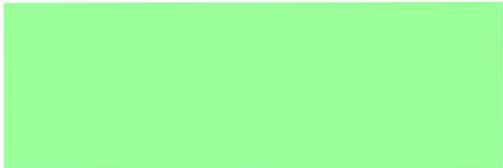




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **SEP 25 2013** OFFICE: CALIFORNIA 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)

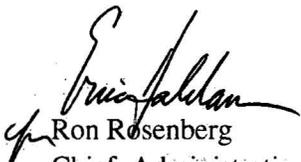
ON BEHALF OF PETITIONER:  


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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California limited liability company established in 2012, states that it operates a travel agency, and is a subsidiary of [REDACTED], located in Canada. The petitioner seeks to employ the beneficiary as the executive director of sales for its new office for a period of three years.<sup>1</sup>

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge.<sup>2</sup>

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. Counsel for the petitioner submits a brief 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:

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<sup>1</sup> Pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

<sup>2</sup> The L Classification Supplement to the Form I-129 indicates that the instant petition seeks to qualify the beneficiary as an L-1A intracompany transferee as a managerial or executive employee of a "new office." Accordingly, the applicable regulation requires the petitioner to establish that "the beneficiary has been employed abroad for one continuous year in the three year preceding the filing of the petition in a managerial or executive capacity." 8 C.F.R. § 214.2(l)(3)(v)(B). Therefore, the AAO will not address whether the beneficiary was employed abroad in a specialized knowledge capacity.

- (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), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity.

**A. Facts**

In a support letter dated July 11, 2012, the foreign entity confirmed that it has employed the beneficiary as its Executive Director of Sales since July 1, 2011. The letter included the following description of his duties:

Managing the entire Consolidation Sales division of the company at its Calgary head office, negotiating contracts with international airlines, dealing with major clients, other sales staff, sub-agents and outside agents on matters pertaining to sales, taking decisions on all aspects of company's Consolidation Sales division including hiring new staff, sub-agents, and outside agents, training them, evaluating their performances, and terminating services of those found consistently underperforming, monitoring, evaluating, and modifying company's marketing plan, researching and implementing promotional campaigns, assembling market data to assist tourism providers in identifying potential patrons and profitable target market segments based on tourist behaviour and markets, working closely with airline pricing departments and sales managers, monitoring company's sales and market shares in key markets of Middle [E]ast, Iran, Europe, Africa, S. America, and S Pacific, and reporting all key developments and providing periodic reports to company's top management and the President.

Additionally, the petitioner provided the beneficiary's resume, in which he describes his current duties as follows:

- Ensuring that the company fully complies with the requirements of both ACTA and IATA
- Supervising and directing the work of other [REDACTED] Sales staff, sub-agents, and outside agents, including developing an implementation program for who will be responsible, what tasks they are responsible for and responsibilities assigned to individuals who must get the job done.
- Responsible for hiring, terminating, retaining and training of new and existing staff
- Continuous researching the tourism industry, including government policies and regulations and industry trends
- Developing sales promotion ideas
- Researching and implementing promotional campaigns that include a variety of advertising, public relations, and sales promotion activities as well as involvement with the chamber of commerce
- Monitoring, evaluating, and modifying the company marketing plan
- Responsible for all relations with suppliers and international airlines including negotiating contracts
- Representing the tourism industry on various economic development committees or task forces relevant to issues such as business retention and revitalization, attraction of new business, workforce preparation, competitiveness and quality of life.

- Networking with individuals and various organizations to improve and enhance the viability of the local tourism businesses through diversification, niche marketing, and regional branding.
- Working with Airlines and tourism providers, travel agencies, receptive, other tourist promotion agencies to package and sell complete tourism products.
- Identifying and soliciting available tourism promotion program funding from both private and public sources
- Assembling market data that will assist tourism providers in identifying potential patrons and profitable target market segments based on tourist behavior and markets.

The petitioner provided Canadian tax documents for the foreign entity including a T-4, Summary of Remuneration Paid. The T-4 indicates that the foreign entity had five employees on its payroll for the 2011 tax year and paid \$155,778 in wages.

On August 10, 2014, the director issued a request for evidence (RFE), instructing the petitioner to provide additional evidence that the beneficiary has been performing the duties of a manager or executive with the foreign entity. The director specifically requested, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties abroad identifying the percentage of time required to perform the duties of the foreign position; and (2) the foreign entity's line and block organization chart showing all of the current organizational hierarchy and staffing levels and to include a list of all employees in the beneficiary's immediate division, department, or team by name, job title, summary of duties, educational level, and salary.

In response to the RFE, the petitioner submitted a letter dated September 4, 2012 in which it appeared to describe the beneficiary's proposed role as executive director of sales in the United States. For example, the petitioner stated that the beneficiary "will be required to analyze the market, sales and business conditions, interpret data and reports, supervise the implementation of marketing programs by staff, hire lower level management employees and evaluate their performance, and suggest strategies to move our company in the right direction." However, the AAO acknowledges that the petitioner stated at the time of filing that the beneficiary's proposed duties will be identical to those he current performs for the foreign entity.

The petitioner further listed the beneficiary's duties as:

- Develop, implement, and oversee marketing and sales plans that generate name awareness and market position for our services,
- Develop, implement, and oversee a method to track selling efforts and results
- Generate, coordinate, and oversee selling strategies, activities and policies to promote products, solutions and support services to the Travel industry,

- Develop, implement, and oversee the most effective strategy for spending a marketing budget to maximize market share and growth
- Oversee the training of lower level management and sales staff members and evaluating their performance
- Responsible for hiring and terminating lower level management and sales staff positions within the company's guidelines

The petitioner stated that the beneficiary "is expected to perform the following duties" and identified the percentage of time he allocates to each duty:

- Ensuring that the company fully complies with the requirements of both IATA (International Air transportation association), and local and national travel related laws, continuous research of the tourism industry, including government policies and regulations and industry trends. (5%)
- Supervising and directing the work of other [REDACTED] Sales staff, sub-agents and outside agents, including developing an implementation program for who will be responsible for, what tasks they are responsible for, and when the tasks are to be completed with a schedule of activities and responsibilities assigned to individuals who must get the job done. (15%)
- Responsible for hiring, retaining, and training of new and existing staff members; conducting PIP (Performance Improvement Program) of under-performing staff and terminating the services of those staff found consistently underperforming. (15%)
- Developing sales promotion ideas, monitoring, evaluating, and modifying the company's marketing plans. Researching and implementing promotional campaigns that include a variety of advertising, public relations, and sales promotion activities among major clients, corporations, and trade bodies such as involvement with the chamber of commerce. Networking with individuals and various organizations to improve and enhance the viability of local tourism business through diversification, niche marketing and regional branding. (15%)
- Responsible for all relations with suppliers and international airlines including negotiating contracts, working with airlines and tourism providers, travel agencies other tourist promotion agencies to package and sell complete tourism products such as all-inclusive packages, custom packages, group packages, wedding and

honeymoon, golf packages, cruises and all other related travel products with special focus on bulk/discounted contractual deals. (20%)

- Working with Airline Managements [sic] on macro-economic matters such as: fare construction, competitive pricing, inventory and revenue optimizations, yield management, and route development based on the market needs and growth. (5%)
- Assembling market data on company's key markets such as: Middle East, Iran, Africa, and South America to assist airlines and tour operators identify profitable target market segments based on tourist behavior and market trends. Analyzing the tourism industry and company's sales data on a monthly basis to re-evaluate company's selling strategies and market share performances. Reporting, drawing up an action plan and discussing these matters frequently with special focus on company's performance to the president. (15%)
- Trouble shooting, supporting staff and clients on all emergency situations requiring performing duties such as: (1) Assisting in complicated travel itineraries/booking; (2) last minute travel arrangements in emergency situations such as bereavement, cancellation, and missed flights; (3) Last minute hotel, car, and insurance bookings; (4) Handling corporate clients needs during after hours and weekend if no agent/staff available; (5) Emergency ticketing and complicated fare constructions when no staff available; (6) Finalizing and reviewing the BSP (Bank settlement Plan) report; (7) Managing the online booking engine in case of unexpected errors; (8) Handling and managing the CRS (reservations system) on system failure situations; (9) Assisting our clients/passengers' in case of strikes, lock-outs, natural disasters to bring them back home or to reschedule their plans and travel needs; (10) Helping staff in any emergency and unexpected situations; (11) Contacting the airlines to get waitlist cleared on discounted business class fares for own clients or sub agent clients or outside agent clients; (12) Attending visiting sales rep and other airline and tour operator officials in our office; (13) Communicating with clients and agents and resolving disputes when fares are increased by airlines without any notice or taxes increased significantly before tickets are paid by client; (14) Visiting the offices of sub agents and outside agents every 6 months; (15) Communicating with some clients in Farsi language who are unable to understand good English; (16) Doing bank deposits if sales staff are on vacation or sick for a day or so; (17) Negotiating purchase contracts with service providers when the president is on vacation; (18) Issuing tickets when the ticketing staff is sick for a day or so or when too many tickets to issue due to seat sales ending on that particular day (10%)

Additionally, the petitioner submitted a line and block organization chart for the foreign entity which includes seven named employees. The chart indicates that the president holds the highest level of authority in the foreign organization. The beneficiary's position of executive director of sales and an executive director of reservations are directly subordinate to the president. The chart indicates that the beneficiary manages a sales manager, who, in turn has four subordinate sales consultants. The chart states that the beneficiary manages outside agencies and three consultants of an affiliated company located within the same office. The chart does not indicate that the executive director of reservations has subordinate employees.

The director ultimately denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed in a primarily managerial or executive capacity for the year preceding the filing of the petition. Specifically, the director found that the beneficiary's duties were indicative of an employee who performs the necessary tasks to provide a service or produce a product, and failed to establish that the beneficiary's duties are primarily managerial or executive.

On appeal, counsel for the petitioner submits a brief stating that the beneficiary spends 80% of his time on the following job duties:

1. Supervising and directing the work of other sales staff and managers – 15%;
2. Hiring and training new staff, sub-agents, and outside agents, conducting performance evaluation and termination of those non-performing – 15%;
3. Sales promotion, marketing and networking - 15%;
4. Negotiating contracts with airlines, tour operators, and sub-agents - 20%;
5. Sales analysis, performance reporting and decision making on sales matters with the President - 15%

Counsel asserts that the record demonstrates that the beneficiary performs "high level responsibilities" beyond the day-to-day operations of the foreign entity's sales division. Counsel claims that the beneficiary's responsibilities hiring and firing of staff members, including managers; supervision and evaluation of subordinate employees; negotiation and approval of contracts with airlines; and promotion of sales and marketing demonstrate that the beneficiary is engaged in more than day-to-day operations of the foreign entity. Counsel states that the beneficiary performs duties to the same extent as the acting president of the corporation.

Further, counsel claims that sales managers and staff members, who report to the beneficiary, perform day-to-day activities, such as: receiving calls from sub agents, clients and passengers; making reservations; handling walk in clients and sub agents; quoting fares for airfare, packages, tours, hotels, and cruises;

receiving payments; explaining bookings and rules of the ticket to clients, sub-agents, and outside agents; issuing tickets in-house or purchasing tickets from other vendors after market research; ticket verifications and internal audit; sales and purchase fulfillment; bookkeeping; accounting at month end and commission settlements; ticket exchanges and refunds based on change of clients plans; and routing.

Counsel emphasizes that an individual shall not be considered to acting in a managerial capacity or executive capacity merely on the basis of the number of employees that the individual supervises or directs.

### B. Analysis

Upon review, the AAO agrees with the director's determination that the petitioner failed to establish that the beneficiary has been employed in a managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(I)(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.* 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 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 functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner's description of the beneficiary's job duties failed to establish that the beneficiary will act in a "managerial" capacity. As mentioned by the director, many of the job duties that are specifically described appear to be non-qualifying duties related to providing product sales. Marketing, promotion and performing market research and analysis do not typically fall within the statutory definition of managerial capacity. Here, the petitioner indicated that the beneficiary will allocate 15% of his time to responsibilities that include "developing sales promotion ideas," "researching and implementing promotional campaigns," "networking with individuals and various organizations." In addition, 15% of the beneficiary's time is allocated to "assembling market data on key markets"; assisting airlines and tour operators to identify profitable market segments and "analyzing the tourism industry." The petitioner has not indicated that the beneficiary's subordinates, who appear to be engaged primarily in direct sales and travel bookings, relieve him from performing these non-managerial marketing and promotion duties.

The petitioner stated that the beneficiary allocates an additional 20% of his time to supplier and airline relations, and notes that he works with these parties "to package and sell complete tourism products." While it appears that the beneficiary has authority to negotiate prices, it also appears that he is directly involved in designing, developing and procuring the packages that the petitioner sells. Again, the petitioner does not indicate that any other employees work with suppliers to source travel products sold by the business. Finally, the petitioner indicated that the beneficiary allocates 10% of his time to supporting staff and clients during emergency situations, duties which include handling travel bookings and other non-qualifying tasks.

The petitioner states on appeal that 80 percent of the beneficiary's time is allocated to managerial duties; however, the detailed description of the beneficiary's duties submitted in response to the RFE indicated that up to 60% of his time would be allocated to responsibilities that require him to perform non-managerial duties. While performing non-qualifying tasks necessary to produce a product or provide 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 (9<sup>th</sup> Cir. 2008).

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)(ii)(B)(2).

The petitioner claims that 30% of the beneficiary's time is spent supervising subordinate personnel. The record does not include any evidence to establish that the beneficiary's subordinates are professionals.<sup>3</sup> The record also fails to establish that the beneficiary primarily supervises or controls the work of other supervisory or managerial employees.

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<sup>3</sup> 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 the organization chart includes a "sales manager" position subordinate to the beneficiary, the record fails to establish that the employee's duties correspond with the position's title. An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (*cited in Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)).

Further, the accuracy of the submitted organizational chart cannot be determined because it contains information inconsistent with the foreign entity's Canadian T-4 tax documents and the petitioner's statements. While the foreign entity's tax documents for 2011 indicate that wages were paid to five employees, the organization chart names seven employees. The AAO acknowledges that the foreign entity could have hired additional staff in 2012; however, counsel specifically states in the appellate brief that the beneficiary was "the latest to join the company." 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). The petitioner has not provided any objective evidence to establish the actual number of employees working for the foreign entity.

Even if the chart did not contain inconsistencies, the petitioner failed to submit a summary of duties for all employees in the beneficiary's immediate division as requested by the director. Without the requested information, the record does not establish that the sales manager actually performs supervisory or managerial duties. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On appeal, counsel states that the sales manager and staff members perform the day-to-day activities for the foreign entity and does not differentiate between the duties of a sales manager and a sales consultant.

The beneficiary's claimed subordinates also include "outside agencies" and "retail travel consultants of affiliated company [REDACTED]." The record does not contain any agreements, record of payment, or contracts with the outside agencies or consultants, or evidence related to the claimed affiliate company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Overall, the evidence of record is insufficient to establish that the beneficiary primarily supervises and controls a subordinate staff comprised of managers, supervisors or professionals, and the petitioner has not established that he is employed as a "personnel 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 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). 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).

While the petitioner refers to the beneficiary as "executive director of sales," the initial description of his duties as discussed above, indicate that he performs a number of non-qualifying duties associated with sales and provision of foreign entity's services, rather than primarily managing a function. The petitioner must establish that the beneficiary primarily performs managerial duties. The petitioner has not done so in this case.

Similarly, the petitioner has failed to establish that the beneficiary will act in an executive capacity. 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. 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 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. As explained above, the record indicates the beneficiary allocates up to 60% of his time to non-managerial marketing and promotional duties and is insufficient to establish that the beneficiary responsibilities and duties are beyond those of first line supervisor. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity. While the petitioner indicates that the beneficiary currently performs duties that were previously performed by the foreign entity's president, the duties described do not fall within the statutory definition of "executive capacity," and do not reflect that the beneficiary allocates the majority of his time to focusing on the broad goals and policies of the foreign entity.

Counsel for the petitioner correctly asserts 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, however, 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 (9<sup>th</sup> 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)).

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). For the reasons discussed above, the petitioner has not established that the beneficiary performs primarily managerial or executive duties in his role with the foreign employer. This conclusion is based on the beneficiary's position description and the petitioner's failure to provide sufficient information regarding the beneficiary's subordinates; it does not rest on the size of the foreign company or the number of employees the beneficiary supervised. The petitioner has failed to establish that the beneficiary has been primarily employed in a managerial or executive capacity with the foreign entity. Accordingly, the appeal will be dismissed.

### III. Managerial or Executive Capacity in the United States

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year.

In a letter dated July 26, 2012, the petitioner stated that the beneficiary "is coming to the U.S. to conduct the same duties in the newly incorporated subsidiary company." The letter provides a list of duties for the proposed U.S. employment nearly identical to the duties performed with the foreign entity. As discussed above the described duties are insufficient to establish that the beneficiary is employed in a primarily managerial or executive capacity.

Further, the petitioner's business plan contains inconsistencies regarding the anticipated staffing of the U.S. company. The plan indicates that in addition to the beneficiary, the petitioner intends to hire one full-time and two part-time travel consultants immediately, as well as a full-time employee to "visit businesses in our area and do door-to-door advertising." Although the plan indicates the part-time employees will increase to full time status within the first year, the business plan also includes an expense projection for the first year of operations which shows anticipated monthly salary expenses of \$8,100 for the entire first twelve months of operations. Further, it is noted that no money is provided for "management salaries" within the first year. Again, 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).

Without a clear explanation of the intended staffing levels, the record does not establish that the petitioner will have a sufficient number of employees within the first year of business to relieve the beneficiary from performing the non-qualifying day-to-day sales activities and allow the beneficiary to focus on primarily managerial or executive duties. For this additional reason the appeal must be dismissed and the petition denied.

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 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 burden has not been met.

**ORDER:** The appeal is dismissed.