



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 05 2014**

Office: VERMONT SERVICE CENTER

FILE

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, 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 [REDACTED] limited liability company established in April 1995, states on the Form I-129 that it is a "Tanker Shipping" business. The petitioner claims to be a subsidiary of [REDACTED] located in Sweden. The petitioner seeks to employ the beneficiary as its general manager of commercial operations for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed in a qualifying managerial or executive capacity or in a position involving specialized knowledge at the foreign entity.

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 did not make material changes to the beneficiary's position in response to the RFE, but rather that the petitioner provided a more detailed account of the beneficiary's duties at the foreign entity. Counsel asserts that U.S. Citizenship and Immigration Services (USCIS) failed to adjudicate the petition using the appropriate preponderance of the evidence standard. Counsel 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:

- (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.

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.

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).

II. THE ISSUE ON APPEAL

A. Facts and Procedural History

The sole issue addressed by the director is whether the petitioner has established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity or in a position involving specialized knowledge, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner stated the following:

[The beneficiary] has been continuously employed as Commercial Operator from September 2011 to the present with [the foreign entity] in Sweden. In this position, [the beneficiary] is responsible for ensuring that all transportation for commercially managed ships is carried out according to C/P [sic]. This includes arranging the most economical bunker plan for managed vessels and keeping the vessel and owner informed about the charterer's voyage, loading and discharge instructions. He assigns the port agent, arranges advances to the port agent, verifies the port costs and settles final disbursement accounts. He is also responsible for maintaining the [redacted] with up-to-date data concerning the voyage, bunkering, etc.

In support of the petition, the petitioner submitted a letter describing the beneficiary's position and duties at the foreign entity identical to the description provided on the Form I-129, adding the following:

He monitors the L.O.I. received before arrival discharge port and ensures that the foreign invoice is issued and that the freight is collected. He is responsible for producing and distributing updated [redacted] calculations and maintaining the voyage file. [The beneficiary] calculates and negotiates the demurrage and monitors the payment. He also calculates the speed and performance on the time chartered vessels. For ships owned by [the petitioner], he is responsible for ensuring that the ships are approved by customers. He analyzes the actual voyage economics for accuracy and evaluates how they relate to estimates explaining the cause of any variances.

In addition, [the beneficiary] ensures that all transportation for vessels chartered to customers is carried out according to C/P [sic]. He is responsible for keeping the [petitioner's] customer information about all relevant information concerning the voyage and its progress. He issues voyage orders and ensures that both the vessel and the owner are informed about the charterer's voyage, loading and discharge instructions. [The beneficiary] is responsible for ensuring that a proper L.O.I. is issued and for maintaining the [redacted] with updated data about the voyage. He reviews the ship owner's freight invoices for accuracy and provides them to customer for payment. He maintains the voyage file and the daily position list. He analyzes and negotiates demurrage claims and provides them to customer for payment. Finally, [the beneficiary] exercises the authority to procure bunkers for the vessels, assign port agents and remit advances to same.

The petitioner also submitted an organizational chart for the foreign entity, dated July 2013, showing the beneficiary within the "Commercial Operations" department, reporting to [REDACTED] general manager. The beneficiary's name is below one other name and above two additional names and is in bold along with the first name, but none of the names listed have identifying position titles.

The petitioner did not submit any additional information about the beneficiary's position or duties, or that of his subordinates, if any, at the foreign entity or the organizational structure of the foreign entity.

The director issued a request for evidence ("RFE") on September 5, 2013, instructing the petitioner to submit additional evidence to demonstrate that the beneficiary was employed in a primarily managerial or executive capacity, or in a position involving specialized knowledge, at the foreign entity.

In response to the RFE, counsel for the petitioner described the beneficiary's position abroad as follows:

. . . [the beneficiary] is currently employed in the managerial position of Commercial Operator with [the foreign entity] in Sweden. In this capacity, [the beneficiary] directs the key day to day operation of vessels and commercial operators in his department. He exercises discretionary authority in negotiating the terms and conditions of contracts/agreements on behalf of the company. He establishes company goals and policies and exercises wide latitude in discretionary decision making. As Commercial Operator, [the beneficiary] directs and manages a staff of four degreed professionals including Commercial Operators, Commercial Operator Trainees and Commercial Operators Marine Claims.

* * *

Please note that in the case at bar, [the petitioner] filed an L-1A petition as a managerial employee. [The beneficiary] manages professional employees abroad and will be required to manage professional employees in the U.S.

The petitioner submitted a letter from the beneficiary, September 18, 2013, describing his duties as "Manager Commercial Operations," as follows:

In the role as Manager Commercial Operations the responsibilities and duties are:

- To ensure the co-ordination of port agency and letter of indemnity requirements with vessel owner/operator and charterer to ensure expeditious vessel cargo handling, port turnaround, and prompt and reasonable disbursements of funds to port agents
- Arrange most economical bunker plan and supply for managed vessels
- Maintains records and reports and systems necessary to document vessel itineraries and commercial operations performance, and to ensure that commercially managed ships are pre-approved by selected major oil companies
- To coordinate all activities pertaining to the performance of all charters undertaken by [the petitioner], including monitoring vessel ETA's, from completion of fixture negotiations to the completion of all operations relating to the expedition of the voyage

- To deal with all operational problems and vessel inspection queries raised by the customers which may arise during any voyage arranged by [the petitioner], in consultation with the Chartering Department and [the petitioner's] management
- To provide technical advice as and when required to assist in the expedition of all voyages, to provide input in the development of commercial opportunities, and assist vessel masters in meeting commercial operational requirements
- To ensure vessels acceptability at ports, terminals, berths, and customers
- Assist chartering department in evaluating technical/operational characteristics of candidate vessels for time charter requirements
- Analyze actual voyage economics for accuracy and how they relate to estimates explaining causes of variances
- Assess time charter vessel speed, fuel consumption, and pumping performance and determine whether compensation due charterer or shipowner
- Oversee preparation or review of shipowner invoices, including analysis and assessment of freight and demurrage calculations and compliance with charter party terms and conditions
- To maintain contact with Government/Industry/regulatory authorities etc. in matters pertaining to Tanker operations and to remain familiar and updated with regard to current and future governmental/regulatory legislation/recommendations
- To be responsible for the preparation and issuance of voyage orders to chartered and managed vessels ensuring that customers provide necessary instructions for intended voyages. Ensures that third party customers chartering managed vessels supply all necessary instructions for intended voyages and that the managed vessels are fully advised of charter party term and conditions
- Adheres to all current company policies and procedures and Quality System

As a manager I am entitled to give recommendations for hiring and promotions and I am authorized to grant leave and vacation applications.

The petitioner submitted a new organizational chart for the foreign entity, dated September 24, 2013, showing the beneficiary within the "Commercial Operations" department, reporting to [REDACTED], general manager. In the new organizational chart, the beneficiary's name has been moved to the top of the list, above four other names, and the word "(Mgr)" has been added at the end of his name. The beneficiary's name is the only name in bold and none of the other four names in the commercial operations department list any identifying position titles.

The petitioner also submitted job descriptions for "commercial operator," dated March 14, 2012, and "commercial operations – marine claims," dated August 12, 2013. The commercial operator job description is almost identical to the position description and job duties originally submitted for the beneficiary's position abroad, and very similar to the one submitted in response to the RFE. The job description for the commercial operator states that the commercial operator reports to the manager commercial operations.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity or in a position involving specialized knowledge. In denying the petition, the director observed that the petitioner submitted a revised

position description in response to the RFE that was similar to the first list of duties provided, but changed the beneficiary's title to include the word "manager" and included additional duties such as "establishes goals and policies" and "exercises discretionary authority," and the right to make hiring and promotion decisions, which simply paraphrase portions of the statute.¹ The director found that the changes made to the beneficiary's title, job duties, and place in the organization appear to be material revisions made for the purpose of making a deficient petition comply with service requirements.

On appeal, counsel for the petitioner asserts that the beneficiary is a managerial employee at the foreign entity. Counsel contends that even if the director found that the foreign position was not managerial, it still involved specialized knowledge. Counsel went on to assert that the beneficiary's position abroad meets the requirements for a specialized knowledge position in that the beneficiary possesses specialized knowledge of the foreign entity's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures. Counsel contends that the petitioner did not make any material changes to the beneficiary's position abroad in response to the RFE and simply provided a more detailed description, as requested by the director. Counsel claims that the petitioner provided an updated and current organizational chart at the time of response to the RFE and did not make any material changes to the organizational chart in order to make a deficient petition comply with service requirements. As noted above, counsel avers that USCIS failed to adjudicate the petition using the appropriate preponderance of the evidence standard.

B. Preponderance Of Evidence

In light of counsel's references to the requirement that USCIS apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

¹ For example, the phrase "establishes goals and policies" paraphrases section 101(a)(44)(B)(iii) relating to the definition of executive capacity; the phrase "exercises discretionary authority" broadly paraphrases section 101(a)(44)(B)(ii) also relating to the definition of executive capacity and section 101(a)(44)(A)(iv) relating to the definition of managerial capacity; and the phrase right to make hiring and promotion decisions paraphrases Section 101(a)(44)(A)(iii) relating to the definition of a personnel manager.

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

C. Analysis

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

Preliminarily, we will address counsel's contention on appeal that if USCIS does not agree that the beneficiary was a manager for the foreign entity, that his previous position abroad was sufficiently technical and specialized as to qualify him as a specialized knowledge employee abroad. In this matter, counsel for the petitioner in response to the RFE, specifically stated:

Please note that in the case at bar, [the petitioner] filed an L-1A petition as a managerial employee. [The beneficiary] manages professional employees abroad and will be required to manage professional employees in the U.S.

Now, on appeal, counsel asserts that the beneficiary's position abroad should also qualify him as a specialized knowledge employee. However, USCIS cannot make a factual determination regarding the beneficiary's

specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge. Here, the director in the issued RFE requested that the petitioner provide evidence supporting any claim that the beneficiary's position abroad was in an executive, managerial or specialized knowledge capacity. The petitioner did not provide any information regarding the beneficiary's purported specialized knowledge for the director's consideration; rather, counsel specifically indicated that in this matter, the beneficiary's position abroad is managing professional employees. Counsel failed to even suggest that the beneficiary's position abroad was in a specialized knowledge capacity. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Moreover, even if we accepted counsel's attempt to change the nature and character of the beneficiary's position abroad on appeal, which we do not, counsel does not provide any additional information about the beneficiary's specialized knowledge or such knowledge required by the position in order to carry out the listed duties.² Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

To reiterate, the record in this matter does not include probative evidence establishing the nature of the beneficiary's claimed specialized knowledge abroad or how the position abroad involves such specialized knowledge. Any claim that the beneficiary's knowledge is specialized must be accompanied by evidence establishing that the beneficiary possesses knowledge that is different from what is generally possessed in the industry. Here, the record does not include any evidence to support that claim. The record does not include the information needed to make a comparison between the beneficiary's training and experience and that possessed by others within the foreign entity or within the industry as a whole.

Other than submitting a description of the beneficiary's current and proposed job duties, the petitioner has not identified any aspect of the beneficiary's position abroad which involves knowledge that rises to a level that is special or advanced. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the

² The statutory definition of specialized knowledge at Section 214(c)(2)(B) of the Act is comprised of two equal but distinct subparts or prongs. First, an individual is considered to be employed in a capacity involving specialized knowledge if that person "has a special knowledge of the company product and its application in international markets." Second, an individual is considered to be serving in a capacity involving specialized knowledge if that person "has an advanced level of knowledge of processes and procedures of the company." See also 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner may establish eligibility by submitting evidence that the beneficiary and the proffered position satisfy either prong of the definition.

regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990).

Turning to the petitioner's description of job duties and whether the petitioner has clearly described the duties performed by the beneficiary sufficient to establish that the beneficiary's position is in either an executive or managerial capacity, we find it has not.³ Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed executive or managerial capacity of a beneficiary, including the foreign entity's organizational structure, the duties of the beneficiary's subordinate employees abroad, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the foreign entity's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

In the instant matter, counsel for the petitioner indicated that the beneficiary has been employed primarily in a managerial position, pursuant to section 101(a)(44)(A) of the Act. The petitioner first characterized the beneficiary's role at the foreign entity as a commercial operator and provided a list of job duties with very specific tasks. The petitioner noted that at the foreign entity, the beneficiary: ensures that all transportation for commercially managed ships and vessels chartered to customers are carried out according to "C/P;" arranges the most economical bunker plan for managed vessels; issues voyage orders and keep vessels and owners informed about the charterer's voyage, loading and discharge instructions; assigns the port agent; arranges advances to the port agent; verifies the port costs and settles final disbursement accounts; maintains the [REDACTED] with up-to-date data concerning the voyage; monitors the "L.O.I." received before arrival discharge port; ensures that foreign invoices are issued and freight is collected; produces and distributes updated [REDACTED] calculations and maintains the voyage file; calculates and negotiates the demurrage and monitors payment; calculates speed and performance on time chartered vessels; ensures that ships are approved by customers; analyzes the actual voyage economics for accuracy and evaluates how they relate to estimates; keeps customer information about all relevant information concerning the voyage and its progress; reviews the ship owner's freight invoices for accuracy and provides them to customer for payment; maintains the voyage file and the daily position list; and exercises the authority to procure bunkers for the vessels, assign port agents and remit advances to same. This initial description shows the beneficiary performing non-qualifying duties at the foreign entity. While these tasks are undoubtedly necessary in order to continue operations, the petitioner does not articulate or otherwise explain how these duties qualify as managerial or executive in nature. Accordingly, the petitioner has not provided sufficient information regarding the beneficiary's duties at the foreign entity to demonstrate that these duties qualify him as a manager or executive.

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. Here, the petitioner also fails to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-managerial and non-executive. The petitioner listed the beneficiary's duties as including primarily operational tasks and failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because most of the beneficiary's daily tasks at the foreign entity, as noted above,

³ When examining the executive or managerial capacity of the beneficiary, we look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

do not fall directly under traditional managerial duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary has been primarily performing duties in a managerial or executive 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 provided a new position description and list of job duties for the beneficiary's position at the foreign entity. The new position description included most of the same duties previously submitted but added several new duties and the word "manager" to the beneficiary's position title.

We do not find that the change in the beneficiary's position title alone is sufficient to warrant a finding of a material change made to the beneficiary's position in response to the RFE. However, the additional duties listed for the beneficiary that were not previously included in the petitioner's initial position description, in combination with the new position title, new supervisory duties, and newly claimed subordinate employees, does raise doubts as to the validity of the information provided in response to the RFE. Additionally, the position description for "commercial operator," submitted in response to the RFE as the duties of the beneficiary's subordinates, is exactly what was described as the beneficiary's duties at the time of filing the petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary supervising some of the actual work and four previously unidentified subordinates in the foreign entity's operation. We again point out that the petitioner does not provide an allocation of the beneficiary's time spent on performing any of the claimed supervisory duties, which appear to be the duties of a first-line supervisor, and the other non-qualifying duties.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added a new duty of directing and managing a staff of four, with the claim that these supervised individuals are degreed professionals, to the job description and added the word "manager" to the beneficiary's title.

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).

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.

In evaluating whether the beneficiary manages professional employees, we evaluate whether the subordinate positions managed 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, at the time of filing, the petitioner did not state that the beneficiary had any subordinates. In response to the RFE, the petitioner stated that the beneficiary "directs and manages a staff of four degreed professionals including Commercial Operators, Commercial Operator Trainees and Commercial Operators Marine Claims." The petitioner submitted position descriptions for commercial operators and commercial operators - marine claims, which are insufficient to demonstrate that the positions require a professional degree. Although the position description for the commercial operator indicates that the position requires a "[m]inimum Master's degree in Nautical Science or equivalent experience," the petitioner does not provide evidence establishing why such a degree is necessary to perform the duties of the position. Moreover, the record does not include evidence that such a degree is equivalent or otherwise comparable to U.S. baccalaureate degree. Further, the requirement to perform the duties of a "commercial operator – marine claims" is only a two year business diploma or equivalent experience/courses. Furthermore, the record does not include evidence establishing that any of the beneficiary's subordinates hold the position of commercial operator or commercial operator – marine claims.

Accordingly, the record in this matter is insufficient to establish that any of the beneficiary's claimed subordinates' positions require a bachelor's degree, such that the individuals holding the position could be classified as professional. Moreover, upon review, the position descriptions for the subordinate positions do not support a finding that these positions are professional, managerial, or supervisory positions. Thus, the record does not establish that the beneficiary's claimed subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner has not established, in the alternative, that the beneficiary is employed by the foreign entity primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C.

§ 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not specifically indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary would devote to duties that would clearly demonstrate that he manages an essential function of the foreign entity, rather than performing 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 his duties are "primarily" managerial. As discussed herein, the petitioner's description of the beneficiary's day-to-day duties at the foreign entity fails to establish that such duties are primarily managerial in nature.

Although neither counsel nor the petitioner claim that the beneficiary's foreign position was executive in nature, for thoroughness we will review the duties of the position in that regard. 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. 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 beneficiary has not been shown to be employed in a primarily executive capacity at the foreign entity. The petitioner failed to demonstrate that the beneficiary's duties primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the beneficiary fail to demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary has been employed primarily in a qualifying managerial or executive capacity or in a position involving specialized

knowledge at the foreign entity. Accordingly, the director's decision is affirmed and the appeal will be dismissed.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity at the U.S. company.

A. Facts Pertinent to the U.S. Position

On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

At this time, [the beneficiary's] services are needed at our Houston office in the position of General Manager Commercial Operations. In this position, [the beneficiary] will function at a senior level within the organizational hierarchy of the company and will exercise wide latitude in discretionary decision-making. [The beneficiary] will be responsible for ensuring a close coordination of port agency and letter of indemnity requirements with vessel owner/operator and charterer to ensure expeditions vessel cargo handling, port turnaround, and prompt and reasonable disbursements of funds to port agents. He will coordinate all activities pertaining to the performance of all charters undertaken by [the petitioner], including monitoring vessel ETA's completion of fixture negotiations, and completion of all operations relating to the expedition of the voyage. He will manage all issues with operational components and vessel inspection queries raised by the customers, which may arise during any voyage arranged by [the petitioner], in consultation with the Chartering Department and [the petitioner's] management.

In support of the petition, the petitioner submitted a letter describing the beneficiary's proposed position in the United States identical to the description provided on the Form I-129 and added the following:

He will arrange the most economical bunker plan and supply for the managed vessels. He will maintain records, reports and systems necessary to document vessel itineraries and commercial operations performance, and to ensure that commercially managed ships are pre-approved by selected major oil companies. . . . He will coordinate and provide technical advice regarding the expedition of all voyages, provides input in the development of commercial opportunities, and guides vessel masters in meeting commercial operational requirements. He will manage the compliance of all vessels to be accepted into all ports, terminals, berths, and customers. He will work with managerial peers in the Chartering Department to evaluate the technical and operational characteristics of candidate vessels for time charter requirements. He will analyze the actual voyage economics for accuracy and explain how they relate to estimates explaining causes of variances. He will assess time charter vessel speed, fuel consumptions, and pumping performance and determine whether compensation is due to the charter or ship owner. He will oversee preparation or review of ship owner invoices, including analysis and assessment of freight and demurrage calculations and compliance with charter party terms and conditions. He will maintain contact with

governmental, industry, and regulatory authorities in matters pertaining to [REDACTED] operations and will remain familiar and updated with regard to current and future governmental, regulatory legislation and recommendations. He will be responsible for the preparation and issuance of voyage orders to chartered and managed vessels ensuring that customers provide necessary instructions for the intended voyages. He will ensure that third party customers chartering managed vessels supply all necessary instructions for intended voyages and that the managed vessels are fully advised of charter party terms and conditions.

The petitioner also submitted an organizational chart for the U.S. company, dated July 2013, showing the beneficiary within the "Commercial Operations" department reporting to [REDACTED], the general manager. The beneficiary's name is above three additional names and is in bold, but none of the names listed have identifying position titles.

The petitioner did not submit any additional information about the beneficiary's proposed position or duties, or that of his subordinates, in the United States or the organizational structure of the U.S. company.

B. Analysis

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

When examining the executive or managerial capacity of the beneficiary, we 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.* Again, 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.

In the instant matter, the petitioner characterized the beneficiary's role as general manager commercial operations, noting he will function at a senior level within the organizational hierarchy of the company and will exercise wide latitude in discretionary decision-making. The petitioner also listed a number of operational tasks the beneficiary would perform. The petitioner did not explain how the tasks listed qualify as managerial or executive duties. The petitioner did not provide any additional information about the beneficiary's proposed duties at the U.S. company or his proposed subordinates.

Given the nature of the specific duties listed for the beneficiary's proposed position at the U.S. company, the record reflects that the beneficiary would more likely than not allocate more than 50% of his time to duties that are non-qualifying. The description appears to have the beneficiary doing more of the actual work, rather than managing the organization, or a department, subdivision, function, or component of the organization. Here, the petitioner again 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 primarily operational tasks and failed to quantify the time the beneficiary would spend on them.

We reiterate that this failure of documentation is important because most of the beneficiary's proposed daily tasks, as noted above, do not fall directly under traditional managerial duties as defined in the statute. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

We note again that 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.

In this matter, the petitioner has not clearly identified the beneficiary's proposed position on the U.S. organizational chart. If the beneficiary, in the proposed position will supervise the three individuals listed below his name on the U.S. organizational chart, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act. As the record does not include probative information regarding the titles and duties of the three "subordinate" employees, we cannot ascertain that these individuals hold managerial, supervisory or professional positions. The record is simply deficient in this regard. Again, without documentary supporting documentary evidence, the record is insufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." Again, 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). Here, the petitioner does not claim that the beneficiary is managing an essential function; however, even if the petitioner makes the claim, the petitioner has not identified the function with specificity, has not articulated the essential nature of the function, and has not established the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). Moreover, the petitioner has not demonstrated that the beneficiary will manage the function and will be relieved from performing the duties related to the function.

Although the petitioner does not claim that the proposed position is an executive position, we also find that the petitioner has not established that the proposed position is an executive position. As noted above, 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). 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. 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.* Here, the petitioner does not

demonstrate how the beneficiary will be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

Based on the evidentiary deficiencies addressed above, we cannot conclude that the beneficiary will be employed in a qualifying managerial or executive capacity at the U.S. company. For this additional reason, the petition cannot be approved.

We maintain discretionary authority to review each appeal on a *de novo* basis. Our *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. CONCLUSION

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.