



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **NOV 12 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg

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 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 New York corporation established in May 2009, states that it operates a textile trading company. The petitioner claims to be a subsidiary of [REDACTED] located in Seoul, Republic of Korea. The petitioner seeks to employ the beneficiary as its "executive textile merchandising manager" for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial 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 will be employed in a wholly executive capacity. Counsel submits a brief and duplicate copies of evidence that was previously provided.

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. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

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

In a letter submitted in support of the Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's proposed duties as follows:

Once he enters the U.S., [the beneficiary] will work in the position of Executive Merchandising Manager of [the petitioner] in charge of directing and governing our worldwide business operation relating to all merchandising functions. More particularly, [the beneficiary] is and will be responsible for the following duties:

- 1) responsible and in charge of the entire [company] worldwide merchandising operation by providing integrated textile mass customization sourcing solutions under the unique [company] business solutions interface;
- 2) formulate worldwide corporate operation vision in international business frame work in merchandising, adopting to the rapid changes in the global fashion and textile markets:
 - (a) formulate long-term global corporate plans of action, (b) set flexible and rapid pace operational policies for worldwide integral business operation to overcome current short comings, such as corporate work duplication, same market competition and fast interchange of market/technical information among the business affiliate companies, and (c) formulate emergency business operation plans to counter the sharp upwards fluctuation of inflation due to the world fluctuation in petroleum supply, availability in raw materials and degradation of purchase power of the US dollar;
- 3) set up corporate operation goals and operating policies for over all [company] global merchandising operations which include business activities engaged in South Korea, Hong Kong, China, Indonesia, India, the Philippines and the US (particularly with the US domestic boutique textile companies specializing in fast turnaround on highly complex production textile materials) and complementary to the worldwide corporate vision and international business frame work, which is set by our President
- 4) responsible for periodic updating and review of all merchandising operation goals and policies depending on the market shift in various global regions, such as retrofitting our operation policies with the expectation of next big insurgence in the apparel market boom in the US driven by lowering of pricing points of apparel goods, and operation policies to counter the slowing down of economy measures resulting from China reaching textile market plateau and/or change in our own business environment brought by internal corporate forces;
- 5) depending on the nature of each project, has the duty and liberty to assemble his top-tier team of experts and support staffs from our global network of business partners and as well as within our global corporate structure, managers, specialists or any other outside consultants in order to plan, executive, evaluate all merchandising programs, particularly our mass customization program;
- 6) formulate operational procedures to promote (a) establishment of strategic vendor relationships and negotiation of best value for the company by each of our global operations, and (b) safe, high reliability and low cost acquisition of textile materials and peripherals for our clients while addressing the availability of mass customization;
- 7) focus on improving business performance through excellence in Measurement, Analysis, Reporting and Knowledge Management Practices (MARKM) and will be point accountable for connecting corporate strategy with merchandising capability through business systems, processes and infrastructure;
- 8) resolve strategic issues by balancing between continuous improvement in merchandising

by way of continued expansion of offering our clients mass customization and fundamental transformation of our global business operations strategy and business flow structure; and

- 9) responsible for deploying proper funds to meet the future needs of merchandising programs of our company and that of our affiliates and to satisfy his staffing needs to satisfy a particular merchandising platform needs.

* * *

Clearly, the aforementioned duties are executive in nature, customarily associated with the position of Executive position related to an essential function of an international corporate business, particularly that of an executive in charge of merchandising operations. [The beneficiary] will be vested with wide latitude discretionary decision-making authority with respect to all issues relating to merchandising operational measures. [The beneficiary] will be the steward of our corporate operational future and everyone in the entire corporate structure has the obligation to follow him in all issues relating to merchandising operational vision and leadership while distributing daily business assignments to each local managers and supervisors. Clearly, his responsibilities are vested in creating a greater and more productive future for our company through his establishment of long term corporate merchandising operational goals, while fine tuning our existing daily operation policies relating to merchandising and to adjust to immediate daily changes in the market as well as the availabilities of our corporate personnel and business specific business and intellectual resources.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary in a "new position" of "executive merchandising manager," reporting to the directing manager/president of the company. The chart shows that the beneficiary would supervise one marketing assistant, [REDACTED]. The organizational chart goes on to list several name brands of apparel but does not provide any explanation as to their involvement in the company structure. The chart includes an accounting employee who reports to directing manager/president and no additional named employees.

The petitioner submitted its "five-year business plan," dated January 10, 2013. The personnel plan listed in the business plan states that the petitioner plans to employ up to 11 employees by December 31, 2016, to include a president, vice president, executive manager, director, and other skilled and un-skilled workers. The business plan also discusses the beneficiary's position at the U.S. company and described his duties as listed above.

The petitioner submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2012, indicating that it had four employees, [REDACTED] and paid \$50,375.58 in wages each quarter.

On January 30, 2013, the director issued a request for evidence (RFE) in which he instructed the petitioner to submit additional evidence to establish that the beneficiary will be employed in a primarily executive or managerial capacity.

In response to the RFE, the petitioner submitted a letter describing the beneficiary's job duties as listed above and added the following:

Our intended position offered is an Executive Position in nature. The title is Executive Merchandising Manager, the job description clearly shows that is an Executive position in charge of the essential function of merchandising for our corporation. In addition as a measure of clarity, the work "manager" in the titles of "Executive Textile Manager", carries the meaning that [the beneficiary] will be managing the Executive function of merchandising for [the petitioner] and [the foreign entity] and it does not indicate that he will be carrying out the merchandising activities himself.

* * *

[The beneficiary] will take the position of an Executive at [the petitioner]. [The beneficiary's] responsibility will be that of executive in nature. He will be performing executive job duties relating to making policies and execute plans of those policies that affect [the petitioner] in all areas of merchandising activities of the corporation engaged in world-wide business transactions spanning multiple continents. [The beneficiary] will be making policy decision on a wide array of business areas relating to merchandising. He will make policies regarding budgets of merchandising activities, policies regarding corporate merchandising schedules as to when certain events are to occur, and policies regarding which merchandising projects will be taken on and performed for clients. Once these policies are set up, workers of [the petitioner] and that of [the foreign entity] and other hand-picked professionals and outside consultants will implement these policies by executing plans of action to implement these policies into the daily operations of the company. All execution of plans will be performed by managers, specialists and employees of our companies in the US as well as in Korea supplemented by outside professional and temporary workers depending on the nature and extensiveness of projects.

As an Executive, [the beneficiary] will not be responsible for carrying out day to day merchandising activities of [the petitioner], but rather he will only be responsible for setting goals, policies, and limits in relation to the merchandising function of the company while all merchandising activities and timely carried out by various employees as stated above. Depending on the type of merchandising activity or project [the beneficiary] will at his discretion will handpick teams of experts and staff members, which will come from [redacted] global network of business partners and [redacted] global corporate structure; which would include managers, specialist or consultant, who may be outside the global network to help execute merchandising policies and projects associated with those policies.

* * *

In our case, there are altogether, 3 Managers who are in turn supported by 9 professional specialists and staff members in the Korean company and two professionals in the US as well as any other outside professionals and consultants who would actually carry out the policies

and goals set by [the beneficiary]. Therefore, it is clear that there are sufficient staff members to perform the day-to-day operations of our company in order to enable [the beneficiary] to be primarily employed in the executive function.

The petitioner further states that the nature of its business is specializing in providing sourcing for hard to find and highly specialized textile materials around the world for its clients; it is not involved in direct production of the textile materials. When asked how much of the beneficiary's time will be spent on managerial or executive duties, the petitioner stated that the beneficiary will spend 85% of his time on executive duties and 15% on non-executive duties, such as "communicating with the company in Korea to trouble shoot and advise of matters of business operations and contact high level company clients as our corporate liaison office in relations to merchandising matters." The petitioner reiterated the same breakdown of the beneficiary's duties listed above but failed to indicate the amount of time the beneficiary devotes to each specific task.

The petitioner submitted a new organizational chart for the U.S. company depicting the beneficiary as "executive textile merchandising manager," reporting to the directing manager/president of the company. The chart shows that the beneficiary would supervise one person in "accounting," [REDACTED] and a marketing/merchandising department with a marketing assistant, [REDACTED] and three "managers and staff to be determined." The petitioner noted on the chart that the three "manager and staff" positions in the marketing/merchandising department will be filled depending on the outcome and scope of merchandising projects.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity. In denying the petition, the director observed that the petitioner did not include a description of the duties of the employees who will be reporting to the beneficiary or performing the actual operational duties of the U.S. company. The director further observed that the petitioner asserts that the beneficiary will be making policy decisions relating to merchandising, but does not give any explanation of the types of specific positions that may be required to carry out these policies and goals, or the duties of such positions. The director found that while the petitioner listed a number of duties that would normally be required of or associated with a manager or executive, the record does not establish that the beneficiary will actually be carrying out these duties.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity to perform an executive function. Counsel refers to the position descriptions previously submitted and reiterates that the beneficiary is an executive in charge of the essential corporate function of merchandising. Counsel provides the following additional information about the beneficiary's position:

The Service has misconstrued the evidence submitted in response to its request for an organizational chart to conclude that it depicts managerial reporting when in fact it merely shows corporate hierarchy and that there are sufficient professional workers and clear plans to hire additional professional workers to undertake and carry out the operational policies and plans set by [the beneficiary]. Therefore, [the beneficiary] will NOT be required to carry out the policies and plans set by him, and he will be free from engagement in unauthorized duties.

...

* * *

As we have repeatedly articulated, [the beneficiary], in his capacity as the Executive Textile Merchandising Manager, will be an executive at our company and he will not be managing any personnel. Rather, he will be in charge of the merchandising function at [redacted] which is an essential corporate function. Any work necessary to carry out the policies and goals set by [the beneficiary] will occur by various professional employees in the U.S., as well as in Korea, plus third-party consultants who specialize in textile sourcing and other additional professionals necessary, as seen fit by [the beneficiary], for each project.

* * *

As the petitioner had submitted the information and documents in several different ways, it is impossible to know the specific positions required to carry out new policies until after [the beneficiary] actually conceptualizes, creates, and imposes merchandising policy. [The petitioner] cannot reasonably articulate the terms and requirements of such positions, or hire the necessary professionals to carry out those policies now, as they do not yet exist. . . .

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The AAO does not doubt that the beneficiary will have discretionary authority over the petitioner's merchandising activities. 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 his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages a business or a component of a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, counsel and the petitioner indicate that the beneficiary will be employed primarily as an executive, pursuant to section 101(a)(44)(B) of the Act, directing the management of a major function of the

organization. The petitioner described the beneficiary's proposed position in very broad terms, noting he will allocate 85% of his time to executive duties and 15% of his time to non-executive duties. The petitioner stated that the beneficiary will be responsible for the worldwide merchandising operation and formulate a worldwide corporate operation vision for merchandising. The petitioner also stated that the beneficiary will set up corporate operation goals and operating policies for the global merchandising operations and resolve strategic issues by balancing between continuous improvement in merchandising and the fundamental transformation of the petitioner's global business operations strategy and business flow structure. However, the petitioner has not identified how its organizational structure would accommodate the beneficiary's proposed position given that it has not explained what resources the beneficiary has at his disposal to carry out such duties.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner makes a declarative statement as to how the beneficiary allocates his time and then provides a list of duties to establish that he will be primarily an executive. In allocating 85% of the beneficiary's time to broad executive duties, the petitioner fails to quantify the time the beneficiary spends on each listed task. This failure of documentation is important because several of the beneficiary's daily tasks do not fall directly under traditional executive duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it 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). 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 actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The 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).

Counsel and the petitioner clearly indicate that the beneficiary will not be employed in a managerial capacity, and therefore, the petitioner has neither claimed nor established that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. The petitioner states that the beneficiary will be employed in an executive capacity directing the management of the textile merchandising function of the organization. While the petitioner has shown that it employs four individuals, their roles within the company remain unclear, as the petitioner has provided only their position titles.

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 or directing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

Here, the petitioner claims that the beneficiary will manage or direct the essential function of textile merchandising in his capacity as an executive. Although the petitioner provided a quasi-breakdown of the beneficiary's duties, the petitioner failed to demonstrate that the beneficiary will allocate at least 51% of his time to managing or directing the essential function of merchandising. The petitioner failed to provide any evidence that it is staffed sufficiently for the beneficiary to focus on the management or direction of the major function, rather than performing the daily operational activities required to carry out the tasks associated with said function. As such, when considered in totality with the petitioner's description of the beneficiary's job duties, it does not establish that the beneficiary will be directing an essential function of the U.S. company or that he would be relieved from performing non-qualifying duties associated with the function he is claimed to manage. While there is no specific requirement that an executive responsible for directing a function directly supervise or control a subordinate staff, the petitioner must establish that someone other than the beneficiary is available to carry out the non-qualifying activities associated with the function. The petitioner indicates that the beneficiary will have global responsibility for the function but has failed to identify who within the organization, in the U.S. or abroad, will be involved in merchandising activities.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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 the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The beneficiary in this matter has not been shown to be employed in a primarily executive capacity. All of the duties listed for the beneficiary involve the formulating or creating of operations and policies related to the textile merchandising function. Conclusory assertions regarding the beneficiary's employment capacity are

not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Although the petitioner provided some limited information on how the beneficiary will formulate those policies and operations, it remains unclear who will actually carry out the tasks associated with such policies or operations. The petitioner makes vague references to third-party consultants and existing staff in the United States and in Korea, stating that there are nine professional specialists and staff members in Korea and two in the United States, who will perform the day-to-day operations of the company in order for the beneficiary to primarily focus on his executive duties. However, the petitioner has failed to provide any evidence of the employees in Korea or the U.S., or contracts with third-party consultants, who will carry out such duties. The petitioner did not indicate which employees in the organizational chart will carry out these duties or provide position descriptions for any employees in Korea or the U.S. demonstrating that they will relieve the beneficiary from performing non-qualifying operational duties.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

At the time of filing, the petitioner was a three-and-a-half year old textile company. The company has four direct employees and seeks to employ the beneficiary as an executive. According to its IRS Forms 941 for the third and fourth quarters of 2012, the petitioner employed the directing manager/president, the accountant, and two other individuals not listed on the organizational chart.¹ The petitioner did not submit any position descriptions for the existing employees in the U.S. or the nine employees in Korea it claims will carry out the policies implemented by the beneficiary. The petitioner also did not provide any contracts or identify the number or types of third-party professionals or consultants that would perform the tasks necessary to perform the day-to-day duties of the merchandising function. Therefore, the petitioner did not submit evidence that it employed any staff members who would perform the actual day-to-day, non-executive operations of the company, and it has not established a reasonable need for an employee who performs primarily executive duties. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving as a function manager even though he was the sole employee. Counsel has furnished

¹ The IRS Forms 941 for the third and fourth quarters of 2012 list [REDACTED] who may be the same person listed on the organizational chart as the marketing assistant, [REDACTED]. However, the petitioner did not provide this clarification.

no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity or as a function manager. The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity. Accordingly, the appeal will be dismissed.

III. MANAGERIAL OR EXECUTIVE CAPACITY ABROAD

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv).

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign entity in June 2007. Where asked to describe the beneficiary's duties abroad for the 3 years preceding the filing of the petition, the petitioner stated:

1. [P]repare marketing proposals of our new line of textile products to increase sales and profitability and present our new product plan to our clients to (1) discuss the marketability of the new proposed product line, (2) reflect the clients' opinion on our new products, and (3) adjust color, design, and materials as requested by the client;
2. [M]eet with clients to discuss the issues arising from the new delivery of various kinds of textile product lines, such as polyester, rayon, acetate, cotton, linen, wool, and silk; and provide appropriate solution to resolve [sic] the issues based on the in-depth knowledge about the synthetic and natural textile;
3. [C]ommunicate and follow up with factories in Korean and oversea [sic] countries for new product specification and costs; and
4. [R]ecommend price of various textile based on the production cost and market price as appropriate.

In support of the petition, the petitioner submitted a letter describing the beneficiary's foreign employment as follows:

In June, 2007, [the beneficiary] joined [the foreign entity] in the position of General Manager, and is currently working for the company as a Team Manager. [The beneficiary] has been increasingly focusing on the clients in the US and is working with famous fashion companies As the Team Manager in charge of the US market, he regularly interfaces with purchasing departments of high fashion companies to resolve merchandise, quality, production timing issues and delivery date as well as to counsel them on the current textile patterns, colors, and materials on the fashion horizon. He is highly familiar with new textile product line, the need and requirement of each company of our clients with distinctive and peculiar taste, and new textiles in development of [the company's] global business. He also frequents numerous textile factories and textile sourcing businesses in South Korea, Hong

Kong, China, Indonesia, India, and the Philippines to forge new business partnerships, plan and schedule future business ventures, as well as to oversee and troubleshoot current on going business partnerships and ventures.

The petitioner submitted a "Certificate of Work Experience" from the foreign entity describing the beneficiary's duties abroad exactly as described on the Form I-129 above.

The petitioner did not submit any additional details about the beneficiary's duties abroad. The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as "general manager." According to the chart, the beneficiary supervises two individuals in "accounting," three individuals in "R&D quality assurance," and a marketing director who has several subordinates.

In response to the RFE, the petitioner states that, "[a]s a General Manager in charge of operation of Korea, [the beneficiary] has overall responsibility of policy decisions and overall operation and business activities in Korea." The petitioner submitted a letter from the foreign entity describing the beneficiary's employment abroad as follows:

As a manager at [the foreign entity], he has the discretion in making managerial decisions on a day to day basis as well as policy making decisions for operating measures including marketing and merchandising operations arising out of our company in Korea.

As the General Manager, [the beneficiary] is required to oversee Accounting, Marketing, and Research and Development Quality Assurance Divisions at our company. He also oversees the fabric mills in Korea/China, Garment factories in Asia, and Buying Offices and agents in Asia. In regards to his managerial duties typically included reviewing the work of the managers and employees in departments of Accounting, Marketing Director, and Research and Development Quality Assurance and giving them an approval on whether assignments given to them were performed properly and what additional tasks needed to be done regarding those assignments. He also created policies relating to merchandising and implemented these policies by the use of subordinates. He was also responsible for hiring, firing, promoting, and demoting managers and employees as situation regarding those actions came up in the course of his daily duties. [The beneficiary] also served as a mentor to all managers and employee to help them handle the challenges and pressures of working in a demanding work environment. [The beneficiary's] further responsibilities included brainstorming and planning by studying various information provided to him from managers and employees regarding opportunities and risks related to current and future projects. . . . Further [the beneficiary] is involved in making plans, budgets, and cooperatively working with managers and employees in order to meet current goals and reach future ones too.

[The beneficiary] was often the highest ranking officer at our company in light of the fact that our President . . . was in overseas [*sic*], leaving majority of daily operations control as well as confirming liberal policy decision making authority to [the beneficiary].

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

The petitioner has provided inconsistent information regarding the beneficiary's job title and duties with the foreign entity during the three years preceding the filing of the petition.

Here, at the time of filing, the petitioner provided a brief position description on the Form I-129 and the foreign entity provided the same position description in its letter for the beneficiary's employment abroad, indicating that the beneficiary performed specialized marketing and customer service duties that, as described, do not fall within the definitions of managerial or executive capacity. The petitioner and foreign entity stated that the beneficiary's current role is that of "team manager," but did not describe any managerial or supervisory duties associated with the role. However, in its initial letter of support, the petitioner provided a completely different description of the beneficiary's position abroad, indicating that he was the second highest ranking employee at the foreign entity and performed primarily managerial duties. In response to the RFE, the foreign entity provided a new position description indicating that the beneficiary's position abroad was that of "general manager" involved in overseeing the marketing, accounting, and research and development departments, making policy decisions, creating policies relating to merchandising, and hiring and firing subordinate employees.

In sum, the petitioner's descriptions of the beneficiary's current position abroad have evolved throughout the record. Absent a detailed and consistent description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates his time to those specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 591-92.

As the petitioner has failed to provide a consistent description of the beneficiary's job title and functions within the foreign entity, it has failed to meet its burden to establish that the beneficiary performed primarily managerial or executive duties. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility

for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.