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



U.S. Citizenship
and Immigration
Services

DATE: **NOV 18 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

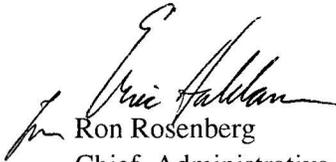
SELF REPRESENTED

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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant visa petition seeking to extend the beneficiary's employment as an L-1A intracompany transferee employed pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), U.S.C. § 1101(a)(15)(L). The petitioner states that it is engaged in the business of scrap metal, textile, and food item import and export, wholesale trade, and marketing. The Form I-129, Petition for Nonimmigrant Worker, indicates that the petitioner has three employees and a gross annual income of \$94,054. The petitioner claims to be a branch office of [REDACTED] in Pakistan and seeks to extend the beneficiary's employment in the position of marketing and sales manager for a period of two years.

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

The petitioner subsequently filed a Form I-290B, Notice of Appeal or Motion. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner provides an expanded description of the beneficiary's job duties and asserts that such duties fall within the statutory definition of 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 three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

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

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 18, 2012 seeking to extend the beneficiary's employment as its marketing and sales manager. The petitioner indicated on the petition that it was established to engage in marketing and the importation, exportation, and wholesale trade of scrap and food items. The petitioner also indicated that the company was established in 2007 and has three employees.

Along with the petition, the petitioner provided an extensive list of the beneficiary's proposed duties in the United States divided into the following categories: duties and responsibilities for the past three years; general duties; duties and responsibilities in the start-up of U.S. operations; additional responsibilities after one year in U.S. business; overall responsibilities; managerial tasks and duties; administration tasks and duties; MIS tasks and duties; and inventory control and distribution tasks and duties.

The petitioner provided its organizational chart, which indicates that the beneficiary holds the title of "Manager Marketing and Sales (Michigan and New York)" and reports directly to the head of the organization, the Chief Executive Pakistan. The chart also indicates that the beneficiary has three subordinate employees: a Michigan marketing officer, a Michigan office secretary, and a New York marketing officer. The petitioner stated that the office secretary "provides administrative support to the Manager Marketing & Sales and is responsible for accounting and official activities," and the marketing officer "provides sales and marketing support to the Manager Marketing & Sales and is responsible for operational and business activities of the company."

The office secretary's essential job functions include: maintaining office filing systems and assisting with archiving records; processing incoming and outgoing mail as assigned and producing monthly reports from postage equipment; preparing copying, filing, and distributing correspondence, data, and reports; greeting business office visitors, answering telephones, and scheduling appointments; preparing purchase orders, check requests, and travel forms as directed; tracking goods or services ordered; writing letters and memos; maintaining daily calendar and task lists; creating and maintaining spreadsheets and databases; and entering data into college management information systems.

The marketing officer's essential job functions include: archiving relevant marketing material; assist with the implementation of the marketing strategy; originating and planning campaigns in conjunction with marketing; developing promotional opportunities and ideas; reporting on campaigns; meeting with clients and collecting information for order processing; assisting with the development and implementation of the company's business development objectives; providing writing and proof-reading skills; assisting in the commissioning and delivery of marketing material; supplying budget information to the marketing manager; maintaining relationships with suppliers and clients; and attending performances and other events as required.

The petitioner submitted copies of its federal and Michigan employer tax returns which indicated that it employed between zero and three full-time or part-time employees during the first three quarters of 2012 and three employees, including the beneficiary, as of September 2012.

On December 28, 2012, the director issued a Request for Evidence, ("RFE"), instructing the petitioner to provide additional evidence to establish that the beneficiary's employment in the United States would be primarily managerial or executive in nature. Specifically, the director requested: (1) a more detailed

description of the beneficiary's day-to-day duties including the percentage of time allocated to managerial or executive duties; (2) a line and block organization chart for the U.S. entity showing the company's current organizational hierarchy and staffing levels; (3) the names, job titles, summary of duties, educational level, and salary for all employees; and (4) a copy of the state quarterly wage reports for the third quarter of 2012 that were accepted by the states of New York and Michigan.

In response to the RFE the petitioner submitted an organization chart identifying the beneficiary's subordinates as [REDACTED] Michigan marketing officer, and [REDACTED] Michigan office secretary. The chart includes a subordinate marketing officer position in the New York office, but indicates that the position is not filled. The chart indicates that the office secretary and the marketing officer receive a salary of \$290 per week for 40 hours of employment. The petitioner also provided employer quarterly tax returns indicating that the petitioner had three employees, including the beneficiary, in the fourth quarter of 2012.

The petitioner resubmitted the position descriptions for the beneficiary's subordinate employees and provided a further description of the beneficiary's duties. The description of the beneficiary's position provided in response to the RFE included four pages of duties, approximately 125 duties in total, divided into five categories. The duty description was included, in large part, in the director's decision and will not be repeated here. Briefly, the petitioner indicated that the beneficiary would allocate his time as follows: managerial duties (20%); operational duties (35%); administration and financial duties (25%); inventory control and distribution duties (10%); and MIS tasks & duties (10%).

The petitioner's response to the RFE also included its IRS Forms 941, Employer's Quarterly Federal Tax Return, and Michigan Employer Quarterly Wage/Tax Reports for the third and fourth quarters of 2012. The documents indicate that the company had between two and three employees during the third and fourth quarters and paid \$13,800 in wages during the third quarter and \$16,200 during the fourth quarter of 2012. The petitioner's IRS Form W-3, Transmittal of Wage and Tax Statements, indicates that it paid a total of \$49,350 in wages during 2012 to three employees.

The director ultimately denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive position. The director specifically found that the job description provided suggests that the beneficiary would primarily perform the tasks necessary to produce a product or provide a service. The director also noted that the organization chart did not demonstrate a personnel structure sufficient to support the employment of the beneficiary in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the previously described duties are sufficient to establish the beneficiary's employment in a primarily managerial or executive capacity. The petitioner also provides an additional description of the beneficiary's duties with the following percentages of time:

General Corporate Planning (45%): Directs the entire U.S. entity. He establishes corporate objectives and the policies of our business. He evaluates and analyzes financial statements, economic and business conditions, evaluates the potential strengths and weaknesses, forecasts and plans the future business activities, sets forth goals for the progress, growth and expansion. [The beneficiary] is the ultimate decision maker in the foreign entity with the instruction of chief executive

General Administration (20%): the beneficiary must use his skills and acumen in making judgments on how the business will operate, optimizing the performance of staffing implementing objectives and other discretionary matters. He tailors operation policies involving matters such as finances and accounting ensuring government compliance, growth strategy and other related matters, and ensuring smooth and efficient activities.

Business Development (20%): In promoting relationships with U.S. and foreign business, he advances the sales of scrap, used heavy machinery, and compressor scrap. [The beneficiary] ensures the expansion of sales, and secure progressively increasing development of business and thereby net revenues. He focuses on exports as evidenced by the success [*sic*] export of used scrap compressor to Pakistan and other international buyers.

The success of business depends on good quality used compressor and scrap in stock. Therefore, trustworthy suppliers in Pakistan are important. [The beneficiary] works hard to keep good relationships [with] suppliers in USA, Oman, and Pakistan. He believes that good relationship with every company helps ensure a strong foundation, and it is vital for expansion.

Marketing-Sales (15%): [The beneficiary] modifies the marketing policy consistently. He is always aware of selling prices offered by competitors. He has surveyed present and potential new markets, assessed the requirements of buyers, evaluated and analyzed the market potential in different states, as well as with specific buyer and purchasing groups. With this data, he modifies the marketing strategy.

B. Analysis

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.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner provided an extensive description of the beneficiary's job duties in response to the director's RFE. The petitioner indicated that the beneficiary spends 20% of his time performing managerial duties while the majority of the beneficiary's time is spent on operational duties, administration and financial duties, inventory control and distribution, and MIS tasks and duties. The definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, the petitioner claims that only 20% of the beneficiary's time is spent on managerial duties.

It is noted that some of the beneficiary's "operational" and "administrative and financial" duties appear to potentially qualify as managerial; however, the broad descriptions are insufficient to establish that the beneficiary would perform primarily managerial duties. For example, the petitioner states that the beneficiary is in charge of all marketing and sales activities; provides the overall direction and management of the US organization; ensures the organization remains profitable; manages risks to the organization; and represents the organization. These broadly defined responsibilities may potentially qualify, or include duties that qualify, as managerial or executive in nature. However, the petitioner did not define any specific tasks associated with these general responsibilities, nor did it include them among the beneficiary's stated "managerial" duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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. *Id.* at 1108.

It is also noted that while the petitioner claims the beneficiary spends 20% of his time performing managerial duties; the petitioner's list of managerial duties include several duties that are not typically managerial or executive in nature. For example, the petitioner's list of managerial duties includes: developing customer relations; marketing and communication; seeking out and targeting new customers and new sales opportunities; initiating an action plan to approach and secure new business for the company; meeting marketing and sales objectives; researching, identifying, and capitalizing on market opportunities; gathering information on products and the cost of supplying them; providing information to clients about the latest market situation; and issuing LOI's to clients; and contracting and negotiating with seller about product quality, price, and availability. These duties suggest the beneficiary's performance of the company's day-to-day marketing activities, rather than his managerial capacity. Again, the actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

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 has failed to establish that the beneficiary's duties are primarily managerial or executive in nature. The petitioner provided a single percentage to areas of responsibility encompassing non-qualifying and potentially qualifying duties. For example, the petitioner states that the beneficiary spends 25% of his time performing some 55 administrative and financial duties. Without a

further breakdown of the amount of time the beneficiary spends on specific duties, it is impossible to determine how the beneficiary spends the majority of his time. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

On appeal, the petitioner provides a new description of the beneficiary's duties allotting percentages to different categories of responsibilities and duties including: general corporate planning, general administration, business development, and marketing-sales. The petitioner has offered no explanation for these changes in the beneficiary's primary areas of responsibility and does not acknowledge that it previously allocated 100% of the beneficiary's time to the 125 duties provided in response to the RFE. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Accordingly, this analysis will be based upon the information that was provided at the time of filing and in response to the request for evidence.

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.

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). Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve the supervision of employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

At the time of filing, the petitioner stated it had three employees including the beneficiary. In support of the petition and in response to the RFE, the petitioner provided an organization chart and position descriptions for the office secretary and marketing officer. The job descriptions submitted by the petitioner do not

establish that either of the beneficiary's subordinates are professional-level employees.¹ The organization chart submitted with the petition and in response to the RFE indicates that the office secretary and marketing officer are subordinate to the beneficiary. The organization chart and the position descriptions provided for the beneficiary's subordinates do not show that either of the subordinate employees have managerial or supervisory authority over a clearly defined department or function of the petitioner or that the beneficiary's subordinates supervise or manage other employees. Thus, the petitioner has not shown that the beneficiary supervises and controls supervisory, professional, or managerial staff, as required by section 101(a)(44)(A)(ii) of the Act.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties, is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r. 1988).

¹ In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is required for either of the positions subordinate to the beneficiary's.

In the present matter, the petitioner has not established that it will employ the beneficiary as a function manager. The petitioner has not identified or articulated an essential function that the beneficiary manages. Although the beneficiary's position title indicates that he manages sales and marketing, the organization chart does not indicate that the petitioner has any other departments responsible for the non-marketing tasks associated with the ongoing operation of the U.S. company. Rather, the beneficiary's position description indicates that he performs administrative and financial, operational, inventory control and distribution, and MIS tasks and duties in addition to sales and marketing functions. A petitioner cannot satisfy the regulatory requirements by making a blanket claim that the beneficiary is responsible for management of all functions of the business and therefore qualifies as a function manager.

The description of the beneficiary's duties includes: marketing and communication; issuing LOI's to clients; meeting with clients and suppliers; negotiating contracts; customs and export procedures; keeping good records; managing and controlling office expenses; administrate finance and human resources; shipping and freight company documents; managing the company's inventory; keeping records of the product; stock report preparation; managing product delivery; forecasting requirements; preparing a budget; scheduling expenditures; analyzing variances; identifying marketing opportunities; researching, identifying, and capitalizing on market opportunities; improving product packaging; coordinating new product development ; and gathering information on products and working out the cost of supplying them. These duties indicate the beneficiary's involvement in providing the company's services. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act; *see also Brazil Quality Stones, Inc. v. Chertoff*, 531, F.3d 1063, 1069-70 (9th Cir. 2008). 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. As mentioned above, 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).

Further, the position descriptions for the subordinate marketing officer and office secretary fail to demonstrate that these employees relieve the beneficiary from performing primarily non-managerial duties. Many of the beneficiary's described duties overlap with those of his subordinate employees. Other duties, such as "attend performances" and "enter data into college management system," are not clearly functions related to the petitioner's described scrap metal trading business. Without a clear description of the duties performed by the beneficiary's subordinates and an explanation of how the beneficiary and his subordinates divide overlapping duties and responsibilities, the record fails to establish that the subordinate employees perform the majority of the company's non-managerial functions.

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 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 petitioner has not demonstrated that the beneficiary would spend the majority of his time focused on the broad goals of the organization. The petitioner has not established that it has the subordinate staff in place to relieve the beneficiary from many day-to-day non-managerial tasks associated with operating the business. Instead, many of the tasks attributed to the beneficiary, as discussed above, indicate that he is involved in the day-to-day operations of the company. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 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").

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, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F. 2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the

petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner indicates that it plans to hire additional managers and employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

III. Qualifying Relationship

Beyond the decision of the director, the evidence on record does not establish that the petitioner has a qualifying relationship with the beneficiary's former foreign employer.

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

- (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
 - (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate, or subsidiary specified in paragraph (l)(1)(ii) of this section;
 - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

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

- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

A. Facts

The petitioner indicates on Form I-129 that it is a branch of [REDACTED] and that the foreign entity owns 100% of the petitioner's stock.

In support of the petition, the petitioner provided a certificate from the Michigan Department of Licensing and Regulatory Affairs certifying that the petitioner is a Pakistan corporation authorized on August 2, 2007 to transact business in the state of Michigan. The petitioner also provided a 2011 Foreign Corporation Information Update filed with the Michigan Department of Licensing and Regulatory Affairs on March 19, 2012 stating that the petitioner is engaged in "local trade, convenience store business, gas station, [and] import and export" activities. The information update names [REDACTED] as the company's president and names the beneficiary as the company's director.

The petitioner provided an IRS Form 1120S, U.S. Corporation Income Tax Return for an S Corporation, for 2010. The Form 1120 is incomplete and does not contain income, deduction, or tax and payment information. The form indicates that the company was incorporated August 2, 2007 and has three shareholders.

The petitioner also provided an IRS Form 1120, U.S. Corporation Income Tax Return, for 2011 indicating that the petitioner is a convenience store and import and export business. The 2011 Form 1120 at Schedule

K indicates that the corporation is a subsidiary in an affiliated group or a parent-subsidary controlled group. Schedule K also states that no foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax exempt organization owns directly 20% or more, or owns, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote. Instead the document indicates that an individual or estate owns directly 20% or more, or owns directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote. The Form 1120 further indicates the petitioner is owned by two shareholders identified as the beneficiary (45%) and (55%).

On appeal, the petitioner submits its IRS Form 1120, U.S. Corporation Income Tax Return, for 2012 indicating that the company is a scrap trading business with gross sales of \$566,690. The Form 1120 indicates at Schedule K that no foreign or domestic corporation, partnership, or individual owns directly 20% or more or indirectly 50% or more of the total voting power of all classes of the corporation's stock entitled to vote. The attached Form 1125-E, Compensation of Officers, indicates that the petitioner is owned by the beneficiary (45%) and (55%).

With respect to the foreign entity, the petitioner submitted import and export registration certificates from the government of Pakistan which identify the beneficiary as the proprietor of the company.

The petitioner provided a letter from dated July 19, 2012 stating that the petitioner is a Pakistani partnership business with a branch office in the USA. The certificate states that it "is issued as per the request of our client without any risk and guarantee at our part." An auditor's report from names and the beneficiary as partners of the foreign entity as of June 30, 2012 holding 55% and 45% of the company's stock, respectively.

B. Analysis

Upon review, the evidence fails to establish that the petitioner has a qualifying relationship with the foreign entity.

In visa petitions requesting an extension of a beneficiary's L-1A status after the opening of a new office, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) explicitly requires the petitioner to submit "[e]vidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section." The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the

direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, *supra* at 649-50. Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

Although the petitioner submitted documents from the State of Michigan Department of Licensing and Regulatory Affairs indicating that the petitioner, a corporation from Pakistan, was authorized to conduct business in the state on August 2, 2007; the record contains inconsistent information regarding the ownership and control of the petitioner and the foreign entity.

The petitioner did not provide any IRS Forms 1120-F, U.S. Income Tax Return of a Foreign Corporation, used by U.S. branches of foreign entities to file U.S. income taxes. Instead the petitioner submitted two tax IRS Forms 1120, U.S. Corporation Income Tax Return, for tax years 2011 and 2012 and an IRS Form 1120S for 2010. As stated in its title, Form 1120 is used by U.S. Corporations to file federal income taxes. An entity incorporated in the United States will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). IRS Form 1120S, U.S. Income Tax Return for an S Corporation, is used by S corporations. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See Internal Revenue Code*, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part.

Further, the petitioner has not explained the inconsistency in the number of shareholders on the tax documents provided. While both tax documents indicate the U.S. business is owned by shareholders rather than a branch of the foreign entity; the 2011 Form 1120 indicates that the petitioner is owned by two individual shareholders whereas the 2010 Form 1120S indicates that the company has three shareholders. The petitioner has not provided any explanation or evidence to reconcile the differences in the tax returns.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof, may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The petitioner has also failed to provide consistent evidence of the ownership and control of the foreign entity. The petitioner provided an audit report for the foreign entity to indicate the foreign entity was owned by the beneficiary and [REDACTED]. However, the petitioner also submitted two import/export certificates from the government of Pakistan indicating that the foreign entity was owned by the beneficiary. The certificates did not indicate that the company was a partnership or identify [REDACTED] as partner/director of the company. The petitioner has not submitted tax documents, articles of incorporation, or any other objective evidence to reconcile the inconsistencies in the record or show the ownership and control of the foreign entity. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, there is insufficient evidence to establish that the foreign company is actively engaged in the regular, systematic, and continuous provision of goods or services as an employer in Pakistan. Therefore, the petitioner has not established that the foreign company is a qualifying organization as defined by the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

The petitioner also failed to demonstrate that it maintains sufficient physical premises in order to establish that it is doing business in the United States. 8 C.F.R. § 214.2(l)(1)(ii)(G) requires an organization to be "doing business" in order to be considered a "qualifying organization." 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

The AAO observes that the "physical premises" requirement applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). However, a petitioner is not absolved of the requirement to maintain sufficient physical premises simply because it has been in existence for more than one year. In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

The petitioner provided a lease for space in a New York convenience store; however, on appeal the petitioner claims that the company has not yet received authorization to conduct business in the state of New York. The lease agreement provided for the Michigan address expressly states that the premises are residential and are only to be used for residential purposes. The petitioner has not provided evidence that it maintained sufficient physical premises to conduct business in a regular, systematic, and continuous manner for the previous year.

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, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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.