



U.S. Citizenship
and Immigration
Services

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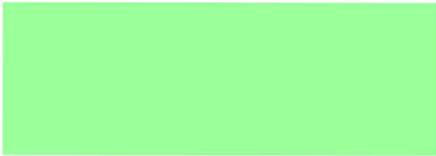


DATE: **SEP 05 2013** OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this petition seeking to classify the beneficiary 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 Florida corporation established in 2011, states that it intends to operate a computer and mobile phone software application development business. It claims to be an affiliate of [REDACTED] located in Germany. The petitioner seeks to employ the beneficiary as the general and operations manager of its new office in the United States for a period of one year.

The director denied the petition concluding that the petitioner failed to establish that it will support a managerial or executive position within one year of the approval of the petition.

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 asserts that the petitioner has met all eligibility requirements for the requested classification. Counsel submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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. The Issues on Appeal

A. Employment in the United States in an Executive or Managerial Capacity

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 24, 2012 seeking to employ the beneficiary as its general and operations manager. The petitioner indicated that it is a start-up computer and mobile phone software developer established in 2011.

In a letter dated February 3, 2012, counsel for the petitioner described the position of general and operations manager stating that the beneficiary will: manage the organization; supervise and control the work of other supervisory, professional, or managerial employees; have the authority to hire and fire or recommend personnel actions such as promotions, leave authorizations, etc; exercise discretion over all day-to-day operations; direct the management of the organization; establish the goals and policies of the organization; and exercise wide latitude in discretionary decision-making.

Counsel stated that the beneficiary would be responsible for the following: plan for, develop, establish, and implement policies and objectives; coordinate all aspects of the Petitioner's business to ensure that all

operations and financial goals and objectives are met; plan the petitioner's fiscal budget; review activity reports and financial statements to determine progress and status in accomplishing objectives; coordinate formulation of financial programs to provide funding for new operations; supervise the accounting process so targets are met; negotiate and contract on behalf of the petitioner; oversee activities directly related to making products or providing services; direct and coordinate activities of businesses or departments concerned with the production, pricing, sales, or distribution of products; review financial statements, sales, and activity reports and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement; prepare work schedules and assign specific duties for subordinate staff; direct and coordinate organization's financial and budget activities to fund operations, maximize investments, and increase efficiency; confer with board members, organization officials, department heads, and staff members as necessary; determine staffing requirements, interview, hire, and train new employees, or provide oversight to those personnel processes; plan and direct activities such as sales promotions; determine goods and services to be sold and set prices and credit terms based on forecasts of customer demand; and locate, select, and procure merchandise for resale.

In support of the petition, the petitioner submitted a personnel plan for the new office with the following information:

	FY2012	FY2013	FY2014
CEO	\$48,000	\$48,000	\$48,000
Administrative and Marketing	\$3,000	\$18,000	\$18,000
Customer Service Rep.	\$4,800	\$9,600	\$9,600
Customer Service Rep.		\$9,600	\$9,600
Customer Service Rep.			\$9,600
Programmer	\$18,000	\$36,000	\$36,000
Programmer		\$18,000	\$18,000
Programmer			\$18,000
Total	\$73,800	\$139,200	\$166,800

The personnel plan explains that the administrative and marketing position will take over the administrative duties after the initial set-up allowing the beneficiary to focus on executive tasks. According to the plan, one customer service representative can provide email support for four software applications, and additional representatives may be hired if demand increases. Also, the plan states an additional part-time programmer will be hired upon completion of four applications and contract programmers may be used under the supervision of the hired programmers. An organization chart indicates the general operations manager holds the highest position of authority and has two subordinate employees: a secretary and application software developer.

On June 25, 2012, the director issued a Request for Evidence ("RFE") instructing the petitioner to provide additional evidence that it would be able to support a manager or executive within one year of commencing operations. Specifically, the director requested: (1) a copy of the petitioner's business plan including a timetable of each of the petitioner's proposed actions, for a one year period starting on the date the petition was filed; (2) evidence to demonstrate the size of the investment and the petitioner's financial ability to commence doing business and to remunerate the beneficiary, which may include bank statements for the three months prior to filing and/or letters of credit for the foreign entity; (3) evidence that the U.S. company has sufficient physical premises to house the operations and will hire staff to relieve the beneficiary of non-qualifying duties by the end of the first year.

In response to the RFE, the petitioner submitted the following: (1) bank statements indicating that the petitioner received two PayPal transfers totaling \$200,000 and two incoming wire transfers from [REDACTED] on May 17, 2012 and May 30, 2012, for \$12,500 each; (2) a lease agreement signed by the beneficiary for a 350 square foot office space with a monthly rent at \$450 for a one year term starting January 1, 2012; and (3) a business plan with an attached personnel plan.

The business plan indicated that the petitioner received \$200,000 in startup funding from the foreign entity and projected \$118,649 in total expenses for the first year; \$203,948 the second year; and \$255,905 in the third year. The expenses included projected salaries of \$73,800 the first year; \$139,200 the second year; and \$166,800 the third year. The business plan stated that the company would be managed by the beneficiary and that the beneficiary would gradually be relieved from the day-to-day duties of the company by an employee responsible for: "taking care of the day to day operations of the business, marketing, and personnel management." The plan also stated that the petitioner would use an outside accounting firm and that customer service representatives and future part time programmers would work from home, eliminating the need for additional office space.

A monthly personnel plan was attached to the business plan. The personnel plan indicates that the beneficiary would be the sole employee until July 2012, at which time the petitioner planned to hire a customer service representative and programmer. The personnel plan indicates that the administration and marketing position would be filled in November 2012. The chart reflected that following salaries: the beneficiary would earn \$4,000 per month; the administrative and marketing position would earn \$1,500; the programmer would earn \$3,000; and the customer service representative would earn \$800 per month.

The director denied the petition finding that record failed to establish that the petitioner could support a manager or executive position within one year of the date of filing. The director stated that the petitioner must show that the beneficiary would meet the four criteria of executive capacity by the end of the first year, which requires the beneficiary to have at least one subordinate that meets the definition of managerial capacity found under Section 101(a)(44)(A) of the Act. The director further stated that there was no evidence to establish the beneficiary would be relieved from performing primarily non-qualifying duties by the end of the requested period of nonimmigrant status.

On appeal, counsel for the petitioner asserts that the petitioner was unable to hire additional employees without approval of the beneficiary's visa, and that "the beneficiary would be in the position to hire more

employees given the fact that the nature of the United States business demands it." Counsel further asserts that the director should give deference to the petitioner's business judgment.

The petitioner provides an augmented organizational chart in support of the appeal. It indicates that the beneficiary, in the position of CEO, will supervise a full-time lead programmer and a marketing and administration position. The lead programmer will supervise three programmers in application and web development. According to the chart, the lead programmer will shift from performing the actual programming duties to supervising the internal and external programmers and will have full authority over the day-to-day operations of the department. The chart indicates the marketing and administration position will have three subordinate customer service representatives providing marketing via social media, blogs, and forums. According to the chart, the position will primarily manage the customer service/marketing department, will take care of the company's day-to-day duties, including managing the external accounting firm, and will have full authority to hire and fire subordinate customer service representatives.

Upon review, the petitioner has failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the petition's approval.

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.*

The position description states that the beneficiary will: manage the organization; supervise and control the work of other supervisory, professional, or managerial employees; have the authority to hire and fire or recommend personnel actions; exercise discretion over all day-to-day operations; and plan for, develop, establish, and implement policies and objectives. These duties merely paraphrase the statutory definitions of managerial and executive capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Specifics are clearly important to indicate whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

While the beneficiary's described duties may generally fall under the definitions of managerial or executive capacity, the vague nature of the description raises questions as to his actual proposed daily activities. For example, the beneficiary's remaining proposed duties include: coordinate all aspects of the petitioner's business; confer with board members, organization officials, department heads, and staff members as necessary supervise the accounting process; oversee activities directly related to making products or providing services; direct and coordinate activities of businesses or departments concerned with the production, pricing, sales, or distribution of products; and direct and coordinate organization's financial and budget activities. These vague descriptions have the potential to include a wide range of both qualifying and non-qualifying daily duties and fail to provide any insight into the activities the beneficiary will perform on a

daily basis within the context of the petitioner's business and anticipated staffing levels during the first year of operations. In fact, the position description provided for the beneficiary's proposed position as general manager of the U.S. start-up company is essentially identical to that provided for his role as CEO of the foreign entity, a company that has been operating in Germany since 2004, despite the obvious disparity between the two companies in terms of staffing, business activities and organizational development. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). While performing non-qualifying tasks 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties would constitute the majority of the beneficiary's duties within one year, or whether the beneficiary would primarily perform non-managerial administrative or operational duties. 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).

The position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity. 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 proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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. As noted above, the petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

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. 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.

The organization chart submitted on appeal and the business and personnel plans indicate that the beneficiary is the petitioner's sole employee and that the petitioner intends to hire a programmer and customer service representative in July 2012 and an administration and marketing position in November 2012. However, an organization chart submitted with the initial petition shows the beneficiary supervising a secretary and

application software developer with no additional subordinate employees. The petitioner has not provided an explanation or evidence to reconcile these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner confirms that it has not hired any employees, so it appears that both submitted organizational charts were intended to depict the intended structure of the company.

Even if the augmented organization chart is considered, the petitioner has failed to establish that the beneficiary will be employed as a personnel manager within the first year of operation. The personnel plan does not indicate that the lead programmer will have any subordinate programmers within the first year. While the plan does indicate that the marketing and administration position will have one subordinate part-time customer service representative, the petitioner has not established that the marketing and administration position is a manager or supervisor. The evidence must substantiate that the duties of the beneficiary and his subordinates correspond to their placement in an 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 manager position. The limited position description provided for the marketing and administration position indicates that the marketing and administration position "will take care of the companies day to day duties" and "take over administrative duties after the set-up of the company." Without further details regarding the duties performed by the customer service representative and the marketing and administration position, it is unclear whether the marketing and administration position will have the authority and responsibilities of a supervisor or manager or will be performing non-supervisory or non-managerial daily operational and administrative duties of the organization. As such, the petitioner has not established that the beneficiary's proposed subordinates will be supervisors or managers, and has not established that the beneficiary will be a personnel manager.

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). Although it is possible that the programmer is a professional employee, the petitioner has identified educational requirements for the position or a description of the programmer's job duties to establish that a bachelor degree is required for the position.

Assuming, *arguendo*, that the programmer position is a professional position, the petitioner must still establish that the beneficiary's duties are primarily managerial in nature in order to support its claim that he qualifies for the benefit sought. The record does not support a finding that supervising single professional is the beneficiary's primary responsibility or that the majority of his proposed responsibilities as a whole will be managerial. Whether the beneficiary is a managerial employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be 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).

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 detailed job description that clearly explains 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. In the instant case, the petitioner has not claimed or provided evidence that the beneficiary will manage an essential function; and, as previously discussed, the petitioner has not provided sufficient evidence that the beneficiary will be relieved of performing the tasks necessary for the petitioner to provide its services.

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 employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The beneficiary in this matter has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than its day-to-day operations. As mentioned above, the petitioner has not established that the beneficiary would have sufficient subordinate employees to relieve him from performing non-qualifying operational and administrative duties.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a nonimmigrant 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). In the instant matter, record fails to establish that within the first year of business operation the petitioner would have sufficient staffing to relieve the beneficiary from performing the non-qualifying day-to-day operational duties.

The AAO does not doubt that the beneficiary possesses authority and discretion over the new entity as its sole owner and manager; however, the petitioner has failed to show that his actual day-to-day duties would be primarily managerial or executive within one year. The fact that the beneficiary owns and 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").

For the abovementioned reasons, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year. Accordingly, the appeal will be dismissed.

B. Employment Abroad in a Managerial or Executive Capacity

Beyond the decision of the director, the petitioner failed to establish that the beneficiary's employment with the foreign entity was in a managerial or executive capacity.

The record indicates that the beneficiary was employed with the foreign entity since September 2004 in the position of CEO/President. The support letter submitted concurrently with the Form I-129 states that: "[A]s Chief Executive Officer/CEO and President/Owner [the beneficiary] has been determining and formulating policies and providing the overall direction of the company within its own guidelines; and planning, directing, or coordinating operational activities at the highest level of management with the help of subordinate directors or managers."

The letter further describes the beneficiary's duties to include the following: directing and coordinating the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency; conferring with other organization officials and staff members to discuss issues, coordinate activities, and resolve problems; analyzing operations to evaluate performance of company and its staff in meeting objectives and to determine areas of potential cost reduction, program improvement, or policy change; directing the planning and implementation of policies, objectives, and activities of organizations or businesses to ensure continuing operations, to maximize returns on investments, and to increase productivity; preparing budgets for approval including the funding and implementation of programs; directing and coordinating activities of businesses or departments concerned with production, pricing, sales, or distribution of products; negotiating or approving contracts and agreements with suppliers, distributors, federal and state agencies, and other organizational entities; reviewing reports submitted by the director or managers to recommend approval or to suggest changes; and appointing officers and delegating responsibilities to them.

The petitioner submitted an organization chart for the foreign entity. The chart identifies the beneficiary as CEO. He is placed at the same level as the managing director, and an arrow points horizontally from the managing director to the CEO. Directly under the managing director an arrow points downward to a general manager, who is placed directly under the managing director. Considering the lateral positioning of the managing director and the directional arrows, the chart does not clearly indicate who is subordinate to the beneficiary.

In the RFE, the director requested additional information to establish the beneficiary's managerial or executive capacity. The director instructed the petitioner to submit, *inter alia*, the following: (1) a complete organization chart for the foreign entity including the beneficiary that identifies each employee by name and position title; (2) a complete description for the employees on the organization chart with a breakdown of the estimated number of hours devoted to each of their job duties per week; and (3) information regarding any independent contractors working for the foreign entity including the number of contractors, descriptions of the services provided, and copies of all service contracts.

In response to the RFE, the petitioner provided a revised organization chart for the foreign entity. The revised organization chart placed the programming/managing director and marketing/ administration position subordinate to the beneficiary. The chart indicated that the programming/managing director spends 40 hours per week on application development and 10 hours per week on web development. The managing director oversees a general manager that works 40 hours a week, whose duties are not provided. The marketing/administration position subordinate to the beneficiary spends 10 hours per week on accounting, 20 hours per week on project development, and 10 hours per week on marketing/public relations. The marketing/administration position and the general manager supervise three subordinate part-time customer service representatives. The customer service representatives spend a combined total of 50 hours per week on e-mail tickets, five (5) hours per week on knowledgebase maintenance, and five (5) hours per week on social media monitoring.

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

The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties the beneficiary performed. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates his time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity.

The description of the beneficiary's position with the foreign entity includes many of the same vaguely described duties as the position description for the proposed U.S. position. As discussed above, the broadly described duties fail to articulate the beneficiary's daily activities. It is unclear what the beneficiary does daily to coordinate, direct, or plan various business activities. The description also fails to indicate who the beneficiary will direct, supervise, or coordinate to perform the non-qualifying duties associated with the beneficiary's broadly described responsibilities. Again, specifics are clearly important to indicate whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would

simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Moreover, the petitioner has not explained the inconsistencies regarding the number of employees included on the foreign entity's initially submitted organization chart, and the organization chart provided in response to the RFE. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not include pay records, tax documents, or any other evidence that would explain or resolve the inconsistency in the record. Further, while the chart appears to depict two tiers of subordinate supervisors reporting to the beneficiary, the petitioner did not attribute any supervisory or managerial duties to these employees. The managing director, based on the brief description of duties provided, allocates all his time to programming for application and web development and does not perform supervisory level duties. While the petitioner depicts a general manager position directly subordinate to the programming/managing director, it did not provide even a brief description of this employee's duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Without evidence of the foreign entity's employment levels, it is impossible to determine the beneficiary's actual position within the organizational structure. It is also not possible to determine whether the organization has a sufficient number of employees to relieve the beneficiary from primarily performing the non-qualifying duties necessary to produce the product or provide the service or to elevate the beneficiary to the level that fulfills the statutory definition of managerial or executive capacity.

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).

The petitioner has not established that 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. For this additional reason, the petition must be denied.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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 petitioner has not met that burden.

ORDER: The appeal is dismissed.