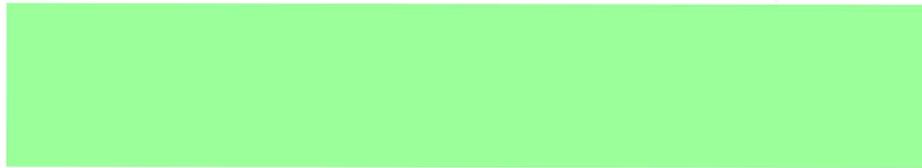




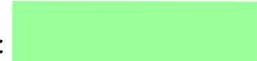
U.S. Citizenship  
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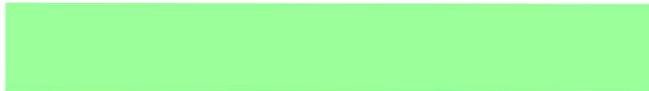
OFFICE: CALIFORNIA SERVICE CENTER FILE:



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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO 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 Delaware corporation established in October 2004, states that it engages in the manufacture of MRI systems. The petitioner claims to be an affiliate of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as its "Sales General Manager/Director" for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that 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 will be performing in a managerial capacity 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.

## II. THE ISSUES ON APPEAL

The sole 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.

The petitioner filed the Form I-129 on September 13, 2013, indicating that it had 31 current employees and a gross annual income of \$18 million. In its initial letter of support, the petitioner described the beneficiary's proposed position and duties in the United States as follows:

As Sales General Manager/Director at [the petitioner], [the beneficiary] will lead and manage the sales group in collaborative efforts to combine the sales objectives across China and US divisions of [the petitioner]. . . . [the beneficiary's] position in the United States will continue to primarily include responsibilities in both a managerial and an executive capacity. [The beneficiary] will be primarily engaged in the following duties:

- Promote marketing shares in the medical equipment industry globally.
- Strengthen marketing strategy in collaboration with other senior level managers
- Develop a sales plan to be implemented in the Sales Department according to the marketing strategy
- Direct sales managers in the development of sales policies and performance.
- Collaborate with other senior level managers to assign targets to all sales managers along with developing a sales budget.
- Adjust the sales target and budget from time to time according to the actual marketing condition.
- Establish and maintain public relationships.

[The beneficiary's] position as the Sales General Manager/Director at [the petitioner] will include managerial responsibilities. First, as the Sales General Manager/Director, First, [*sic*] [the beneficiary] will be responsible for leading and managing the Sales Department. Second, [the beneficiary] will supervise and control the work of other supervisory, professional, or managerial employees as he must direct sales managers in the development of sales policies and performance[.] Third, [the beneficiary] will have the authority to hire and fire or recommend those as well as other personnel actions. Finally, [the beneficiary] will exercise discretion over the day-to-day operations of the activity and function of the Sales Department as he is generally tasked with promoting marketing shares in the medical equipment industry globally.

[The beneficiary] will also be primarily engaged in various employment activities in an executive capacity. First, [the beneficiary] will direct the management of the Sales Department, which is a major component of the organization. [The beneficiary] must direct sales managers in the development of [the petitioner's] sales policies and performance. Second, [the beneficiary] will establish the goals and policies of the Sales Department. [The beneficiary] is tasked with strengthening [the petitioner's] marketing strategy in collaboration with other senior level managers, and then developing a sales plan to be implemented in the Sales Department according to the marketing strategy. [The beneficiary] will also assign targets to all sales managers and develop a sales budget for the Sales Department. Furthermore, He [*sic*] must adjust the sales target and budget from time to time according to the actual marketing condition. Third, [the beneficiary] will exercise wide latitude in discretionary decision-making, which is essential for the performance of his duty to lead and manage the Sales Department to combine the sales objectives of [the petitioner] with [the foreign entity]. Finally, [the beneficiary] will receive only general supervision or direction from higher level executives. [The beneficiary] is directly responsible to the President and Vice President of [the petitioner].

The petitioner submitted a job description for the beneficiary's position in the United States describing his function and duties and responsibilities as follows:

Function:

Help to lead and manage the sales group in collaborative efforts to combine the sales objectives across China and US divisions of [the petitioner]. Promote the company's marketing shares in the medical equipment industry globally.

Duties/Responsibilities:

- Participate in strengthening [the petitioner's] marketing strategy and help develop sales plan according to marketing strategy.
- Direct the development of [the petitioner's] sales' [*sic*] policies and performance.
- Help to establish and maintain public relationships.
- Help to assign targets to all sales managers, develop sales budgets, and adjust from time to time according to the actual marketing condition.
- Other tasks assigned by President and VP of [the petitioner].

The petitioner submitted an organizational chart for the U.S. company lacking the names of the individuals in the listed positions. The organizational chart simply lists "Sales" parallel to other departments reporting to the "VP/GM."

The director issued a request for additional evidence ("RFE") on September 25, 2013, advising the petitioner that the description of duties provided for the beneficiary's position at the U.S. company were vague and did not provide a percentage of time that the beneficiary would dedicate to his tasks. The director noted that the submitted organizational chart did not list the names and duties of the beneficiary's proposed subordinates and the petitioner failed to submit evidence to support the current employment of said subordinates. The director instructed the petitioner to submit additional evidence to demonstrate that the beneficiary's proposed position in the United States will be managerial or executive and that he has sufficient subordinate employees to relieve him from performing non-qualifying duties.

In response to the RFE, the petitioner submitted a letter from [redacted] Vice President and General Manager of the U.S. company, expanding on the beneficiary's duties in the United States as follows:

As a Sales General Manager/Director, [the beneficiary] will spend approximately 25% of his time directing and managing his direct reports. He will oversee their development of sales policies and each employee's performance.

[The beneficiary] will be responsible for developing a sales plan to be implemented in the Sales Department according to the marketing strategy and the goals and objectives set by the board. He will collaborate with other [petitioner] sales team members. This will include domestic and global sales and marketing strategies. [The beneficiary] will spend approximately 20% of his time on this duty.

[The beneficiary] will also be responsible for promoting our shares in the market in the medical equipment industry, globally. As [the petitioner] needs to expand our US Sales, we will be introducing more product lines other than our current 1.5T [redacted] system. [The beneficiary] will be an integral part in introducing the . . . system in the global market. [The beneficiary] will spend approximately 20% of his time ensuring that [the petitioner] is promoted globally.

[The beneficiary] will collaborate with the Senior Vice President of Sales and other senior level management to assign targets to all sales managers along with developing a sales budget. He will spend approximately 20% of his time on this duty. Assigning and developing sales budgets helps to direct the sales department in achieving organizational goals and objectives set by the board.

[The beneficiary] will spend approximately 5% of his time monitoring and adjusting sales targets and budgets accordingly to the actual market conditions.

[The beneficiary] will spend approximately 10% of his time establishing and maintaining public relationships. This includes visiting potential or established customers and appearances at industry tradeshows. He will also continue current relationships that he has established in the [redacted]

The letter further described the petitioner's staffing in the sales department and the beneficiary's subordinates as follows:

As the Sales General Manager/Director, [the beneficiary] will be responsible for 2 reports ([redacted]). Once [the beneficiary] arrives, he will be responsible for hiring an additional report of International Sales Manager. So in total he will be managing three people. . . . [The beneficiary] will be responsible for writing annual performance appraisals on his direct reports . . .

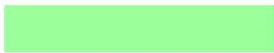
\* \* \*

All of [the beneficiary's] direct reports at [the petitioner] are required to have at least a bachelor's degree and possess knowledge of Magnetic Resonance Imaging (MRI) systems, other medical devices, and their components. A few of [the beneficiary's] reports are required to have a more specific bachelor's degree such as electronic engineering, physics, biomedical engineering, or related science and/or engineering fields.

The petitioner did not submit a new line and block organizational chart for the U.S. company, rather it submitted a six-page document, titled Organization Structure, delineating the structure for the petitioner, including the sales and clinical applications department, as follows:

Sales & Clinical Applications – Dept. 500

[redacted] - Manager, Clinical Applications and Customer Training



Duties: Oversee all aspects of in-house and end user customer applications training. Performs in-house validation activities. Performs beta testing. Provides marketing and sales requirements to engineering for product development. Support trade show activities. Provide validation data to regulatory for 510K submissions [*sic*].

\* \* \*

... Senior VP, Sales Division at [the petitioner]

Duties: Determine and implement sales strategies for US and Western hemisphere markets, budget creation for both sales and cost of sales for sales and support team. Customer engagement working with business development and marketing functions to determine best strategy and use of resources.

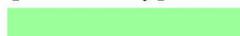
\* \* \*

... VP of US Sales

Duties: Establish US Sales and Process Team. Directly responsible for sales execution in the US based on strategy established with Senior VP of Sales. Works with Senior VP of Sales to create annual budgets for sales achievement and team costs. Responsible for establishing and maintaining customer relationships.

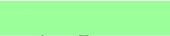
\* \* \*

[Beneficiary] – Manager/Director, Sales General

 – MRI Sales Engineer (to be hired)

Duties: Help to research the Market in the MRI field and closely related diagnostic imaging field. Define clinical application suites for MR product lines and services, create documentation for product performances, advanced clinical applications, use features, and other specifications to support sales activities, help to manage the product and image demo activities and support trade shows and exhibitions.

\* \* \*

 - RF Coil Specialist/Engineer (Consultant)

Duties: Repair and design of 3<sup>rd</sup> party RF coils, build specialty RF coils and build infrastructure needs and design required test fixtures.

To Be Hired – Sales Manager, International

Duties: Responsible for establishing and growing sales in global markets, centering in on Mexico and South America. Establish, grow, and maintain customer relationships in those areas. Assist with budget creation. Help to create and achieve global sales and profit goals. Help to design and recommend sales and marketing program and set short and long term sales strategies for international sales.

Although the petitioner's initial letter of support states that the beneficiary reports to the president and vice president of the petitioner, the Organization Structure document, submitted in response to the RFE, is unclear as to the lines of direct reports. It remains unclear whether the beneficiary reports to the "VP of US Sales," who reports to the "Senior VP, Sales Division at [the petitioner]," or whether he is parallel to the Senior VP of the sales division, and reports directly to the vice president/general manager. Additionally, the Organization Structure document lists duties for each of the positions within the "Sales and Clinical Applications" department, but does not list any duties, education level, or salary level, for the beneficiary's position as "Manager/Director, Sales General" to accompany the petitioner's description of his duties in its letter of support.

The petitioner submitted a copy of an "Independent Consultant's Agreement" with [redacted] subordinate to the beneficiary in the position of RF Coil Specialist. The agreement was signed on September 13, 2013, and is effective from September 12, 2013 to December 31, 2013. The agreement describes Mr. [redacted] duties as in the Organizational Structure document above and states that his "assignments will be directed by the [petitioner's] VP/GM."

The petitioner also submitted a payroll document summary for [redacted] from January 1, 2013 to October 4, 2013, indicating that he was a regular employee at one time as evidenced by his salaried compensation, healthcare, vision, dental, and 401K deductions, and tax withholdings.

The director denied the petition on November 19, 2013, concluding 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 it appears the U.S. position of Sales General Manager/Director is primarily assisting with the day to day non-supervisory duties of the business, which precludes the beneficiary from being considered a manager or executive. The director further found that the U.S. business does not have an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. The director observed that the beneficiary is not a function manager as the petitioner did not show that he manages or directs the management of a department, subdivision, function, or component of the organization, rather it appears that he is primarily involved in the performance of routine operational activities of the entity rather than in the management of a function of the business.

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 his position as detailed above. Counsel states that the director mischaracterized the beneficiary's proposed duties and failed to consider the reasonable needs of the petitioning U.S. company for the position of Sales General Manager/Director and in refusing to fully consider the beneficiary's subordinates because they hadn't been hired at the time of filing the petition.

Counsel submits a new organizational chart for the U.S. company, clearly depicting the beneficiary as "General Sales Manager/Director," directly reporting to the vice president/general manager. The new organizational chart shows that the beneficiary is in a position parallel to the "Sales Senior VP" listed in the Organizational Structure document submitted in response to the RFE. The new organizational chart also shows that the beneficiary has three direct subordinates: "Sales Engineering – [redacted]," "RF Coil Sales & Repair – [redacted]" and "International Sales – TBD."

Counsel also submitted new job description documents for the beneficiary's subordinates' positions: "RF Coil Specialist/Engineer" and "MRI Sales Engineer." The job description document provides the same duties and responsibilities listed in the Organizational Structure document submitted in response to the RFE. Counsel also submitted a copy of an I-797, Approval Notice, for [REDACTED] in H1B status from October 9, 2013 to September 14, 2016.

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.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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

The petitioner first characterized the beneficiary's role as sales general manager/director and briefly described his duties in very broad terms, noting that he will promote marketing shares in the medical equipment industry globally; strengthen marketing strategy in collaboration with other senior level managers; develop a sales plan to be implemented in the sales department; direct sales managers in the development of sales policies and performance; collaborate with other senior level managers to assign targets to all sales managers along with developing a sales budget; adjust the sales target and budget; and establish and maintain public relationships. The petitioner further explained that the beneficiary's position includes managerial responsibilities in that he will be responsible for leading and managing the sales department; supervising and controlling the work of other supervisory, professional, or managerial employees; have the authority to hire and fire or recommend those as well as other personnel actions; and exercise discretion over the day-to-day operations of the activity and function of the sales department as he is generally tasked with promoting marketing shares in the medical equipment industry globally. The petitioner also explained that the beneficiary's position includes executive responsibilities in that he will direct the management of the sales department, which is a major component of the organization; establish the goals and policies of the sales department, tasked with strengthening marketing strategy and developing a sales budget in collaboration with other senior level managers; exercise wide latitude in discretionary decision-making, which is essential for the

performance of his duty to lead and manage the sales department; and receive only general supervision or direction from higher level executives. The initial description in the petitioner's letter of support indicated that the beneficiary would perform a combination of qualifying and non-qualifying duties. Where the petitioner did attempt to clarify the beneficiary's duties, it simply paraphrased the statute for managerial and executive capacity at sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

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. In this matter, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial or what proportion would be executive functions and what proportion would be non-executive. The petitioner listed the beneficiary's duties as including both managerial or executive tasks and administrative or operational tasks, but failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because several of the beneficiary's proposed daily tasks, such as promoting marketing shares in the medical equipment industry globally and establishing and maintaining public relationships, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in a managerial 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. The duties listed in response to the RFE also included a combination of qualifying and non-qualifying duties. The petitioner indicated that the beneficiary would spend 25% of his time directing and managing his direct reports, overseeing their development of sales policies and each employee's performance; 20% of his time developing a sales plan to be implemented in the sales department according to the marketing strategy and the goals and objectives set by the board; 20% of his time promoting market shares in the global medical equipment industry; 20% of his time collaborating with the Senior Vice President of Sales and other senior level management to assign targets to all sales managers along with developing a sales budget; 5% of his time monitoring and adjusting sales targets and budgets according to actual market conditions; and 10% of his time establishing and maintaining public relationships, including visiting potential or established customers and appearances at industry tradeshows, as well as maintaining current relationships already established in the [REDACTED]. 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).

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 him 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 his 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 his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

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

Here, the petitioner indicated that the beneficiary will devote 25% of his time to directing and managing his direct reports, overseeing their development of sales policies, and each employee's performance. Although the job descriptions provided by the petitioner for each of the beneficiary's subordinates at the U.S. company specifically state that each position requires a bachelor's degree in a specific field, the list of duties provided are not informative enough to demonstrate that the positions themselves require a bachelor's degree, such that they could be classified as professional. The organizational chart lists an RF Coil Specialist/Engineer, an MRI Sales Engineer, and an International Sales Manager as the beneficiary's direct subordinates; however, the broad and vague lists of job duties for the subordinate positions do not support a finding that they hold a professional, managerial, or supervisory position. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and 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. 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 him from performing non-qualifying operational duties.

Even assuming *arguendo* that the subordinate positions are professional and the beneficiary manages professional subordinate positions, the petitioner has not demonstrated that the subordinate positions perform duties that would relieve the beneficiary from performing non-qualifying duties, such as the actual sales of the petitioner's product. Here, the lists of duties provided for the beneficiary's subordinate positions are specific to the petitioner's products themselves, and not the actual sales of the products. The beneficiary's lists of duties are overwhelmingly geared toward the development of sales strategy, marketing strategy, global marketing, sales budgets, and setting sale targets for the sales department; however, the petitioner has not identified any sales personnel within the U.S. company to staff the sales department and perform the actual sales function of the company. Furthermore, even if these positions were identified by the petitioner, either in the organizational chart or elsewhere, at the time of filing, the petitioner had only hired one independent contractor, three days a week, subordinate to the beneficiary in the RF Coil Specialist/Engineer position; the remaining positions of MRI Sales Engineer and International Sales Manager remained vacant. As such, although the positions themselves are considered and evaluated in the totality of the record, it remains evident that, at the time of filing, the beneficiary did not have subordinate employees to perform the duties associated with these positions or with the actual sales function of the company. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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, counsel for the petitioner asserted that the beneficiary qualifies as a function manager in the alternative in response to the director's RFE. However, counsel merely states that the beneficiary manages an essential function of the petitioner, that is the sale of MRI devices, 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, rather than perform the duties related to the function. Moreover, the petitioner has not demonstrated that it has hired sales staff to perform the actual MRI sales function of the company, and therefore, it would become the beneficiary's responsibility to perform the sales tasks associated with the MRI sales function, rather than managing the MRI sales function of the U.S. company.

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 the petitioner stated 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 him from performing non-qualifying operational and administrative duties. The job duties provided for the beneficiary fail to demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Furthermore, 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 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 provides brief job descriptions for the beneficiary's subordinates in the U.S. The listed duties are not sufficient to establish that the subordinate employees relieve the beneficiary from performing tasks related to producing a product or providing a service of the business.

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