



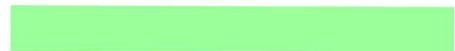
U.S. Citizenship
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Services

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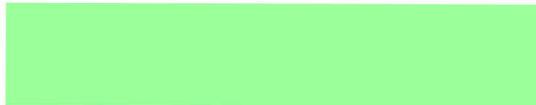


DATE: **APR 09 2014**

OFFICE: VERMONT SERVICE CENTER

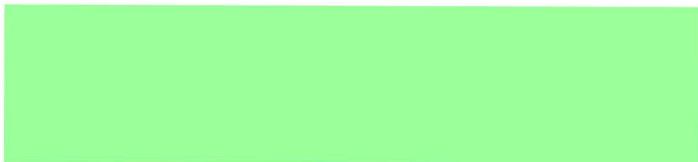


IN RE: Petitioner:
 Beneficiary:



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

ON BEHALF OF PETITIONER:

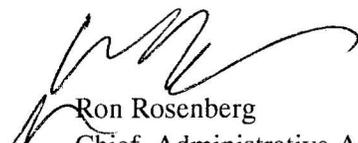


INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129), seeking to employ 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 New York corporation established in February 2012, states that it engages in a "car telematics system R & D and manufactur[ing]" business. The petitioner claims to be a subsidiary of [REDACTED] located in Shanghai, China. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States. The petitioner now seeks to extend her employment in the position of general manager for an additional three years.

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.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the "petitioner is qualified to support an executive, and [the] beneficiary is eligible, qualified and does in fact, act as an executive" at the U.S. company. Counsel 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

A. Facts and Procedural History

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

The petitioner filed the Form I-129 on May 10, 2013. The petitioner stated on the Form I-129 that the beneficiary will continue to be employed as general manager of the U.S. company. The petitioner indicated that it engages in "car telematics system R & D and manufacture," with three current employees, but failed to indicate its gross annual income.

The petitioner submitted a letter dated April 29, 2013, in which it described the beneficiary's position in the United States as follows:

We desire that [the beneficiary] continue to fill her position as General Manager in the New York Office of [the petitioner], and we desire that she continue to do so. This position is a key managerial one within the New York subsidiary company. As such, [the beneficiary] will continue to be responsible for:

1. Continuing to manage the operations of the newly formed New York subsidiary;
2. Supervise and control the work of other supervisory and managerial staff;
3. Hiring and firing of personnel and other personnel actions such as promotion and leave;
4. Develop and direct operation guidelines and procedures;
5. Formulate new business goals, to bring together departments of the company to work on each business plan;
6. Supervise their work, setting standards for the work and general guidelines for each assignment which must be followed and executed by departments of the company;
7. Coordinate the various teams to assure that each business plan is implemented adequately and on schedule;
8. Supervise the implementation and management of the policy and policy of developing new business market in the United States, Canada, and South America;

9. Develop organization and distribution systems;
10. Set marketing goals for improvement products;
11. Use past experience to establish managerial and sale systems similar to the parent company in China.

The petitioner submitted an organizational chart of the U.S. company illustrating that the general manager reports to the Board of Directors. The general manager then supervises the following departments: Administration, Accounting, Intelligent [*sic*], IT, Marketing & Sales, and Customer Support. The administration department consists of one manager and one secretary; the accounting department consists of one manager and a bookkeeper; the intelligent department consists of one manager and four engineers and programmers; the IT department consists of one manager and one IT specialist; the marketing and sales department consists of one manager and four sales persons; and the customer service department consists of one manager, two technical support persons, and two telephone support persons. The organizational chart submitted does not include the names of any employees.

The petitioner also submitted a list of job descriptions for each of the positions presented in the organizational chart. The job descriptions for each of the departments include a few, brief bulleted tasks for the positions listed. The document describes the beneficiary's position as general manager as follows:

Department & Job Title[:]

Executive

General Manager

Duties[:]

- Plan, direct and control the strategic operation of the Company through the managers to achieve the Company's goals.
- Establish financial goals of the Company;
- Oversee the Company's financial activities, capital management activities, investment return appraisals, and profits allocation;
- Develop and direct financial guidelines and procedures;
- Project and forecasts for the Parent Company on the business of the New York Office;
- Establish or abolish company financial polices [*sic*];
- Plan for any loan packaging for the business expansion if required;
- Supervise liaison work with the local banking network;
- Hire and fire personnel at his [*sic*] own discretion[:];
- Coordinate with various departments to assure that each business project is implemented adequately and on schedule[.]

No. of Employees[:]

One

Under the supervision of[:]

Parent Company

The petitioner submitted its business plan, dated 2012, and described its company organization as follows:

[The petitioner] is going to set the positions of president/vice president and a general manager who will be responsible for the six departments.

Administration Department will be the responsibility of the Secretary, who will be responsible for the receptionist and together they will be taking care of daily operation in general of the company, including answering phone calls, dealing with all orders and correspondence, and general administration work.

Marketing & Sales Department will consist of four sales persons under the supervision of the Marketing & Sales manager. Two of the sales persons will be responsible to promote the business in New York, and the other two will deal with business in other states.

Logistics Department will undertake a range of business tasks to support the smooth and efficient operation of logistic processes and typical work activities including monitoring the quality, cost and efficiency of the movement and warehousing of cargos, as well as co-ordinating and controlling the order cycle and associated information systems.

Accounting Department will be under the supervision of the Account Manager, who assigned the works two bookkeepers [*sic*] to take care of the account books, billing and all accounting matters of the company.

The Technical Support Department will have two specially engaged in-house technicians responsible for the maintenance of our company's technology system as well as the update of the system. They will make decisions of choosing software and computer programs are most suitable for our company development.

The Customer Service Department will be in charge of a senior customer service representative. There will be two junior customer service representative who will take care of serving the customers on phone and take orders and the other will takes [*sic*] care of the maintenance and update of the website, handles all E-trade orders.

The AAO notes that the business plan includes an organizational chart of the U.S. company identical to the one submitted with the petition. The organizational chart does not include a "logistics department" or a "technical support department."

The business plan goes on to describe the beneficiary's position and duties at the U.S. company as follows:

[The beneficiary] will continue performing duties as the General Manager in a bona fide managerial capacity in the U.S. subsidiary of the foreign parent company. [The petitioner] requires her fulfilling the capacity of a General Manager by taking overall responsibility for managing both the revenue and cost elements of a company's income statement; overseeing most or all of the firm's marketing and sales functions; and being responsible for leading and coordinating the strategic planning functions of the company. The General Manager's duties in the U.S. subsidiary will include supervisory responsibility for professional staff and department of subdivision of the Company for a key function. She will plan, organize, direct,

and control the Company's major functions and work through other employees to achieve the Company's goals.

However, [the beneficiary] will NOT be required to nor need to perform the tasks necessary to produce the products or provide the services of the Company. The majority of her duties will be related to operational and policy management, such as supervising other professional or immediate subordinate managerial staff, as well as directing and controlling the day-to-day operations of a significant function, unit or subdivision of the Company. [The beneficiary] will NOT be required to supervise lower level employees, neither will she be required to perform the non-managerial day-to-day operations, or to get involved in the ordinary operational activities of the Company, such as doing sales work, operating machines, writing computer programming code, et cetera.

As determined by the foreign parent company's board of directors, [the beneficiary] will be required to fulfill the following detailed managerial capacities and responsibilities: Retaining overall accountability and holding overall responsibility for the operation of the Company; Receiving only general supervision from higher executives, the board of directors, or stockholders; Establishing internal regulations and policies; Establishing specific Company's goals and objectives; Devising strategies and formulate policies to ensure that these objectives are met; Utilizing wide latitude in discretionary decision making; Managing the Company and its subordinate departments; and planning, directing, and coordinating the operations of the Company.

As for staffing, [the beneficiary] will be required to supervise and control other immediate subordinate managerial, supervisory, or professional personnel or manages *[sic]* an essential function within the Company; to use the authority to hire and fire or recommend personnel actions, or to function at a senior level if managing a function; and to appoint department heads, who manage the employees who carry out programs.

On May 17, 2013, the director issued a request for additional evidence ("RFE") in which she instructed the petitioner to submit, *inter alia*, evidence that the beneficiary's position in the United States will be in a managerial or executive capacity.

In response to the RFE, the petitioner submitted a letter, dated June 3, 2013, describing the beneficiary's duties as follows:

We desire that [the beneficiary] continue to fill her position as General Manager in the New York Office of [the petitioner], and we desire that she continue to do so. This position is a key managerial one within the New York subsidiary company. As such, [the beneficiary] will continue to be responsible for:

1. Manage the operations of the newly formed New York subsidiary – 100% made up of the following:
2. Supervise and control the work of other supervisory and managerial staff – 50%;

3. Hiring and firing of personnel and other personnel actions such as promotion and leave – 10%;
4. Develop and direct operation guidelines and procedures – 10%;
5. Formulate new business goals, to bring together departments of the company to work on each business plan – 10%;
6. Supervise their work, setting standards for the work and general guidelines for each assignment which must be followed and executed by departments of the company – 5%;
7. Coordinate the various teams to assure that each business plan is implemented adequately and on schedule – 5%;
8. Continue to supervise the implementation and management of the policy and policy of developing new business market in the United States – 2.5%;
9. Develop organization and distribution systems – 2.5%;
10. Continue to set marketing goals for improvement products and marketing of American products into China – 5%.

The petitioner submitted a new organizational chart of the U.S. company that illustrates the organization identical to the one previously submitted, except that it does not list the number of employees for each position. The new organizational chart also does not include names of employees for the listed positions.

The petitioner submitted a document titled, "Independent Contractor Agreement," dated June 5, 2013, between the petitioner and [REDACTED]. According to the agreement, [REDACTED] is the manager of marketing and sales through May 31, 2014.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director found that the actual lines of responsibility among the beneficiary and her subordinates appear to overlay each other and they appear to coordinate their activity to the point where the actual line of authority as general manager cannot be determined. The director found that the beneficiary will not be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve her from performing the services of the corporation. The director observed that the petitioner does not currently employ any full-time salespersons or others to provide the initial sales and services of the company to its customers; it would therefore seem likely that the beneficiary must be primarily engaged in providing sales and other services to its customers, not solely directing the company's business as asserted by the petitioner.

On appeal, counsel for the petitioner states the following about the beneficiary's duties and the petitioner's staffing:

It is here submitted that Petitioner is qualified to support an executive, and Beneficiary is eligible, qualified and does in fact, act as an executive. Petitioner, as the only international subsidiary of the parent company, [the foreign entity], must have a general manager overseeing the office and reporting back to the parent company. The parent company in China employs over 100 people, encompassing many divisions such as research and development, information technology, field tests, accounting, sales, administration, and customer service. The research and development department encompasses over 20 people, including engineers, programmers, and design. . . .

It is therefore submitted that beneficiary performs an essential function for the organization. . .

The beneficiary here is an individual in the United States who spearheads and supervises the entire process by which the parent company's products are distributed. . . . The parent company here, located in China, performs all design, research, development and production. Beneficiary's duties in the United States are to oversee the different teams in the U.S. offices, which are themselves overseen by other managers. These departments include sales, administration, accounting and customer service. The U.S. company also provides technical support, since use of its products sometimes require technical expertise.

The previously submitted and attached evidence shows that the majority of [the beneficiary's] duties relate to operational or policy management, not participation in day-to-day operations. [The beneficiary] will undoubtedly be required to apply her expertise to perform higher-level sales when negotiating new, important business accounts, however these tasks are handed off to the lower managers and staff once established. Again, beneficiary only oversees those accounts which are large enough and important enough to need her direct involvement, otherwise, these tasks are left to the sales and administrative teams. The majority of [the beneficiary's] time, then, is devoted to managerial duties, such as meeting with higher-level managers and establishing new goals and policies for the company.

The petitioner submitted a letter addressing the beneficiary's duties in the United States as follows:

[The beneficiary] will manage the organization by generally overseeing it and ensuring that the stringent standards of the parent company are being met. She will supervise the work of other department heads, set goals with the department heads, who will then report to her about their respective departments directly. Through their reports, [the beneficiary] will be aware of the everyday happenings of the office. . . .

[The beneficiary] oversees staff, many of whom have advanced degrees. . . . It is re-iterated here that beneficiary's responsibilities are mainly managerial, as only someone working at this level of management would be allowed to head up a subsidiary office . . . in the United States.

. . . She oversees rather than joins the sales team. . . .

The petitioner went on to provide the same list of job duties with accompanying percentages submitted in response to the RFE and added some additional details to some of the duties, such as "supervise work of departments, setting standards for the work and general guidelines for each assignment which must be followed and executed – 5%," "overseeing hiring and firing of personnel and other personnel actions such as promotion and leave – 10%," "develop and direct operation guidelines and procedures – 10%," and "formulate new business goals, to bring together departments of the company to work on each business plan – 10%."

The petitioner submitted its 2012 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates that it paid \$66,000 in salaries and wages in 2012. The itemized deductions statement indicates that the petitioner also paid a contractor fee of \$64,907 in 2012.

B. Analysis

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

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 United States Citizenship and Immigration Services (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). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

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, 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 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").

The petitioner first characterized the beneficiary's role as general manager and described her duties in very broad terms, noting that she will manage the operations of the subsidiary; supervise and control the work of other supervisory and managerial staff; develop and direct operation guidelines and procedures; formulate new business goals; coordinate with the various departments; develop organization and distribution systems; and set marketing goals for improvement products. The initial description indicated that the beneficiary would perform a combination of qualifying and non-qualifying duties. The petitioner then provided a different list of job duties for the beneficiary's position that primarily consisted of financial responsibilities, such as establish financial goals of the Company; oversee the Company's financial activities, capital management activities, investment return appraisals, and profits allocation; develop and direct financial guidelines and procedures; establish or abolish company financial policies; plan for any loan packaging; and supervise liaison work with the local banking network.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner listed the beneficiary's duties as including both managerial and administrative or operational tasks, but failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because several of the beneficiary's proposed daily tasks, as noted above, did not fall directly under traditional managerial duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in a managerial capacity. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the RFE, the petitioner relisted the original list of job duties for the beneficiary and added percentages of time devoted to each as described above. The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Here, the petitioner indicates that the beneficiary will spend the majority of her time, 50%, "supervis[ing] and control[ing] the work of other supervisory and managerial staff," an additional 10% "hiring and firing of personnel and other personnel actions such as promotion and leave," and another 5% "supervis[ing] their work, setting standards for the work and general guidelines for each assignment which must be followed and executed by departments of the company." However, although the petitioner submitted a list of job duties for each of the beneficiary's subordinates, the petitioner failed to demonstrate that it has hired employees to fill any of the listed positions subordinate to the beneficiary. The petitioner submitted a single independent contractor agreement for the manager of marketing and sales, but this agreement was entered into on June 5, 2013, approximately one month after filing the instant petition. 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). Accordingly, the June 5, 2013 independent contractor agreement is not probative in this matter.

While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its general manager, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify her as a manager or executive. 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 petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*.

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. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The AAO notes that, while the petitioner consistently claims that the beneficiary will be responsible for supervising subordinate professionals and managers, it has not met its burden to provide evidence of wages paid to employees, as required by 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner listed three employees on the Form I-129, but failed to provide any evidence of such employees at the time of filing. In response to the RFE, the petitioner provided the same organizational chart depicting 22 employees, including the beneficiary, but again, failed to provide any evidence of such employees. Although the director explicitly requested that the petitioner submit an organizational chart listing each employee by name and copies of its quarterly wage reports for the third and fourth quarters of 2012 and the first quarter of 2013 when responding to the RFE, the petitioner failed to do so. 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). Therefore, the record before the director contained evidence that the petitioner employed only one employee, the beneficiary, at the time of filing.

Even assuming *arguendo* that the petitioner had submitted sufficient evidence of wages paid to its claimed employees, the evidence of record does not establish that such employees are managers, supervisors or professionals. 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 job duties provided by the petitioner for each of the positions listed in the organizational chart demonstrate that the positions themselves do not require a professional degree. The petitioner has not established that any of the beneficiary's claimed subordinates require a bachelor's degree, such that they could be classified as professional. The organizational chart lists the managers of each of the six departments as the beneficiary's direct subordinates. However, the lists of job duties for the manager positions do not support a finding that they hold a professional, managerial, or supervisory position. 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 her 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. In the instant matter, the petitioner failed to submit 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. Furthermore, the petitioner has failed to submit evidence that the beneficiary has any subordinate employees to relieve her from performing non-qualifying operational duties.

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.

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. See 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 her duties are "primarily" managerial.

Here, counsel for the petitioner made an unsupported claim, on appeal, that the beneficiary "performs an essential function for the organization." However, the petitioner failed to provide a breakdown of the beneficiary's job duties to support such a claim and failed to demonstrate that the beneficiary will allocate at least 51% of her time to managing an essential function of the U.S. company. In fact, neither counsel nor the petitioner claimed that the beneficiary is a function manager at the time of filing or in response to the RFE.

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. See 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, the petitioner has not demonstrated that the beneficiary's duties will primarily focus on the broad goals and policies of the organization. Although the petitioner states that the beneficiary is an executive and on appeal, counsel for the petitioner indicates that the beneficiary has been carrying out executive duties, the petitioner has not provided sufficient information about the beneficiary's duties to establish that she is an executive at the U.S. company. The list of job duties provided by the petitioner is not indicative of an executive position. In addition, as discussed, the petitioner's lack of additional employees at the time of filing, demonstrates that the beneficiary is not relieved from involvement in the day-to-day operations of the company.

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)).

Furthermore, 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.

Counsel further refers to two unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in either of the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity or as a function manager. Accordingly, the appeal will be dismissed.

III. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.