



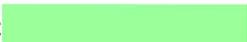
U.S. Citizenship
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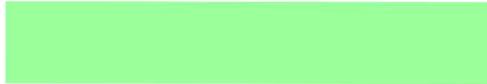


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OFFICE: VERMONT SERVICE CENTER

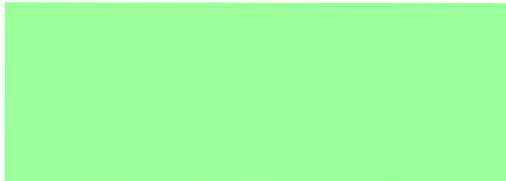
FILE: 

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 this 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 New York corporation established in August 1987, states that it engages in the manufacture and wholesale of frozen shrimp products. The petitioner claims to be a subsidiary of [REDACTED], located in India. The petitioner seeks to employ the beneficiary as its "Manager, Traffic & Documentation" for a period of three years.

The director denied the petition concluding that the petitioner failed to establish: (1) the beneficiary has been employed in a managerial or executive capacity with the foreign entity; and (2) the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

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 asserts that the beneficiary is performing in a managerial capacity at the foreign entity and will be employed as a function manager at the U.S. company. 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.

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.

When examining the executive or managerial capacity of the beneficiary, we 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, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from

performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

II. THE ISSUES ON APPEAL

A. U.S. Employment in a Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

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

Responsibilities will include: issuance of purchase orders; monitoring of purchase orders to ensure prompt shipment by shippers, traffic & documentation follow up including facilitating clearance by customs and FDA; negotiating global contracts with steamship lines; negotiating contracts with trucking companies; maintaining relationships with customs brokers, FDA, steamship lines, warehouses, trucking companies, insurance companies; liaison with customs brokers and FDA officials; updating CSS database for tracking from departure to final destination; following up with warehouse for receipt of goods shipped to customers; sales invoicing and accounting into the database; inventory management.

In its initial letter of support, the petitioner described the beneficiary's proposed position and duties in the United States as follows:

We now wish to transfer [the beneficiary] to the US in the capacity as Manager of Traffic and Operations for [the petitioner]. Her duties will include the following:

- Responsible for all matters related to traffic, documentation, trucking – import and sales, liaison with customers, attending meetings with customers, clients, shipping lines, etc.
- Will continue to man the back office operations from the U.S.
- Issuance of purchase orders.
- Vigilant monitoring of purchase orders issued to ensure the shippers keep shipment commitments.

- Overseeing Traffic & Documentation – following up with packers for shipment advices of containers loaded and ensuring documents are received well in advance to facilitate clearance by Customs and FDA at various ports in the USA, without incurring any additional cost or demurrages. Ensuring that containers are discharged after clearance and warehoused in a timely manner to meet customer requirements, following up with our finance department to ensure that DA/DP documents are paid for and cleared in a timely manner.
- Skillful negotiation of Global contracts with steamship lines for carriage of reefer shipments to USA from countries such as Vietnam, Thailand, India, Bangladesh, etc. Monitoring performance based on contracted terms and ensuring MQC's are met and incentives for the same is credited to the company.
- Negotiating Contracts with various trucking companies for distribution of refrigerated goods from our contracted warehouses to customer's warehouses, all over USA. The contracts are then passed on the customer service to nominate truckers for each sale.
- Maintaining on-going relationship with Customs Brokers, FDA office, Steamship Lines, Warehouses, trucking Companies, Insurance companies, etc.
- Liaison with Customs Brokers and FDA officials with reference to FDA related matters of the company.
- Liaison with Insurance companies, steamship lines and shippers on matters relating to claims arising out of temperature abuse, in-transit, at sea or land and raising claims and ensuring settlements/collections.
- Updating of Microsoft dynamics database for tracking the container right from departure origin till it reaches the final destination, which is the warehouse.
- Inventory Management – Monitoring of inventory to ensure sales are based on FIFO, ensuring that inventory in the Microsoft Dynamics is matched with inventory in all warehouses, back filling of slacks.
- Continuing to oversee the back office operations which also includes monitoring and making sure that all invoices are journalized and accounted in a timely manner, ensuring that bank reconciliation is done on a month to month basis and updating of books of accounts in Microsoft Dynamics.
- Follow up and ensure that purchase orders from customers are received, updated in the system, inputting of sales orders, negotiation with truckers for best available rates and prompt deliveries, overall responsibility for all customer related requirement and making sure that all operational aspects are taken care of with regard to import of containers and sale of products to the end user.
- Also keeping a close watch and follow up on accounts receivable and payable, monitoring of deductions made by customers, checking of broker commissions payable as per contracts signed with our brokers.

The petitioner went on to state that the beneficiary will supervise Ms. [REDACTED] Ms. [REDACTED] and Ms. [REDACTED] in the United States.

The petitioner submitted a document from the foreign entity, addressed to the beneficiary, advising her of the transfer to the U.S. company and listing her duties at the U.S. company exactly as above.

The petitioner submitted an organizational chart for the U.S. company, depicting the beneficiary as "Manager, Traffic & Documentation," reporting to the "CEO, Sales & General Administration." The chart showed that as manager of traffic and documentation, the beneficiary will supervise a "sales coordinator," Ms. [REDACTED] an "executive general administration," Ms. [REDACTED] and an "executive customer service," Ms. [REDACTED]

The director issued a request for additional evidence ("RFE") on August 5, 2013, advising the petitioner that the description of duties provided for the beneficiary's position at the U.S. company does not demonstrate that she will function at a senior level within the organizational hierarchy other than in position title. The director noted that it appears the beneficiary will be primarily engaged in non-managerial, operational tasks, such as monitoring purchase orders, ensuring that containers are discharged and warehoused, and monitoring inventory. The director further observed that it is not clear whether the three staff members under her supervision are considered professionals and will relieve her from performing the services of the company. The director instructed the petitioner to submit a detailed percentage breakdown of the beneficiary's job duties at the U.S. company and a list of her subordinates by name, job title, summary of duties, education level, and salary.

In response to the RFE, the petitioner expanded on the beneficiary's duties and submitted the following breakdown of duties for her position in the United States:

- Responsible for the whole team and program manage all associated operations. Work delegation and ensure follow up to 100% closure. (10%)
- Managing sales of our products (shrimp and meal kit) to 3 of our major customers namely [REDACTED]] (10%)
- Strategize and implement decisions in discussion with the senior management. (5%)
- Responsible for all logistics arrangements, negotiations and liaison with appropriate authorities and factories. (10%)
- Global contract negotiation. (5%)
- Responsible for performance appraisals of the team members and associated increments. Evaluate self and team's performance and ensure direction in accordance with organizational goals. (5%)
- Responsible for Back Office operations being run in India with a team of 6 Persons and supervise a team of 3 in the United States. (10%)
- End-to-end recruitment, training and staffing of employees in beneficiary's division. (5%)
- Monitor inventory management, accounts receivable, accounts payable, sales deductions, broker commissions, contracts, traffic and documentation, accounts reconciliations. (10%)
- Prepare the pricing matrix; negotiate and prepare competitive pricing strategies. (10%)
- Monitor sales budgets. (5%)
- Conduct regular inspection and audit at the warehouses. (10%)
- Analysis and preparation of case studies towards statutory compliances. (5%)

The petitioner went on to provide a brief description of duties, consisting of four to five bullet points, for each of the beneficiary's three subordinates.

The petitioner submitted a new organizational chart for the U.S. company, depicting the beneficiary as "Manager, Traffic & Documentation," reporting to the "CEO, Sales & General Administration." The chart showed that as manager of traffic and documentation, the beneficiary will have two lines of supervision. First, she will supervise a "sales coordinator," Ms. [REDACTED] an "executive general administration," Ms. [REDACTED] and an "executive customer service," Ms. [REDACTED] in the U.S.; and second, she will supervise the "back office," consisting of a "traffic & documentation executive," a "systems coordinator," an "inventory" position, an "executive accounting" position, an "executive A/P" position, and an "executive A/R" position.

The director denied the petition on September 13, 2013, concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the beneficiary's duties provided in response to the RFE appear to have been significantly modified in a way to fit the definitions of manager and executive as set forth in the Act. The director observed that the day-to-day duties listed on the initial submission now only take up a smaller portion of the beneficiary's time, including monitoring inventory management, accounts receivable, accounts payable, traffic and documentation, sales budget, etc. The director further observed that the petitioner added several duties that seem to fall in line with the definition of a manager, including planning and implementing decisions with senior management, completing performance appraisals, and recruiting and training employees. The director further found that the petitioner failed to establish that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve her from performing non-qualifying duties. The director observed that the petitioner submitted job descriptions for the three employees subordinate to the beneficiary, but failed to provide a percentage breakdown of their duties or evidence of education level and salary. The director summed up that "the record does not show that the beneficiary will perform duties that would qualify her as a manager or an executive."

On appeal, counsel for the petitioner asserts that the beneficiary's proposed position in the United States meets the requirements for managerial capacity and describes her position as follows:

The Position of Manager of Traffic and Documentation is a key executive position for [the petitioner]. The position is Managerial in nature since the beneficiary manages entire department of the company, the backoffice [*sic*] operations and is coming to the U.S. to manage the Traffic and Operations in the import of goods from India. . . . The petitioner[']s letter clearly indicated that [the beneficiary] manages a department, is part of the senior managerial team, and reports directly to the CEO of the company. In this capacity, she is responsible for the Customer Service and Traffic and Operations functions of the U.S. office. . . . The organizational chart makes clear to [the beneficiary's] executive role within the organization.

Irrespective of whether the individuals to be managed are professional or managerial employees, the status provides for managing essential function and that is exactly what the Beneficiary's function is in the organization. Since the petitioner is importer of goods from India, [the beneficiary] manages that very department that allows for the import of goods. . . . This is essential function of the company and without such Manager, the company is incapable of conducting business. [The beneficiary] has significant discretion in decision-

making regarding to the day-to-day activities. [The beneficiary] will be in a managerial/executive position for [the petitioner]

* * *

The position offered is clearly managerial and executive in nature. . . . She will supervise three supervisory level workers as well as a team of 6 employees back in India. [The beneficiary] also will work in an executive capacity in that she directs the management of documentation and traffic of imported goods, all critical functions of the company.

Counsel further states that the beneficiary's job duties "were not altered as the Service contends in the denial letter[,] rather the described job duties clarified as to how the beneficiary manages the day-to-day activities of the department." Counsel provides the same list of job duties with attached percentages for the beneficiary and the same brief list of job duties for her subordinates in the United States.

Counsel submits a letter from the petitioner, dated October 10, 2013, that is almost identical to the letter submitted in response to the RFE. The petitioner lists the same duties for the beneficiary and her subordinates at the U.S. company. Counsel also submits resumes and evidence of employment for [redacted] and [redacted] two of the beneficiary's subordinates in the United States.

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

The petitioner first characterized the beneficiary's role as manager of traffic and documentation and briefly described her duties in very broad terms, noting that she will liaison with customers; attend meetings with customers, clients, and shipping lines; issue purchase orders; follow up with packers for shipment status and ensure documentation is received to facilitate clearance by customs and FDA; ensure that containers are discharged after clearance and warehoused timely to meet customer requirements; update Microsoft dynamics database for tracking containers from departure origin to the warehouse; monitor inventory to ensure sales are based on FIFO; ensure that inventory in Microsoft dynamics is matched with inventory in all warehouses; continue to oversee the back office operations in India, which includes monitoring and ensuring that all invoices accounted for timely, that bank reconciliation is done monthly, and updates are completed in Microsoft dynamics; follow up and ensure that purchase orders from customers are received and updated in the system; input sales orders; and negotiate with truckers for best available rates and prompt deliveries. Thus, the initial description shows the beneficiary will primarily perform non-qualifying duties.

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 does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that the beneficiary is to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In this matter, the petitioner failed to document what proportion of the beneficiary's duties would be managerial duties and what proportion would be non-managerial or what duties would be executive duties and what proportion would be non-executive. The petitioner listed the beneficiary's duties but failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because the beneficiary's proposed daily tasks, as noted above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in either 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, and again on appeal, the petitioner provided a brief and equally vague list of job duties for each of the beneficiary's proposed subordinates and an additional list of duties for the beneficiary's proposed position, including an allocation of percentages of time the beneficiary would spend on each duty. This additional list of duties for the beneficiary primarily includes non-qualifying operational duties that are not carried out by the beneficiary's subordinates. The list of job duties for the beneficiary's subordinates indicate that they will not relieve her from devoting approximately 60% of her time on non-qualifying operational duties, such as making logistics arrangements with factories, inventory management, sales with three major customers, and regular inspections and audits of the warehouse. The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Further, this additional list of duties for the beneficiary does not include several of the previously listed non-qualifying duties, such as issuance of purchase orders, following up with packers for shipment containers, updating Microsoft dynamics database, follow up with customers to ensure purchase orders are received and updated in the system, and inputting sales orders. 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 the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify her as a manager or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of

the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that her 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 must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner indicated that the beneficiary will devote 10% of her time to supervising three employees in the United States and six employees in India, 5% of her time on their performance appraisals, and an additional 5% of her time on recruitment, training and staffing of employees in her division as well as spending a portion of 10% of her time on work delegation. Thus, the beneficiary will spend less than 30 % of her time on duties related to supervision of others. Moreover, the job duties provided by the petitioner for each of the beneficiary's subordinates at the U.S. company demonstrate that the positions themselves do not require a professional degree. The petitioner has not established that the positions held by any of the beneficiary's claimed subordinates require a bachelor's degree, such that they could be classified as professional. Furthermore, although specifically requested by the director, the petitioner failed to provide probative evidence of the subordinates' education level. Attaching resumes that include a reference to a degree or simply listing a degree is insufficient. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

As noted above, although the organizational chart lists a sales coordinator, an executive of general administration, and an executive of customer service as the beneficiary's direct subordinates, the lists of job duties for the subordinate positions do not support a finding that the positions are professional positions. Nor has the petitioner shown that any of these three employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. We note counsel's claim on appeal that the sales coordinator supervises an individual in "Accounts (Sales and receivables);" however, neither the petitioner nor either version of its organizational chart identifies this individual as the sales coordinator's direct subordinate. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The petitioner has not submitted consistent, probative evidence demonstrating that the beneficiary's

subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and her proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. In the instant matter, the petitioner failed to submit credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Furthermore, the petitioner has failed to submit evidence that the beneficiary's subordinate employees will relieve her from performing non-qualifying operational duties.

The petitioner has not established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

Here, the petitioner did not claim that the beneficiary qualifies as a function manager. Although, on appeal, counsel asserts that the beneficiary manages an essential function of the petitioner, that is the import of goods from India, 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 she would manage an essential function of the U.S. company, rather than perform 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 will "primarily" perform 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 the beneficiary's duties are "primarily" managerial. As discussed herein, the petitioner's description of the beneficiary's proposed day-to-day duties fails to establish that such duties would be 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 will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although counsel states that the beneficiary will be a manager and an executive, none of the beneficiary's listed duties, presented at the time of filing, in response to the RFE, and on appeal, include duties that correspond to the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. In addition, the petitioner has not established that the beneficiary's subordinate employees would relieve her from performing non-qualifying operational duties. The job duties provided for the beneficiary fail to demonstrate that the beneficiary will focus the majority of her time on executive duties rather than 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 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)). However, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his or her duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Here the petitioner has not established that the beneficiary's subordinate employees or any others relieve her from performing tasks related to providing the business' product and service.

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

B. Employment Abroad in a Managerial or Executive Capacity

The second 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).

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:

From June 15, 2001, [the beneficiary] has held the position of Manager of [redacted] responsible for the operational functions of the USA offices ([the petitioner]). Her responsibilities at the back office include: issuance of purchase orders; monitoring of purchase orders to ensure prompt shipment by shippers, traffic & documentation follow up including facilitating clearance by customs maintaining relationships with customs brokers, FDA, steamship lines, warehouses, trucking companies, insurance companies; liaison with customs brokers and FDA officials; updating CSS database for tracking from departure to final destination following up with warehouse for receipt of goods shipped to customers; sales invoicing and accounting into the database.

In its letter of support, the petitioner described the beneficiary's duties at the foreign entity as follows:

Since June 2001, [the beneficiary] has been working as Manager of the [redacted] in Cochin, India. In this capacity, she is responsible for the Customer Service and Traffic and Operations functions of the US office. The volume handled by her department is approximately 350 containers annual, or approximately \$38 million. Her duties include:

- Issuance of purchase orders.
- Vigilant monitoring of purchase orders issued to ensure shipment commitments are kept by the shippers.
- Traffic & Documentation
- Maintaining on-going relationship with Customs Brokers, FDA office, Steamship Lines, Warehouses, trucking Companies, Insurance companies, etc.
- Liaison with Customs Brokers and FDA officials with reference to FDA related matters of the company.
- Sales invoicing
- Supervision of Customer Service Department with regard to inputting of Sales Orders of sales personnel based in U.S. and follow up with truckers for delivery of the orders to customers warehouses.
- Inventory Management
- Liaison with finance department on accounts receivable to ensure that dues are collected within the stipulated credit period set.
- Audit all expense bills and authorize payables. With strict audit of bills, we are able to save the company over \$ 50,000 in wrongly billed tariffs and double billing.

[The beneficiary] is currently working in an executive and managerial capacity overseeing the work of 6 employees. . .

The petitioner went on to provide a brief description of duties for each of the beneficiary's six subordinates:

[redacted]

The petitioner submitted an organizational chart for the foreign entity, depicting the beneficiary as "Manager, Traffic & Documentation," under the heading of [REDACTED] reporting to the "Manager, Internal Audit & Procurement Analyst." The chart showed that as manager of traffic and documentation, the beneficiary supervised a "traffic & documentation executive," a "systems coordinator," an "inventory" position, an "executive accounting" position, an "executive A/P" position, and an "executive A/R" position.

The petitioner submitted a letter from the foreign entity, dated June 26, 2013, certifying that the beneficiary has been employed by the foreign organization since 1986 and is currently a member of the "senior management cadre."

The petitioner also submitted the beneficiary's resume, listing her employment at the foreign entity from July 2001 to the present, and describing her duties almost identical to those listed above. The following additional duties were listed on the beneficiary's resume for her employment at the foreign entity:

- Traffic & Documentation – following up with packers for shipment advices of containers loaded and ensuring documents are received well in advance to facilitate clearance by Customs and FDA at various ports in USA, without incurring any additional cost or demurrages. Ensuring that containers are discharged after clearance and warehoused in a timely manner to meet customer requirements, following up with our finance department to ensure that DA/DP documents are paid for and cleared in a timely manner. Volume handled by this department is approx 350 containers annually, valuing approx \$38 million.
- Updating our Dynamics database for tracking the containers right from departure origin till it reaches the final destination, which is the warehouse.
- Following up with the warehouse for receipt of goods shipped to customers.
- Sales invoicing and accounting of it in our accounting database.

In the RFE, the director advised the petitioner that it appears the beneficiary was primarily engaged in non-managerial, operational tasks, such as issuing purchase orders, handling invoices, and managing inventory, at the foreign entity. The director observed that the brief descriptions of the beneficiary's subordinates' duties are not clear in demonstrating that they were acting in a supervisory, professional, or managerial capacity. The director instructed the petitioner to submit a detailed percentage breakdown of the beneficiary's job duties at the foreign entity and a list of her subordinates by name, job title, percentage breakdown of duties, education level, and salary.

In response to the RFE, the petitioner expanded on the beneficiary's duties which are an almost verbatim description of the beneficiary's duties for the U.S. company. The breakdown of duties for the beneficiary's position at the foreign entity is as follows:

- Responsible for the whole team and program manage all associated operations. Work delegation and ensure follow up to 100% closure. (10%)
- Strategize and implement decisions in discussion with the senior management. (10%)
- Responsible for all logistics arrangements, negotiations and liaison with appropriate authorities and factories. (10%)
- Global contract negotiation. (10%)

- Responsible for performance appraisals of the team members and associated increments. Evaluate self and team's performance and ensure direction in accordance with organizational goals. (5%)
- Responsible for India operations supervising a team of 6 persons [sic]. (5%)
- End-to-end recruitment, training and staffing of employees in beneficiary's division. (10%)
- Monitor inventory management, accounts receivable, accounts payable, sales deductions, broker commissions, contracts, traffic and documentation, accounts reconciliations. (10%)
- Prepare the pricing matrix; negotiate and prepare competitive pricing strategies. (10%)
- Monitor sales budgets. (5%)
- Conduct regular inspection and audit at the warehouses. (5%)
- Analysis and preparation of case studies towards statutory compliances. (10%)

The petitioner went on to expand on the previously submitted descriptions of duties for the beneficiary's six subordinates at the foreign entity. Each of the beneficiary's subordinates' brief description of duties consists of three to six bullet points. The petitioner, however, failed to quantify the amount of time the subordinates devote to their briefly described duties.

The petitioner submitted a new organizational chart for the foreign entity, which is almost identical to the one submitted at the time of filing. The only difference in the new organizational chart, is that the beneficiary reports directly to the "CEO, Sales & General Administration" and not to the "Manager, Internal Audit & Procurement Analyst."

The director denied the petition concluding, in part, 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 again found that the beneficiary's foreign duties provided in response to the RFE appear to have been significantly modified in a way to fit the definitions of manager and executive as set forth in the Act. The director also observed that the petitioner re-submitted the job descriptions for the six employees subordinate to the beneficiary, but failed to provide a percentage breakdown of their duties or evidence of their education level and salary. The director summed up that "it appears that the beneficiary had first-line supervisory responsibilities over non-professional employees and that she was primarily engaged in day-to-day, operational tasks."

On appeal, counsel for the petitioner does not address the issue relating to the beneficiary's qualifying employment abroad. Counsel simply states that the beneficiary "has worked in an executive and managerial capacity for one year in the preceding three for the foreign entity before the filing of the first L-1A petition." Counsel submits a letter from the petitioner, dated October 10, 2013, that is almost identical to the letter submitted in response to the RFE. The petitioner lists the same duties for the beneficiary and her subordinates at the foreign entity. Counsel also submits several e-mail messages between the beneficiary and customers as evidence of her current position at the foreign entity.

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

The petitioner first characterized the beneficiary's role as manager of traffic and documentation and briefly described her duties in very broad terms, noting that she currently issues purchase orders; monitors purchase

orders to ensure shipment commitments are kept by the shippers; "Traffic & Documentation;" performs sales invoicing; supervises the customer service department with regard to inputting of sales orders from sales personnel based in the U.S.; follows up with truckers for deliveries to customers' warehouses; conducts inventory management; liaises with finance department on accounts receivable to ensure that dues are collected timely; and audits all expense bills and authorizes payables, at the foreign entity. The initial description indicated that the beneficiary primarily performs non-qualifying duties at the foreign entity.

The petitioner also provided a brief and equally vague list of job duties for each of the beneficiary's subordinates at the foreign entity and, in response to the RFE, an additional list of duties for the beneficiary's position abroad, including an allocation of percentages of time the beneficiary would spend on each duty. This additional list of duties for the beneficiary includes several tasks, such as responsible for the whole team and program, strategize and implement decisions in discussion with senior management, and global contract negotiation, taking up approximately 30% of her time, that are not sufficiently defined to demonstrate what the beneficiary does on a routine basis or that she performs any qualifying duties. The list also includes several duties that appear to be supervisory, taking up 20% of her time, but as discussed in detail below, the beneficiary has not been shown to supervise professional, managerial, or supervisory employees at the foreign entity, such that these duties could be considered qualifying duties. The remaining 50% of the beneficiary's time appears to be devoted to very specific tasks involved in producing a product or providing a service of the business. 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. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*. Again, 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).

Again, we note 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). As indicated above, although the beneficiary is not required to supervise personnel, if it is claimed that her 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. 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).

Here, the petitioner indicated that the beneficiary devotes 5% of her time to supervising six employees in India, 5% of her time on their performance appraisals, 10% of her time on recruitment, training and staffing, and a portion of 10% of her time on work delegation. The job duties provided by the petitioner for each of the beneficiary's subordinates at the foreign entity demonstrate that the positions themselves do not require a professional degree. The beneficiary's direct subordinates at the foreign entity listed on the organizational chart include a traffic and documentation executive, a systems coordinator, an inventory position, an executive accounting position, an executive A/P position, and an executive A/R position. The briefly described job duties for the subordinate positions do not support a finding that these positions are

professional, managerial, or supervisory positions. Accordingly, the record does not demonstrate that any of the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. We observe further, that the petitioner has not indicated that the beneficiary's duties abroad were primarily supervisory duties.

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). The term "essential function" is not defined by statute or regulation; thus as observed above, 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 at the foreign entity. 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 she manages an essential function of the foreign entity.

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 or her duties are "primarily" managerial. As discussed herein, the petitioner's description of the beneficiary's duties abroad and the allocation of time spent performing the duties fails to establish that such duties are primarily managerial in nature.

We here emphasize 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.* 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. The job duties provided for the beneficiary's employment abroad fail to demonstrate that the beneficiary focuses the majority of her 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 was employed by the foreign entity in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. 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.