas, & petrochemical industries in efficient and cost-effective bases [*sic*].
- Establishing schedules for each purchasing project and assigning tasks to subordinate employees.

- Providing final approval to purchase orders, which are discussed to provide the final approval signature.
- Directing the relationship with customs agencies and brokers for the export and import of foreign products.
- Evaluating and signing major distribution agreements.
- Dealing with suppliers regarding negotiations over credit lines when required.
- Looking for opportunity areas to create new rules to help prevent future problems.

The petitioner stated the beneficiary's involvement with the personnel department included:

- Supervising and training subordinate managers and professionals, including the Sales & Marketing Manager.
- Providing final approval to increase salaries, bonuses and compensation to employees.
- Evaluating and signing warning letters delivered to employees who do not comply with the company's processes.
- Exercising final hiring authority on new personnel.
- Maintaining contact with employees of the company to encourage a harmonious work environment.

The petitioner also provided job descriptions for the sales/marketing manager, the purchasing agent and the sales agent as follows:

Sales and Marketing Manager

- Direct, plan and implement marketing and sales activities. 10 hours
- Evaluate how target markets respond to marketing efforts. 5 hours
- Increase profit and retain loyal customers. 5 hours
- Resolve customer complaints regarding sales and services. 5 hours
- Prepare budgets and approve budget expenditures. 5 hours
- Evaluate customer preferences to determine the focus of sales efforts. 5 hours
- Project sales and determine the profitability of products and services. 2.5 hours
- Plan and manage training programs for sales staff. 2.5 hours

Purchasing Agent

- Lead the purchasing team group in all phases. 5 hours
- Identify and develop training opportunities. 5 hours
- Authorize order materials and services as per negotiated and appropriately approved. 5 hours
- Review purchase requisitions, approve and issues purchase orders in accordance with company policy and negotiated terms and conditions. 5 hours
- Maintain procurement files. 5 hours
- Track purchasing activity and measurements. 5 hours

- Discuss defective or unacceptable new goods or services with users, vendors and others to determine cause of problem and take corrective and preventative action. 5 hours
- Manage vendor relationships. 5 hours.

Sales Agent

- Locate and contact potential clients to offer advertising services. 10 hours
- Provide clients with estimates of the costs of advertising products or services. 5 hours
- Process all correspondence and paperwork related to accounts. 5 hours
- Prepare and deliver sales presentations to new and existing clients. 5 hours
- Prepare promotional plans. 5 hours
- Gather data about consumers, competitors, and market conditions. 10 hours.

The petitioner further included job descriptions for potential employees in various positions and a proposed organizational chart depicting the positions of future employees it planned to hire within the next five years.

The petitioner claimed that it had demonstrated through the evidence submitted that it is active and operating, had secured sufficient physical premises, and that subordinate employees had been hired to relieve the beneficiary from performing non-managerial duties. The petitioner also made clear throughout the response that the beneficiary, as the petitioner's general manager, did not fall into the category of managing an essential function. The petitioner asserted that the beneficiary directly supervises the work of a managerial and professional employee and identified the sales/marketing manager as the managerial and professional employee supervised. The petitioner allocated five hours per week of the beneficiary's time spent on supervision. The petitioner also claimed that the sales/marketing manager supervised the purchasing agent and the sales agent. In the same letter in response to the RFE, the petitioner provided a second version of the purchasing agent's duties as follows:

Purchasing Agent

- Identifies prospects [sic] clients utilizing creative techniques.
- Analyzes plans and implements marketing and sales activities.
- Prepares quotes for potential clients.
- Contacts suppliers and negotiates prices.
- Prepares purchase orders.
- Assists the Sales & Marketing Manager in achieving or exceeding established annual sales goals.
- Contacts freight forwarding agency to coordinate delivery and to ensure that all customs requirements are met.

The petitioner also amended the sales agent's duties by deleting references to the petitioner's advertising products. The petitioner did not provide an explanation regarding the differences in duties attributed to these two employees.

The petitioner submitted its 2012 second quarter Form 941, showing the petitioner employed only one individual and an accompanying August 2012 letter signed by the Form 941 preparer noting that the filed Form 941 contained a typographical error. The preparer also noted that he had corrected the report to reflect the petitioner's accurate number of personnel for the second quarter as four. The record included checks issued to the petitioner's four claimed employees. The first check issued to the individual in the position of sales/marketing manager is dated June 28, 2012, the second check is dated July 13, 2012, the third check is dated July 30, 2012, and the fourth check is dated August 15, 2012. The checks do not contain an endorsement on the back. The photocopies of these checks do not reflect that the checks were cashed or cancelled. The checks, at most, indicate the recent employment of a sales/marketing manager. The record also included checks issued to the individual in the position of purchasing agent beginning in February 2012 and continuing through August 2012, all of which include the payee's endorsement on the back. The record further included checks issued to the individual in the position of sales agent beginning in March 2012 and continuing through August 2012, all of which include the payee's endorsement on the back. The record also included checks issued to the beneficiary beginning in February 2012 through August 2012, some of which included the payee's endorsement and some which did not.

The petitioner again claimed that it had hired other workers to relieve the beneficiary from performing non-qualifying duties. The petitioner asserted that the beneficiary's duties are mainly related to the management operations of the company rather than to the actual provision of services. The petitioner averred that the beneficiary supervises other professional employees, has discretion to direct the company's operations, and has the power to hire and fire employees as he functions at a senior level within the organizational hierarchy. The petitioner noted that the beneficiary has discretionary authority to make investments, to initiate new business ventures on behalf of the foreign entity, to manage the company budget, to implement operation procedures, to enforce company policies, to delegate responsibilities to other employees, and to represent the company.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director determined that the petitioner had provided vague and generic job descriptions for its employees. The director determined that the job duties of the beneficiary revealed that he would be engaged primarily in operational activities that do not fall within the statutory definitions of either managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary "will manage supervisor, professional, or sub-manager" and that the beneficiary's "primary job duties are managerial or executive and [the] Beneficiary has the highest authority and discretionary power in managing the company." Counsel asserts that the petitioner has shown a continuing and steady increase in its gross sales, profit and net income and has hired four employees, including the beneficiary. Counsel reiterates that the beneficiary's direct subordinate, the sales/marketing manager, manages a purchasing agent and a sales agent.

Counsel contends that the beneficiary has been controlling, directing, and taking charge of the company by using his skills, perceptions and business judgment and accordingly clearly meets the first criterion of being a manager under 8 C.F.R. § 214.2(l)(ii)(B)(1). Counsel also contends that the beneficiary meets the second criterion of being a manager under 8 C.F.R. § 214.2(l)(ii)(B)(2) as the

beneficiary oversees and manages the essential function of the "company's marketing strategy, ensuery of supplying sources and maintaining and exploring procurement and supplying channels." Counsel further contends that whether the beneficiary manages people or an essential function, both are an implied and integral part of the beneficiary's position and job duties. Counsel contends that as the beneficiary has hired three subordinate employees, plans to hire more employees, and functions at a senior level within the company, he has also met the third criterion of being a manager under 8 C.F.R. § 214.2(l)(ii)(B)(3). Finally, counsel contends that the beneficiary both has power and discretion over how the business operates daily and has authority over and actually manages the essential function of ensuring the overall success of the business. Counsel avers that the beneficiary is not a first-line supervisor but that the beneficiary has authority over making the company's policy, strategy plan, and operational procedures and accordingly has met the requirements found at 8 C.F.R. § 214.2(l)(ii)(B)(4).

Counsel also asserts on appeal that the beneficiary is an executive and that a review of the beneficiary's duties shows that he also meets the requirements of 8 C.F.R. § 214.2(l)(ii)(C) for the same or similar reasons demonstrating that he meets the manager definition. Counsel notes that it is contrary to the statute, regulations, and case law for United States Citizenship and Immigration Services (USCIS) to discriminate against L-1 managers and executives based solely on the size of the petitioning U.S. entity. Counsel contends that the petitioner's business is complex and warrants a finding that the beneficiary qualifies in a capacity as a corporate executive or manager as defined by the Act.

Counsel also directly challenges the director's decision in several aspects. First, counsel finds the director's discussion of the hours the petitioner allocated to the beneficiary's various duties and those of his subordinates largely irrelevant. Counsel observes that the director's discussion of the duties of the beneficiary's subordinate sales/marketing manager confusing; but counsel concludes that a review of the sales/marketing manager's degrees in psychology and human resources management relate to her duties in business marketing and management and accordingly she occupies a position that is professional. Counsel also contends that the sales agent position is a professional position. Finally, counsel avers that the director ignored the growth of the company and the increase in the petitioner's finances.

Counsel, in sum, asserts that the beneficiary's duties relate primarily to the management of the company's overall sales and marketing function, that the beneficiary supervises and controls the work of a sub-manager who is a professional, that the beneficiary exercises the authority to hire and fire employees under his supervision, and that the beneficiary does not directly perform the routine sales and marketing functions carried out by the office, but rather exercises discretion over the day-to-day operations of the petrochemical machinery and equipment sales and marketing division.

III. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in the United States in a managerial or executive capacity as defined at 101(a)(44)(A) or (B) of the Act. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Preliminarily, we observe that the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS' regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Furthermore, after one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). In the instant matter, as is discussed below, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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.* In this matter, the petitioner's initial description of the beneficiary's duties was general and failed to provide any understanding of the beneficiary's actual duties. In response to the RFE, the petitioner focused the discussion of the beneficiary's position on his job duties as a personnel manager and counsel emphatically rejected any discussion of the beneficiary's position as a function manager. Counsel also failed to discuss the beneficiary's duties in the context of an executive position. On appeal, counsel reverses the past rejection of the beneficiary as a function manager and asserts that the beneficiary will perform the duties of a function manager and also of an executive. However, the petitioner must demonstrate with probative, consistent evidence that the beneficiary's responsibilities will meet all the requirements of either one capacity or all the requirements of both capacities. The petitioner may not claim to employ a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In this matter, the petitioner has not satisfied the requirements of either definition.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than on the day-to-day operations of the enterprise.

In this matter, the petitioner has not provided evidence of a subordinate level of managerial employees for the beneficiary to direct. The petitioner's organizational chart depicts the beneficiary over a sales/marketing manager, who in turn is placed over a sales/purchasing agent, and a sales agent. As the director noted, the record does not include sufficient information regarding the claimed managerial duties of any of these three positions. The description of the duties of the sales/marketing manager depicts an individual performing the duties involved in the marketing of the petitioner's product and services. She plans the marketing and sales activities, evaluates the

target markets, works on retaining customers, resolves customers' complaints, and evaluates customer preferences. The petitioner's general reference to the sales/marketing manager's projection of sales and determining profitability also appears to relate to a marketing duty. Accordingly, she spends the majority of her time performing duties directly related to marketing. The petitioner does not specifically describe duties demonstrating that this employee will direct or supervise others in terms of marketing or training. The petitioner vaguely references this employee's involvement in preparing and approving budgets but does not identify if this is the company's budget or the marketing budget.

Similarly, the description of the duties of both the sales/purchasing agent and the sales agent does not include detailed information demonstrating that these individuals are managers. Although the petitioner initially described the sales/purchasing agent as leading the purchasing team, the petitioner did not employ a "purchasing team" when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The majority of the sales/purchasing agent's initially described duties show this employee maintaining files, tracking purchasing activity, discussing goods or services with clients, and reviewing purchase requisitions. In the later version of the description of the purchasing agent's duties, this employee spends an unspecified amount of time identifying prospective clients and implementing marketing and sales activities and assisting the sales and marketing manager, as well as preparing quotes for potential clients, preparing purchase orders, contacting suppliers and the freight forwarding agency. Even when analyzing both disparate descriptions of this employee's job duties, the petitioner does not effectively describe this position as a management position. Likewise, a review of the sales agent's duties show this employee finding clients, contacting clients with quotes, processing correspondence, delivering sales presentations, among other operational tasks. The description of duties does not provide information sufficient to show that this individual is management.

As the petitioner has not provided a consistent detailed description of a subordinate level of managerial employees for the beneficiary to direct, the petitioner has not established the first criterion set out in the definition of executive capacity at 8 U.S.C. § 1101(a)(44)(B). In addition, the petitioner has not established that the beneficiary will be primarily directing the enterprise rather than performing the routine and necessary tasks to operate the enterprise. Referencing broadly-cast business objectives such as "[p]lanning, developing and implementing policies and procedures for company operations" and "[p]lanning and implementing new operating procedures to improve efficiency and reduce costs" overall and as those objectives relates to each employees' department is not sufficient to establish the beneficiary's actual role in the organization. For example, the petitioner does not include evidence that the beneficiary created an investment plan or developed policies and procedures for the sales and purchasing agents, or the sales/marketing manager. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In this matter, the petitioner indicated that the beneficiary analyzed financial reports and authorized payments, credit lines, special discounts, and payment of taxes, as well as monitored the collection of debts and directed product simplification and standardization. Although the petitioner noted that the beneficiary directed and supervised the collection of debts and directed product simplification

and standardization, the petitioner did not provide evidence of others engaged in these activities. The petitioner also claimed that the beneficiary directed the relationship with customs agencies and brokers for the export and import of foreign products, analyzed and approved contracts with major distributors and suppliers, and established schedules for sale delivery and purchasing projects. However, only in the second iteration of the purchase agent's duties does the petitioner vaguely refer to the agent negotiating prices with suppliers and contacting a freight forwarding agency to coordinate delivery and ensure custom requirements are met. Such general references are insufficient to establish who actually performs the work of negotiating contracts and establishing the relationship with customs agencies and brokers. In another example of the lack of information regarding the performance of duties, the petitioner stated that the beneficiary supports the sales department by attending negotiating meetings with clients regarding major projects but does not identify any negotiating duties for the sales agent. A review of the duties of the petitioner's employees when the petition was filed does not support the claim that the beneficiary would be relieved from performing routine tasks associated with buying and selling the petitioner's products and services, including acting in a first-line supervisory role, negotiating contracts with suppliers and distributors, collecting debts, and performing other financial duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava, Id.*

Accordingly, the record does not support counsel's assertion that the beneficiary will be engaged primarily in executive duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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).

To determine whether the beneficiary in this matter will primarily perform the duty of a personnel manager, we turn first to the petitioner's description of duties. Initially, other than indicating that the beneficiary's duties involve "[s]upervising, managing, training of U.S. employees (including hiring and firing)" and submitting an organizational chart, the petitioner did not describe the beneficiary's duties as primarily supervising personnel. In response to the director's RFE, the petitioner noted that the beneficiary spent five hours per week performing this duty. The petitioner emphasized that the beneficiary directly supervised the work of the sales/marketing manager and identified the sales/marketing manager position as managerial and professional.

However, as observed above, the description of duties for the sales/marketing manager is generic and describes a position that involves performing marketing duties. Based on the description, the sales/marketing manager appears to primarily perform the duties of the department. Although the petitioner indicates that the purchasing agent spends a few hours implementing marketing and sales activities and assisting the sales/marketing manager, this duty appears to be incidental to the purchasing agent's principal duties of preparing quotes and purchase orders, handling billing, contacting suppliers, and coordinating deliveries. Similarly, the sales agent, who may work with the sales/marketing manager, is primarily contacting clients, processing paperwork, and providing estimates. Neither description of duties for the employees depicted as subordinate to the sales/marketing manager is sufficiently detailed to demonstrate that they relieve the sales/marketing manager from performing the actual duties of the marketing/sales department. Moreover, the petitioner did not allocate any of the sales/marketing manager's duties to supervising or managing other employees. Accordingly, the record is insufficient to establish the sales/marketing manager position as one that is managerial. As this position does not demonstrate the sales/marketing manager is primarily a supervisor or manager, the beneficiary's position is not one that primarily supervises a managerial or supervisory employee.

Counsel also asserts that the sales/marketing manager position and the sales agent position are professional positions. He points to the sales/marketing manager's degree in human resource management and psychology and the sales agent's degree in psychology as evidence that these two employees are professionals. However, it is not the employee's degree that creates the professional position; rather it is the performance of the duties of a particular position that result in the classification of a position as professional. 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. In this matter, the descriptions of duties for the sales/marketing manager and the sales agent are so general that it is not possible to conclude that the performance of their duties requires an advanced degree. In other words, the petitioner has not established that a bachelor's degree is necessary to perform the work generally described. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Accordingly, the petitioner has not established that the beneficiary will primarily supervise individuals who hold professional positions. Moreover, we observe again, that the petitioner allocated only five hours per week of the beneficiary's duties to supervision; accordingly, the petitioner does not claim that this is the beneficiary's primary duty.

The record indicates, at most, that the beneficiary's subordinates perform the actual day-to-day tasks of marketing, selling, procuring, distributing, and exporting machinery. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*. Upon review of the totality of the record, including the petitioner's descriptions of duties for its four employees, the petitioner has not established the beneficiary is primarily a personnel manager.

Regarding counsel's assertion on appeal that the beneficiary is a function manager, we observe first counsel's emphatic rejection of the beneficiary's role as a function manager in response to the RFE. Nevertheless, we will briefly examine counsel's new way of describing the beneficiary's role within the organization. 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided the requisite evidence to establish that the beneficiary manages an essential function.

On appeal, counsel asserts that the beneficiary manages the essential function of ensuring the overall success of the business as well as overseeing and managing the essential function of the "company's marketing strategy, ensurety of supplying sources and maintaining and exploring procurement and supplying channels." However, other than these general statements, the petitioner has not articulated the essential function and has not described the proportion of the beneficiary's daily duties attributed to managing the essential function. Upon review of the beneficiary's duties, as discussed above, the beneficiary will spend some of his time as a first-line supervisor supervising the non-professional positions of the marketing/sales manager, the purchasing agent, and the sales agent. In addition, the petitioner fails to document what proportion of the remainder of the beneficiary's time would be spent on managerial functions and what proportion would be spent on non-managerial duties. This failure to document the time the beneficiary spends on specific duties is important because several of the beneficiary's daily tasks include operational tasks such as negotiating contracts with major suppliers and distributors, establishing schedules for sale delivery and purchasing projects, and establishing customs relationships with custom agencies and brokers. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Moreover, without more detailed descriptions of the daily duties of the petitioner's other three personnel, the petitioner has not provided probative evidence demonstrating that the beneficiary will be relieved from primarily performing the non-managerial tasks of operating the enterprise. Accordingly, the petitioner has not provided sufficient probative evidence establishing that the beneficiary will serve primarily as a function manager.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's

organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In that regard, we have considered the petitioner's reasonable needs and find in this matter that the petitioner has not provided probative evidence of employees who would perform the non-managerial or non-executive operations of the company. We have also considered the petitioner's growth in the past two months prior to filing the instant petition; however, upon review, the evidence does not support a determination that the petitioner has reached the point that it can employ the beneficiary in a predominately managerial or executive position.

In this matter, the petitioner failed to provide probative and consistent evidence establishing the beneficiary will perform primarily managerial or executive duties. Accordingly, the AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary will be employed in a bona fide manager or executive position for the U.S. business entity. For this reason, the appeal will be dismissed.

IV. Conclusion

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