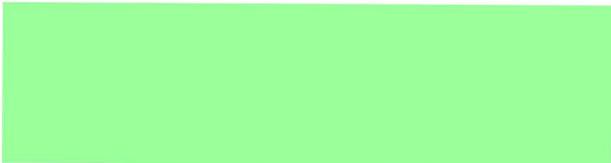
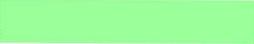




U.S. Citizenship
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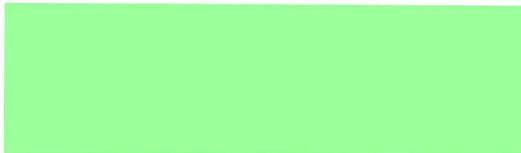


DATE: OCT 24 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

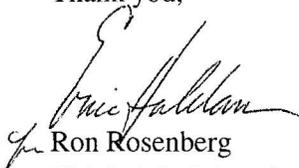


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a 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 California corporation, states that it engages in promoting educational exchange between the United States and China. The petitioner claims to be a subsidiary of [REDACTED] located in Beijing, China. The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his employment as chief executive officer for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends "the field director has overlooked the fact that the petitioner is a start-up company with less than one full year of operation" and that the director "unfairly put requirements that probably only a fully developed company can meet." Counsel for the petitioner submits a brief and additional evidence on appeal.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

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

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

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

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

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

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

II. THE ISSUE ON APPEAL

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 7, 2013. The petitioner stated on the Form I-129 that the beneficiary will be employed as "chief executive officer" and indicated that the company had four employees and a gross annual income of \$168,952.00 as of the date of filing.

In an addendum to the Form I-129, the petitioner described the beneficiary's proposed duties as follows:

1. Formulate major operational policies of the company regarding the U.S. markets.
2. Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions in U.S. market.
3. Hiring personals [*sic*] including managers at all levels in the U.S. company.

4. Direct and coordinate the formulation of financial programs to provide funding for new or continuing operations and projects, to maximize returns on investments.

In its letter of support, the petitioner indicated that the beneficiary will be employed in an executive capacity and described his duties during the petitioner's first year as a new office as follows:

He has been responsible for making all important operations decisions, recruiting employees and assigning them their proper jobs and duties. He represents the company at various conferences such as the well-known China-US Business Summit, universities and all educational institutions to seek more business opportunities for both [the foreign entity] and its U.S. subsidiary [the petitioner]. He has signed as representative of his company numerous contracts with the U.S. educational institutes He has designed the structure of the business operation and the future plan for his company. Although at this time, there are only four employees without separate departments. But prototype of departments has been established and gradually he will supervise approximately 4 managers of the company who in turn will be directly managing their respective divisions.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary as CEO supervising the following individuals:



- Receptionist, Secretary
- Accountant, Office Managing, Clients Arrangement
- Contact with Education Organization, Take charge of WAT Project.
- Consulting.
- Marketing, Consulting, Research

The organizational chart also describes the beneficiary's CEO position as "Manage the company. Marketing. Sales and Consulting."

The petitioner submitted copies of its Internal Revenue Service (IRS) Forms 941, Employer's Quarterly Federal Tax Return, and its California Form DE-9 quarterly wage reports, for the third and fourth quarters of 2012. The Forms DE-9 state that the petitioner had three employees - [redacted] and the beneficiary - at the end of the third quarter, and five employees - [redacted] and the beneficiary - in the fourth quarter of 2012. The petitioner submitted 2012 Forms W-2, Wage and Tax Statement, for the beneficiary showing \$33,000 in wages, tips, and other compensation; for [redacted] showing \$2,000 in wages, tips, and other compensation; for [redacted] showing \$7,500 in wages, tips, and other compensation; for [redacted] showing \$6,000 in wages, tips, and other compensation; and for Ji Guo showing \$1,000 in wages, tips, and other compensation.

On January 16, 2013, the director issued a request for additional evidence ("RFE") in which she instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties, including a percentage of time required to perform the duties of the managerial or executive position; and (2) a more detailed organizational chart, listing all employees by name and job title, including a summary of duties, educational level, and salary for each employee.

In response, the petitioner submitted a document describing the beneficiary's duties as follows:

Description of [the beneficiary's] duties in the U.S. company:

1. Management of U.S. company departments (25% of total working time)
 - In charge of departments meetings, job assignments
 - Recruiting new employees and supervising their trainings
 - Supervising and monitoring the developments of all work and assignments in each department and evaluating the performance of the employees
 - Handling all correspondence with government departments and tax section
 - Handling correspondence with financial section and legal representative
2. Marketing (40% of total working time)
 - Contacting all kinds of educational institution, seeking cooperation and developing new educational resources with them
 - Designing new educational tours (i.e. summer camps, and educational forums)
 - Promoting the image and popularity of the company
 - Organizing exhibitions to attract more clients
3. Sales and consulting (35% of total time)
 - Offering consulting to VIP clients, introducing to them the company [*sic*] programs and signing contracts with them
 - Supervising the department sales people for their dealing with ordinary clients' consulting and contract signing
 - Supervising employees in their handling of after-contract services and matters

The petitioner's response included its IRS Form 1120, U.S. Corporation Income Tax Return for 2012, which indicated that it paid \$33,000 in compensation of officers and \$16,500 in salaries and wages.

The petitioner submitted a new organizational chart for the U.S. company listing the beneficiary as CEO supervising the following departments: front desk, financial and administration department, sales and consulting department, and marketing department. The organizational chart included the following information:

[The beneficiary]

Job Title: CEO

Education: Master Degree

Duties: Manage the Company, Marketing, Sales and Consulting.

Salary: \$3000/Month

Front Desk

Job Title: Receptionist/Secretary

Duties: Answer phones, Paper works [*sic*], reception

Education: College

Salary: \$1000/Month

Financial & Administration Dept.

Job Title: Supervisor

Duties: Accountant, Office Managing Clients Arrangement

Education: College

Salary: \$1500/Month

Sales & Consulting Dept.

Job Title: Supervisor

Duties: Contact with Education Organizations, Take charge of WAT Project, Customer Consulting.

Education: Master Degree

Salary: \$1500/Month

Marketing Dept.

Job Title: Research Assistant

Duties: Marketing, Education Research

Education: Bachelor's Degree

Salary: \$1000/Month

On April 9, 2013, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director found that the petitioner does not have an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. The director observed that the evidence provided does not establish that a bachelor's degree or

higher is actually required for any of the positions subordinate to the beneficiary, and, as such, the beneficiary is not supervising professional employees. The director further found that it appears the beneficiary is primarily involved in the performance of routine operational activities of the entity rather than in the management of the business.

On appeal, counsel for the petitioner contends that "[t]he beneficiary has been acting at a chief executive and managerial level for all the major business of the company despite the fact he may inevitably handle some first-line managerial job due *[sic]* to the nature of the company being still in its start-up phase[.]" Counsel also contends that the "[f]ield director ignored the fact that at least two employees who have been doing jobs that need their professional background and skills and who have received high academic degrees needed for the jobs[.]" Counsel restates the list of duties provided in response to the RFE for the beneficiary and adds the following:

The above list of duties clearly show that the majority of the beneficiary's work such as in charge of meeting, supervising all developments of all works, organizing exhibitions are all the work handled by the head of a company. Even in terms of sales and consulting which may normally be handled by first-line employees, the beneficiary only offers consulting to the company's VIP clients. For ordinary clients, he "supervises" his employees for their dealing with these clients. Overall, what the beneficiary has done all indeed suggest executive and managerial capacity

Nevertheless, even if we do agree with the field director who found some "first-line supervisory" job from the list, we must keep in mind that [the petitioner] is a brand new company with about only one year old and everything must start from zero. It is just inevitable that the beneficiary must take care of some day-to-day business operations such as hiring, contacting institutes and promoting the image and popularity of the company. But one must understand it is only temporary. [The petitioner] is developing and growing nicely considering the limited time. . . .

Counsel goes on to contend that the beneficiary's subordinates are professional employees by stating and emphasizes that two of the employees will supervise their own subordinates in the future. The petitioner submits copies of degree certificates for [redacted] along with a document listing their courses studied and an explanation of the beneficiary's rationale for selecting them for their respective positions.

The petitioner also submits a new "proposed" organizational chart for the U.S. company adding subordinates who would report to existing employees and changing [redacted] title from "research assistant" (listed in response to the RFE) to "supervisor." According to the proposed chart, the financial and administration department supervisor will supervise a bank teller and a driver; the sales and consulting department supervisor will supervise two consultants and a client contractor; and the marketing department supervisor (previously referred to as "research assistant") will supervise a market developer and a research assistant.

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

As discussed above, the petitioner has requested the extension of a petition that involved a new office. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). In the instant matter, counsel for the petitioner contends that the U.S. company is still in a start-up phase and that the director placed an undue emphasis on the amount of time the beneficiary devotes to non-qualifying duties. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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 petitioner has established that the beneficiary will have the appropriate level of authority over the petitioner's business as its partial owner and chief executive officer. 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 owns or manages 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").

At the time of filing the petition, the petitioner stated that the beneficiary was coming to the United States to fill an executive position. On appeal, counsel for the petitioner describes the beneficiary's position as both executive and managerial. A beneficiary may not claim employment as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. At a minimum, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive capacity or each of the four criteria set forth in the statutory definition for managerial capacity.

In the instant matter, the petitioner characterized the beneficiary's role as chief executive officer, noting he will devote 25% of his time to the "management of U.S. company departments," 40% of his time to marketing, and 35% of his time to sales and consulting. The petitioner listed a few of the beneficiary's duties under each larger task, such as, "in charge of departments meetings, job assignments"; "supervising and monitoring the developments of all work and assignments in each department and evaluating the performance of the employees"; "contacting all kinds of educational institution, seeking cooperation and developing new educational resources with them"; "designing new educational tours (i.e. summer camps, and educational forums)"; "promoting the image and popularity of the company"; "organizing exhibitions to attract more clients"; "offering consulting to VIP clients"; "supervising the department sales people for their dealing with ordinary clients' consulting and contract signing"; and "supervising employees in their handling of after-contract services and matters." While these tasks are undoubtedly necessary in order to continue operations, the petitioner has not indicated how the majority of these duties qualify as managerial or executive in nature. None of the duties in the marketing category, accounting for 40% of the beneficiary's time, are managerial or executive, nor are duties such as "handling correspondence" and offering consulting services to clients.

Overall, the record reflects that the beneficiary would more likely than not allocate more than 50% of his time to duties that are non-qualifying. The actual duties themselves 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). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The duties listed by the petitioner at the time of filing are different from those presented in response to the RFE and again on appeal. The petitioner contends that the beneficiary will be an executive at the U.S.

company; however, the percentage breakdown of the time the beneficiary devotes to the listed duties does not demonstrate that he will perform any executive, or managerial, duties. Rather, it appears that the beneficiary will function as a first-line supervisor of non-professional employees and is directly involved in all functional areas of the business and the duties performed by his subordinates, as well as a number of administrative areas. Although the petitioner provided a very brief list of duties for each of the beneficiary's subordinates, it has not demonstrated that those subordinates will relieve the beneficiary from performing non-qualifying operational duties, such as sales, marketing, and consulting.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Further, on appeal, the petitioner submits a "proposed" organizational chart indicating that one employee will be promoted to supervisor and that additional employees will be hired as subordinates to existing department supervisors. As those employees have not yet been hired and the organizational chart is proposed, it cannot be considered in this proceeding. 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).

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).

Here, the organizational chart submitted at the time of filing shows that the beneficiary directly supervises four individuals, none of which had a "supervisor" position title. In response to the RFE, the petitioner

submitted a new organizational chart adding departments and titles to each of the positions. The brief position descriptions for these subordinates include tasks that are not indicative of a managerial, supervisory, or otherwise professional position. Although two of the beneficiary's subordinates have advanced degrees, the petitioner has not established that any of the beneficiary's subordinates require a bachelor's degree to perform their duties, such that they could be classified as professionals. 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, in fact, established that a bachelor's degree in a specific field of study is actually necessary to perform the duties assigned to the beneficiary's claimed professional subordinates. Nor has the petitioner shown that any of the beneficiary's subordinates supervise subordinate staff members, or manage a clearly defined department or function of the petitioner, such that he or she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted an organizational chart depicting the beneficiary as CEO supervising a front desk receptionist/secretary, financial and administration department supervisor, sales and consulting department supervisor, and a marketing department research associate, the petitioner's original organizational chart and letter did not identify "supervisor" positions; the petitioner specifically stated that "there are only four employees without separate departments." The petitioner has not provided credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Further, even if the petitioner had established that one or more of the beneficiary's subordinates is a professional, the petitioner has not established that the beneficiary was engaged primarily in supervisory duties at the time the petition was filed. The petitioner indicated that more than half of the beneficiary's time would be allocated to marketing, sales, consulting and administrative work.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." 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 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. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate he manages an essential function of the U.S. company.

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.

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.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, counsel for the petitioner asserts that the beneficiary is an executive and a manager; however, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, none of the beneficiary's listed duties, presented in response to the RFE and again on appeal, include duties that correspond to the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. The petitioner has not established that the beneficiary's subordinate employees relieve him from performing non-qualifying operational duties. The job duties provided for the beneficiary and his subordinates fail to demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

The AAO notes that 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). 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).

Further, 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. The petitioner's future hiring plans are not relevant to this determination. 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).

Here, the petitioner indicates that the beneficiary had four direct subordinates at the time of filing. However, the job duties provided for the beneficiary and for his subordinates demonstrate that the beneficiary's subordinates will not relieve him from performing non-qualifying administrative and operational duties. The petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

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

The petitioner stated on the Form I-129 that it has a parent-subsidiary relationship with the foreign entity. Specifically, the petitioner stated that "the parent company owns 51% of the stock of the U.S. subsidiary

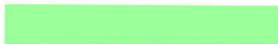
company." In support of this claim, the petitioner submitted its "minutes of first organizational meeting of incorporator(s) of [the petitioner]" indicating that it is authorized to issue 1,000,000 shares of stock. The minutes of the meeting further state that the foreign entity will be issued 510,000 shares in exchange for \$51,000 and the beneficiary will be issued 490,000 shares in exchange for "service contribution \$49,000." The petitioner submitted a "stock transfer ledger sheet" indicating that, on August 24, 2011, the foreign entity was issued 510,000 original shares for \$51,000 cash consideration on certificate number one, and the beneficiary was issued 490,000 shares for \$49,000 service provided consideration also on certificate number one. The petitioner then submitted certificate number two issuing the foreign entity "fifty one thousand" shares of common stock of the U.S. company, and certificate number one issuing the beneficiary "forty nine thousand" shares of common stock of the U.S. company, both dated August 24, 2011. The petitioner also submitted a resolution by the foreign entity, dated July 23, 2011, stating that it would wire \$100,000 to the U.S. company to purchase 51% shares with \$51,000 and the remaining \$49,000 will be used as operating capital for initial operations.

In support of the petition, the petitioner submitted copies of its 2011 and 2012 IRS Form 1120. The 2011 and 2012 Forms 1120 at Schedule K, which includes questions related to the petitioner's ownership and control, are marked "no" at question 4 which asks, "[a]t the end of the tax year: **a.** [d]id any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote?" Additionally, the 2011 and 2012 Forms 1120 also at Schedule K are marked "yes" at question 7 which asks, "[a]t any time during the tax year, did one foreign person own, directly or indirectly, at least 25% of (**a**) the total voting power of all classes of the corporation's stock entitled to vote or (**b**) the total value of all classes of the corporation's stock?" The question further indicates that the percentage owned is "100" and the owner's country is [REDACTED]. In this case, the record fails to demonstrate the actual ownership of the petitioner. 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).

Due to the inconsistencies detailed above, the petitioner has not met its burden to corroborate its claimed qualifying relationship with the foreign entity. 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).

(b)(6)



NON-PRECEDENT DECISION

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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.