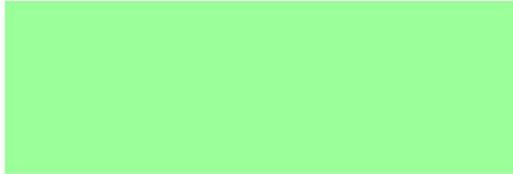




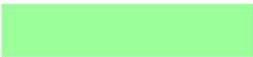
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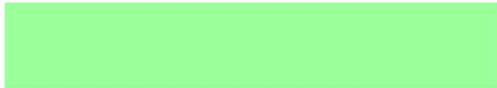
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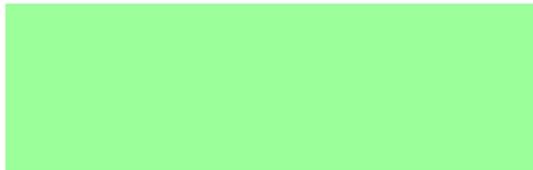
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation established in January 2013, states that it operates an import/export, marketing, and sales of auto spare parts and general merchandise business. The petitioner claims to be a subsidiary of [REDACTED] located in Dubai, U.A.E. The petitioner seeks to employ the beneficiary as the president and CEO of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed in a qualifying managerial or executive capacity 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. On appeal, counsel for the petitioner contends that the "director erred in failing to consider the detailed managerial/executive functions and responsibilities submitted by the petitioner." Counsel submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

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

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

II. THE ISSUE ON APPEAL

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, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

A. Facts and Procedural History

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:

Overall management of the company, [the foreign entity]; Formulate and execute company policies and resolutions of the Board of Directors, Management of the company and staff; Negotiate business transactions with major customers and suppliers, Manage Overseas representatives, Uphold company policies, Responsible for the financial stability and revenue of the company.

In support of the petition, the petitioner submitted a letter from [redacted] vice president of the U.S. company, describing the beneficiary's position abroad identical to the description provided on the Form I-129.

The petitioner did not submit any additional information about the beneficiary's position abroad or the organizational structure of the foreign entity.

The director issued a request for additional evidence ("RFE") on August 9, 2013, advising the petitioner that the description of duties provided for the beneficiary's employment abroad does not demonstrate what he does on a day-to-day basis. The director noted that the petitioner failed to indicate the percentage of time the beneficiary devotes to his managerial duties and an organizational chart to establish the beneficiary's position within the foreign entity. The director instructed the petitioner to submit evidence that the beneficiary's position abroad was in a managerial or executive capacity.

In response to the RFE, the petitioner submitted a letter from the foreign entity describing the beneficiary's duties abroad as follows:

Since 2004 [the beneficiary], as the 49% shareholder and as pert [sic] of his responsibilities as the managing director, has made several executive decisions involving ordering spare parts and goods from overseas. The decisions included setting company objectives to take whatever necessary steps to make deals and contracts with the suppliers of the goods and trading with the wholesalers; negotiating purchase price and setting sale price; determining where to buy the good [sic] at the cheaper price without compromising the quality of the product in order to gain profits.

* * *

[The beneficiary] is responsible for overall management of the [foreign entity], which includes:

Responsible for the financial stability and revenue of the company including dealing and overseeing with the banking and invoices – approximately 30% of time

Formulate and executing company policies and resolutions of the Board of Directors – 10% of time

Managing the company and staff which also includes checking the accuracy of arrived documents for customs clearance – 30% of time.

Negotiate business transactions with major customers and suppliers and Manage Overseas representatives and uphold company policies – 30% of time

* * *

Moreover, he also supervises a staff of two persons as shown in the organizational chart.

* * *

... [the beneficiary] has been exercising wide latitude in discretionary decision making in the financial and budgetary matters of the company and in dealing with the suppliers overseas. At the same time he has been training our staff by having them directly assist him with the banking and contracting the suppliers and having them assist him with the banking, follow up calls and custom clearance [sic].

The petitioner submitted an organizational chart for the foreign entity depicting Mrs. [redacted] (51% shareholder) above the beneficiary, who is listed as 49% shareholder and managing director. According to the chart, the beneficiary supervises [redacted] as the accountant, and [redacted] as the office assistant.

The petitioner also submitted a document titled, "Job Duties Summary," describing the job duties for all of those listed on the organizational chart. The beneficiary's duties are described identical to the previous

descriptions provided with the petition and again in response to the RFE. The document goes on to describe the beneficiary's subordinates' duties as follows:

Mr. [REDACTED]
Office Assistant to Ms. [REDACTED] and [the beneficiary]
Under supervision of Managing Director [the beneficiary] – respond to customer inquiry, answer phone & emails, direct mail, Assist Ms. [REDACTED] and Managing Director with the banking and payroll deposits, Assist the accountant with purchase billings, payment of local business fees as needed.

[REDACTED]
Accountant responsible for financial transactions, billing, payment of local license fees and bookkeeping[.]

The director denied the petition on November 12, 2013, concluding that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. In denying the petition, the director found that the duties described are more indicative of an employee who will be performing the necessary tasks to provide a service or produce a product. The director further found that, based on the submitted organizational structure and job descriptions for the beneficiary and his subordinates, it appears that the beneficiary's position abroad is primarily involved in the performance of the day-to-day non-supervisory duties of the business and the performance of routine operational activities for the foreign entity. The director concluded that the petitioner had not established that the beneficiary has been employed primarily in a qualifying managerial or executive capacity at the foreign company.

On appeal, counsel for the petitioner restates the petitioner's response to the RFE, relating to the beneficiary's position abroad, and adds the following:

The legal and formal documents submitted with the petition and the response to the [RFE] clearly show that under the laws of both the Dubai, UAE and California, the Beneficiary is and has been an Executive/Manager of the foreign entity, and he is coming to the United States entity to perform with the same or similar job duties as an executive/manager. The main and key executive/managerial function the beneficiary performs is to closely interact with existing customers to solicit new order [sic] and to seek out prospective new buyers worldwide. This also includes interacting with various existing and new suppliers worldwide.

Counsel also asserts that the director erred when placing "undue" emphasis on the educational levels of the beneficiary's subordinate employees at the foreign entity and that this should not be a decisive factor in approving or denying the petition.

Counsel further asserts that the director's decision appears to be discriminatory against small-sized businesses owned by minorities. Counsel references a report published in August 2013 as relevant in this regard.

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that that the beneficiary worked in a qualifying position abroad for the required one year in the past three years prior to filing.

As the director stated, when examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) 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 company'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 company'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 director also properly found that 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). Moreover, we observe that 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 abroad as managing director and provided a vague description of the beneficiary's position for the foreign entity. The description did not establish that the beneficiary primarily performed in the capacity of either an executive or a manager at the foreign entity, as those terms are defined in the statute and regulations. For example, the petitioner indicated that the beneficiary is responsible for the "overall management of the company," but failed to provide an accurate picture of what he does on a daily basis. Although the petitioner noted that the beneficiary will formulate and execute company policies and resolutions of the Board of Directors; manage the company and staff; negotiate business transactions with major customers and suppliers; manage overseas representatives; uphold company policies; and be responsible for the financial stability and revenue of the company, this information failed to convey an understanding of the beneficiary's routine daily duties.

In the letter from the foreign entity response to the RFE, the foreign entity grouped some of the duties together and added percentages of time the beneficiary devotes to those tasks. The foreign entity also added that the beneficiary supervises a two-person staff and has been training the staff to assist him with the banking, contracting with suppliers, follow-up calls, and customs clearances. 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.

Furthermore, on appeal, counsel for the petitioner repeats the same job duties for the beneficiary as provided in response to the RFE, and adds that the beneficiary's main executive/managerial function is to closely interact with existing customers to solicit new orders and to seek out prospective buyers worldwide. This

addition is particularly important because such duties are not listed in the percentage breakdown provided by the petitioner, and if it is the beneficiary's main function as an executive/manager of the foreign entity, the foreign entity should have allotted time to this particular duty. 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).

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 section 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, we 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 petitioner indicated that the beneficiary supervises two employees. The vague and brief 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. Although the organizational chart lists an accountant as one of the beneficiary's subordinates, the brief description of the duties of the position shows that the individual is performing the duties of a billing clerk and bookkeeper. Similarly, the description of the office assistant's duties shows that the individual provides receptionist, customer service, and clerical duties. The lists of job duties for the subordinate positions do not support a finding that either of these individuals holds a professional degree. Further, the description of duties for these individuals does not include any detail that indicates the duties are managerial, or supervisory duties. 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 has not established, in the alternative, that the beneficiary is employed abroad 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. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties at the foreign entity as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate that he manages an essential function of the foreign entity. Further, the beneficiary's job duties as described depict the necessary day-to-day operational duties of the business.

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 duties abroad fails to establish that such duties are primarily managerial in nature.

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 failed to demonstrate that the beneficiary's duties abroad primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. For example, it is the beneficiary that negotiates business transactions with customers and suppliers, he deals with and oversees the banking and invoices, and he checks the accuracy of arrival documents for customs clearance. These duties, while important, are not executive functions but rather the performance of necessary tasks in order to operate the business on a day-to-day basis. Upon review, the job duties provided for the beneficiary's employment abroad fail to demonstrate that the beneficiary focuses the majority of his time on executive duties but rather shows the beneficiary spends the majority of his time performing the day-to-day operations of the business.

We note 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 section 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 business 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)). We recognize that the foreign entity currently has one position labeled an accountant and one office assistant position, in addition to the beneficiary's position. However, the vague job duties provided for the beneficiary and the very brief job duties provided for his subordinates fails to demonstrate that the beneficiary performs at an executive level or that his subordinates relieve him from performing non-qualifying operational and administrative duties.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. Accordingly, 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 within one year of approval of the new office petition.

A. Facts Regarding the Proposed 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:

Act as the President & CEO of the U.S[.] entity, [the petitioner] and build the U.S. entity from "start-up," establish a successful subsidiary for the parent company, [the foreign entity]; Lead the U.S. company from a start-up to a substantial level in the market, Negotiate Business deals, Overall management of the company, [the foreign entity] [*sic*]; Formulate and execute company policies and resolutions of the Board of Directors, Management of the company and staff; Negotiate business transactions with major customers and suppliers, Manage Overseas representatives, Uphold company policies, Responsible for the financial stability and revenue of the company.

In support of the petition, the petitioner submitted a letter from [redacted] vice president of the U.S. company, describing the beneficiary's proposed position in the United States as an executive, identical to the description provided on the Form I-129.

The petitioner also submitted a business plan that includes the following information on proposed staff at the U.S. company:

- Office Manager/Executive Assistant – this will be a full-time position requiring good organizational skills, phone skills and the ability to train and motivate others.
- Credit Analyst – This will initially be a part-time position transitioning to full-time as trade volume grows. This individual will pre-qualify trading partner's credit worthiness and ability to pay at the completion of all transactions.
- Bookkeeper/Accounts Clerk – This individual will be responsible for all financial transaction entries into the accounting system, accounts receivable billing and timely payment of operation expenses.

Staffing levels are expected to increase in concert with the expected growth of trade volumes.

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

In the RFE, the director advised the petitioner that its business plan lacked sufficient detail as to its proposed organizational structure and support of an executive or managerial position within one year of the petition's approval. The director instructed the petitioner to submit evidence that the beneficiary's proposed position in the United States will be in a managerial or executive capacity.

In response to the RFE, the petitioner submitted a letter from the foreign entity briefly addressing the U.S. company's staffing plan by stating, "the appointments of proposed employees depends on how successful and profitable the business is. However, at the end of first year we are hoping and aiming to employ five employees in the California, USA company."

The petitioner submitted an updated business plan, which now includes a list of positions to be hired with brief job duties for each. Specifically, the business plan describes the beneficiary's job duties as follows:

President/CEO – [The beneficiary] – Duties: Establish all standards, policies and procedures for the US company. Contact manufacturers and suppliers in the US to expand spare parts supply chain for export and negotiate manufacture of US made parts for export.

The "vice president, secretary" position is filled by [REDACTED]. His duties include hands-on training by the beneficiary to take over as the future president and CEO of the U.S. company, assisting the president in reviewing all contracts and communications, assist the president in hiring of all staff, and coordinate and schedule staff in required duties. The "office manager/executive assistant" position's duties will include handling all communication between the president and other staff in the United States and abroad, and requires a bachelor's degree. The "credit analyst" position's duties will include being responsible for all financial transaction entries into the accounting system, accounts receivable billing and schedule timely payment of accounts payable and operation expenses, and is preferred to have an associate's degree in accounting and/or bookkeeping certification. The "accountant" position's duties will include reviewing the work of the bookkeeper and credit analyst for accuracy and completeness, preparing profit and loss and balance sheet statements as required, and preparing all tax returns, and requires a bachelor's degree in accounting. The "general manager trade development" position's duties will include identifying and developing new trading business for the U.S. company and implementing corporate growth strategies in the worldwide markets, and requires a master's in business administration.

The business plan also includes a "proposed timetable for 2013-2014," which indicates that [REDACTED] is already employed by the U.S. company as its vice president/secretary, and it plans to hire an office manager/executive assistant, bookkeeper and credit analyst within the first two months of the beneficiary's arrival at the U. S. company. The petitioner then plans to hire for the general manager trade development position in the following two months.

The business plan also includes a proposed organizational chart for the U.S. company, depicting the beneficiary as "CEO/President," supervising [REDACTED] as vice president/secretary. The vice president/secretary directly supervises the "general manager trade development" position, which supervises the accountant and office manager/executive assistant positions. The accountant supervises the bookkeeper (which is listed as a part-time position), and the office manager/executive assistant supervises the credit analyst.

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of approval of the petition.

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

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Again, 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.* As discussed above, 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 contribute to a complete understanding of a beneficiary's actual duties and role in a business.

We do not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president and partial owner. However, as discussed above, not only must the petitioner show that the beneficiary performs the high-level responsibilities that are specified in the definitions, the petitioner must establish 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). We again emphasize that 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").

In the instant matter, the petitioner characterized the beneficiary's role as president and CEO, stating he will negotiate business deals; manage the company and staff; formulate and execute company policies and resolutions of the Board of Directors; negotiate business transactions with major customers and suppliers; manage overseas representatives; uphold company policies; and be responsible for the financial stability and revenue of the company. In response to the RFE, the petitioner provided an updated business plan and stated that the beneficiary's position would require him to establish all standards, policies and procedures for the U.S. company; contact manufacturers and suppliers in the US to expand spare parts supply chain for export; and negotiate manufacture of US made parts for export. While these tasks are undoubtedly necessary in order to continue operations, the petitioner has not indicated how these duties qualify as managerial or executive in nature.

Given the vague and general descriptions of the beneficiary's duties, the record reflects that the beneficiary would more likely than not allocate more than 50% of his time to duties that are non-qualifying. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). The record does not include sufficient probative evidence so that we may conclude that the petitioner will actually support the beneficiary in a managerial or executive position within one year of approval of the petition.

To reiterate, 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." See 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 section 101(a)(44)(A)(ii) of the Act. In this matter, the petitioner provided position descriptions for the one current employee, the vice president/secretary, and five future hires, listing them in the updated business plan.

Again, in evaluating whether the beneficiary manages professional employees, we 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 petitioner's organizational chart indicates that the beneficiary directly supervises the vice president/secretary, who directly supervises a general manager of trade development. There are an additional four subordinates beneath the general manager of trade development. The list of job duties for each of the subordinates do not list any managerial or supervisory duties or include tasks which are indicative of a managerial, supervisory, or otherwise professional position. Additionally, although the petitioner claims that some of the positions require a bachelor's degree or higher, the petitioner has not detailed any specific duties pertinent to any of the positions that would require a bachelor's degree to perform them. We observe further, that the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree in a specific field of study is actually necessary to perform the duties assigned to the beneficiary's subordinates. Nor has the petitioner established that any of the beneficiary's subordinates will primarily supervise subordinate staff members, or manage a clearly defined department or function of the petitioner, such that he or she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employees are or will be primarily supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted an organizational chart depicting the beneficiary as the "president and CEO" directly supervising the "vice president/secretary," the petitioner has not provided credible evidence of an 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 within one year of approval of the petition.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." Again, we note that 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary would devote to duties that would clearly demonstrate that he would manage an essential function of the U.S. company.

We observe again that 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.* Here, the petitioner has not shown that 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.

We emphasize 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 section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the petitioner indicates that the beneficiary's direct subordinate is already employed at the U.S. company, and that it intends to hire three additional employees within the first year of operations. However, the job duties provided for the beneficiary and for his subordinates show that the beneficiary and his subordinates will primarily perform non-qualifying operational and administrative duties. The petitioner has not provided credible evidence establishing that the beneficiary's subordinates will relieve him from primarily performing non-qualifying operational and administrative duties within one year of the approval of the petition. The record is simply deficient in this regard.

Based on the evidentiary deficiencies addressed above, we cannot conclude that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of the approval of the new office petition. 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. COUNSEL'S CLAIM OF DISCRIMINATION

On appeal, counsel references a report published in 2013 as relevant to the instant matter. However, a review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint here is that the director denied the petition. As discussed in detail above, the petitioner has not met its burden of proof and the denial was the proper result under the statute and regulation.

V. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.