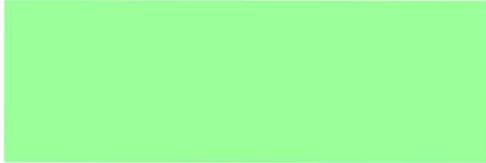




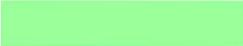
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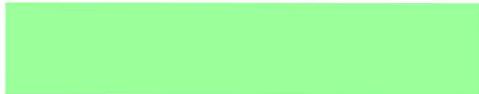


DATE: **AUG 25 2014**

Office: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner filed a motion to reopen and reconsider to the service center. The director granted the motion to reopen the petition and subsequently affirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, seeking to extend the beneficiary's status 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 [REDACTED], states that it operates a limousine service business. The petitioner claims to be a branch of [REDACTED] located in Egypt. The petitioner seeks to extend the beneficiary's employment as its president for a period of three years.<sup>1</sup>

The director denied the petition on two alternate grounds, concluding that the petitioner failed to establish that (1) the beneficiary will be employed in a primarily managerial or executive capacity in the United States, and (2) the beneficiary was employed in a primarily managerial or executive capacity, or in a position involving specialized knowledge, at the foreign entity. The petitioner filed a motion to reopen and reconsider the denied petition. The director granted the motion to reopen and reconsider and affirmed her decision to deny the petition on the same grounds.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner contends that the director failed to consider all of the evidence presented demonstrating that the beneficiary has been working in an executive capacity and erroneously concluded that that the business has not been active when it presented evidence of business conducted at its [REDACTED] MA location. The petitioner 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.

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<sup>1</sup> On the Form I-129, the petitioner indicated that the beneficiary was coming to the United States to open a "new office," pursuant to 8 C.F.R. § 214.2(l)(3)(v); however, in response to the RFE, the petitioner clarified that the instant petition is for an extension of a previously approved new office petition for the same beneficiary.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as

promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

## II. THE ISSUES ON APPEAL

### A. Employment in a Managerial or Executive Capacity in the United States

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

#### 1. Facts

The petitioner filed the Form I-129 on November 16, 2012. The petitioner indicated on Form I-129 that it operates a "limousine service" business with four current employees and stated "n/a" where asked to state its gross annual income. Where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

- Lead company meetings to make all executive business decisions including financial, marketing, and legal;
- Liaison between parent company and branch;
- Oversee operations to evaluate performance of the company;
- Appoint department heads or managers, and assign or delegate responsibilities to them;
- Determine company goals;
- Oversee staffing decisions;
- Oversee the establishment of contacts;
- Direct and oversee all meetings and sales;

- Oversee the development of a routine and efficient system of daily business; [and]
- Approve budgets and significant financial expenditures[.]

In its letter of support, the petitioner specifically stated that the beneficiary's duties at the U.S. company will be the same as the duties he performed at the foreign entity. The petitioner then described the beneficiary's duties at the foreign entity and at the U.S. company exactly as described on the Form I-129 above. The petitioner did not provide any additional information about its organizational structure or the beneficiary's duties.

On the Form I-129, the petitioner specifically stated that it operates a limousine service business. In support of the petition, the petitioner submitted a copy of its State of New York certificate of incorporation indicating that it was established on [REDACTED] and specifically stated that "the purpose of the corporation is to engage in the business of real estate . . . ." The petitioner also submitted its Commonwealth of Massachusetts Foreign Corporation Certificate of Registration, dated [REDACTED] specifically stating that the corporation's activities will be "equipment, tools, and party supply rentals." The petitioner submitted its Commonwealth of Massachusetts, [REDACTED] Certificate of Business, dated [REDACTED] indicating that it is doing business as [REDACTED] MA.

In support of the petition, the petitioner submitted its lease agreement with [REDACTED] for premises located at [REDACTED] beginning on June 1, 2012 for a period of five years. The lease agreement states that the leased premises consist of a "showroom and lot [of] 2000.00 SF" and 15 parking spaces. The petitioner also submitted its lease agreement with [REDACTED] for premises located at [REDACTED] beginning on June 20, 2011 through June 19, 2014. The attached rider to the apartment lease indicates that the premises consist of apartment #1 but does not clarify the size of the apartment or number of residents. The rider further states the following about the use of the premises:

The Apartment must be used only as a private Apartment to live in as the primary residence of the Tenant and for no other reason. Only a party signing this lease may use the Apartment. The Apartment is subject to limits on the number of people who may legally occupy an Apartment of this size.

The petitioner submitted photos of the leased premises in [REDACTED] NY, which show a sliding glass door with a posted sign above the door and an additional diagonal on one of the glass doors of the U.S. company's name and a photo of what appears to be a residential living room directly inside the sliding glass door with a desk, chair, laptop computer, and printer. The petitioner also submitted photos of the leased premises in [REDACTED] MA, which show a large showroom containing multiple types of unidentified equipment and one large desk with a computer, printer, and chair. The outside of the showroom has a large sign stating [REDACTED] along with multiple construction-type trucks that appear to be available for rent.

The petitioner submitted its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for 2011 stating that it paid \$0 in salaries and wages and costs of labor and \$8,250 in compensation of officers; however, the petitioner failed to submit Form 1125-E, as instructed by Form 1120, to identify the officers of the U.S. company. The petitioner submitted payroll documents indicating that it made the following payments in the month preceding the filing of the petition:

- October 19, 2012: 40 hours of wages to the beneficiary, [REDACTED] and 11 hours of wages to [REDACTED]
- October 26, 2012: 40 hours of wages to the beneficiary, [REDACTED] and 11 hours of wages to [REDACTED] and [REDACTED]
- November 2, 2012: 40 hours of wages to the beneficiary and [REDACTED] 26.75 hours of wages to [REDACTED] and 11 hours of wages to [REDACTED]

The payroll documents indicate that all employees, including the beneficiary, work in [REDACTED] MA.

On November 30, 2012, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to provide additional evidence to establish that the beneficiary will be performing the duties of a manager or executive. The director specifically requested that the petitioner submit a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis; a list of all U.S. employees identifying each by name and position title, along with a complete position description to include the number of hours devoted to each task; copies of its IRS Forms 941 for the first, second, and third quarters of 2012; an explanation of the payroll documents submitted showing discrepancies in the employees and number of hours they worked, as well as clarification on the location of the business where each of the employees worked, the limousine business in NY or the equipment rental business in MA; and answers to several specific questions listed in the RFE.

In response to the RFE, the petitioner submitted the following description of the beneficiary's duties:

As President, [the beneficiary] is responsible for all business and strategic planning, management and directing staff, and coordinating activities and resources. . . . One Hundred percent of the Beneficiary's duties are allotted to executive and managerial functions. [The beneficiary] has full discretionary authority over all the operations of the business.

[The beneficiary] has been specifically responsible for the following:

- Creating, communicating, and implementing the organization's vision, mission, and overall direction. Lead company meetings to make all executive business decisions including financial, marketing, and legal to ensure the viability and expansion of the company. 3 hrs/week
- Oversee the development of a routine and efficient system of daily business; Meet with Office Manager to oversee operations to evaluate performance of the company; Direct and oversee all meetings and sales, review sales reports, formulating and implementing the strategic plan that guides the direction of the business. 10 hrs/week
- Determine Company goals and overseeing the complete operation of the organization in accordance with the direction established in the strategic plans; Evaluating the success of the organization, maintaining awareness of both the external and internal competitive landscape, opportunities for expansion, customers, markets, new industry developments and standards. Approval of new leases and decisions to expand this business. 10 hrs/week

- Control of finances, approve budgets, authorize significant financial expenditures, analyze financial statements. Direct new strategies based upon financial reports and oversee implementation. 10 hrs/week
- Oversee the appointment department heads or managers, and assign or delegate responsibilities to them; Oversee staffing decisions; Leading, guiding, directing, and evaluating the work of managers. 1 hr/week
- Liaison between parent company and branch. 5 hrs/week
- Oversee the establishment of contacts, organization representation. 1 hr/week

The petitioner provided the following explanation regarding its current employees in the United States:

During its initial stages, the company has hired staff to conduct the daily operation of the business. With the expansion of revenue, [the petitioner] will be looking to hire a Sales Manager, sales/marketing staff, delivery personnel, in-house mechanic, and installation crew. Currently, [the petitioner] has hired the following staff:

[REDACTED] Office Manager: [Reports to President]

\* \* \*

[REDACTED] Warehouse/Equipment Manager: [Reports to Office Manager]

\* \* \*

[REDACTED] Bookkeeper: [Reports to Office Manager] [part time: 11 hrs/week]

\* \* \*

Outsource: Accountant and Legal Services are outsourced.

The petitioner provided a brief list of job duties for each of the listed employees and indicated the number of hours they devote to each duty.

The petitioner also submitted its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first, second, and third quarters of 2012. The petitioner had one employee and paid \$1,500.00 in wages in the first quarter of 2012; two employees and paid \$11,884.50 in wages in the second quarter of 2012; and five employees and paid \$16,482.25 in wages in the third quarter of 2012.

With respect to its physical premises, the petitioner provided new and previously submitted photographs and stated:

[The petitioner] has committed to a lease for their headquarter office which is currently located in [REDACTED] New York as well as a new facility in [REDACTED] Massachusetts for its business operations. The [REDACTED] office is used only for administrative purposes. All customer service related business is conducted through the leased facility in [REDACTED]

Massachusetts. The facility in [REDACTED] includes the following: 1800sf showroom with reception area; 30 parking spaces, 2 offices 200sf and 300sf, and 2000sf garage.

On February 4, 2013, the director denied the petition 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 petitioner failed to establish that (1) it has sufficient personnel to relieve the beneficiary from performing daily work for the business, (2) its residential premises in [REDACTED] NY has sufficient space to house an administrative office as previously stated, and (3) its [REDACTED] MA equipment rental location exists at the indicated location. The director found that the duties provided for the beneficiary's position are broad and not sufficiently detailed with respect to his daily duties. The director further found that the listed duties for each of the beneficiary's subordinates do not show that they will be relieving the beneficiary of the day-to-day tasks of operating the rental equipment business or a limousine service business. The director specifically noted that the petitioner failed to explain the discrepancies among its number of employees, their hours of work, and their work locations as requested in the RFE.

The petitioner filed a motion to reopen and reconsider the denied petition. The director granted the motion to reopen and reconsider and subsequently affirmed the denial of the petition making the same observations as in the initial denial. The director also raised the issue of the petitioner's involvement with [REDACTED] [REDACTED], who is the signatory of several corporation documents with the Commonwealth of Massachusetts and an Equipment Rental Contract on which he is identified as the petitioner's president. The director further observed that the nature of the petitioner's business operations is not clear and the petitioner did not submit evidence to demonstrate that it has started a limousine service business.

On appeal, counsel for the petitioner reiterates the beneficiary's duties at the U.S. company, and those of his subordinates as listed in response to the RFE. Counsel addresses the employee discrepancy noted by the director as follows:

The Petitioner has explained that the quarterlies and hours represent the wages for each employee on an hourly basis. The Petitioner hired said employees hourly during the initial stages of the business so as to be cost effective based upon the business needs. All said employees are currently working in the [REDACTED] location which is the main site for the company. The Petitioner has submitted landlord approvals for both location in [REDACTED] New York and [REDACTED] Massachusetts. [The petitioner] is leasing space from [REDACTED] as reflected in the lease. [REDACTED] has been retained as a registered agent for [the petitioner] in addition to being the landlord.

Counsel goes on to address the petitioner's leased physical premise issues at the [REDACTED] NY and [REDACTED] MA locations as follows:

The premises secured are more than sufficient to house the executive functions of the business for [the beneficiary] and his administrative staff. . . . Petitioner has submitted significant evidence which demonstrates that main functions of the business are located in [REDACTED] Massachusetts.

Furthermore, [the petitioner] has submitted multiple invoices which is clear evidence that business is being conducted out of the [REDACTED] location. . . . [The petitioner] has also submitted evidence that it is in fact conducting limousine/livery services as part of its business services. [The petitioner] has presented a copy of the registration for one of the vehicles that is used for livery services.

The petitioner submits an "Affidavit" from [REDACTED] landlord for the leased [REDACTED] NY premises, dated November 15, 2013. In the affidavit, the landlord confirms that he has granted the petitioner "permission to operate as a business at this location and [the petitioner] has been using this location for its administrative services."

The petitioner submits a list of "meetings" with dates ranging from June 27, 2012 to November 8, 2013, indicating that the beneficiary "and consulting and employees" were involved in each of the meetings. The document lists 83 separate meetings, which include the following:

- Install more signage in front of showroom;
- Advertising in restaurant menus, the internet, and yellow pages;
- Purchase of tables, chairs, and party supplies for rentals;
- Training on set up of tents, chairs, and tables;
- Return customers' calls;
- Charging customers for damaged or unclean rental returns;
- Monitoring calls for customers requesting limo service;
- Maintaining proper maintenance records for rental equipment;
- Contacting local businesses for market price on limo services;
- Routinely calling customers for snow removal;
- Emailing customers to wish a Happy Holiday;
- Advertising wedding rentals;
- Performing employee training and safety;
- Investing in the purchase of bounce houses;
- Hiring more employees for the summer of 2014 and 2015 due to increase in business; and
- Providing business cards and fliers to customers.

The petitioner submits its payroll details for November 22, 2013, which states that the beneficiary and the office manager worked 40 hours that week, the bookkeeper worked 20 hours that week, and another employee whose title has not been provided worked 15 hours that week.

## 2. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are

in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, 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").

The petitioner first characterized the beneficiary's role as president and described his duties in very broad terms on the Form I-129 and again in its letter of support, as detailed above. The initial description indicated that the beneficiary would perform general managerial tasks, such as "lead company meetings to make all executive business decisions including financial, marketing, and legal," "appoint department heads or managers, and assign or delegate responsibilities to them," and "determine company goals"; however, the petitioner failed to provide sufficient details to demonstrate that the beneficiary would primarily perform such duties. 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 response to the RFE, the petitioner provided a new list of job duties for the beneficiary and a brief list of job duties for three of his subordinates. The new list of job duties listed for the beneficiary was equally broad and also included a series of vaguely described managerial responsibilities, as listed above. When asked about its physical premises in [REDACTED] New York, where the Form I-129 indicates that the beneficiary will work, the petitioner stated that the [REDACTED] NY location is its headquarters and used only for administrative purposes and its [REDACTED] MA location is used for all customer service related business. However, the petitioner's payroll documents indicate that the beneficiary is actually employed at the [REDACTED] MA location as Massachusetts state income tax is withheld from his pay. This is important because the petitioner has not indicated that it has hired any administrative staff to support the administrative functions of the U.S. company.<sup>2</sup> If the beneficiary does in fact work at the [REDACTED] NY location, it would be reasonable to expect that he would be performing the administrative tasks associated with the U.S. company. Doubt cast on any

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<sup>2</sup> The fact that the petitioner stated that it outsourced accounting and legal services is insufficient to establish that it has hired staff to perform the administrative functions of the company. 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)).

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).

Additionally, on appeal, the petitioner submitted a document listing numerous meetings and tasks completed by the beneficiary "and consulting and employees." This list of meetings demonstrates that the beneficiary is directly involved in the day-to-day operations of the business, such as "install more signage in front of showroom," "purchase of tables, chairs, and party supplies for rentals," "training on set up of tents, chairs, and tables," "return customers' calls," and "emailing customers to wish a Happy Holiday." The petitioner has not provided any additional information on the list of meetings other than the beneficiary's name and date the meeting was held. The petitioner did not include any additional details related to each meeting, nor did the petitioner indicate who completed the tasks associated with the meetings, the beneficiary or a subordinate. In this case, the petitioner has not hired subordinate staff in the areas of sales, delivery, or installation and it remains unclear whether the current staff fully relieves the beneficiary from performing non-qualifying duties. 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).

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties 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.

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. 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.

Here, the petitioner indicates that one of the beneficiary's direct subordinates will be the Office Manager. The description of the Office Manager's duties indicates that she allocates some time to specific customer service functions and some time to supervising a staff of two employees. Although the beneficiary is shown to have one subordinate with some supervisory duties, he has not been shown to *primarily* supervise and the control the work of other supervisory, professional, or managerial employees. The fact that one of his subordinates may supervise lower-level employees is not sufficient to establish that the beneficiary qualifies as a personnel manager. The petitioner has failed to demonstrate that the beneficiary's duties will primarily focus on the management of the organization and the supervision of qualifying managerial, professional, or supervisory employees, rather than on producing a product or providing a service of the petitioner. As noted above, all of the subordinate employees are charged with specific duties while the beneficiary would reasonably be responsible for all other aspects of the day-to-day operation of the company, such as sales, deliveries, and installation. Further, the petitioner's profit and loss statement for 2012 indicates that the petitioner's income was primarily generated by "labor/service," in the amount of \$62,062.33, and followed by sales, in the amount of \$35,538.53, but the petitioner failed to disclose the type of labor or service it provides and failed to demonstrate that it has actual sales staff. Therefore, it is unclear who performed the tasks associated with labor, services, and sales, to demonstrate that the beneficiary is relieved 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 indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary would devote to duties that would clearly demonstrate that he would manage an essential function of the U.S. company.

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. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

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. 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 asserts that the beneficiary is an executive; however, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although the petitioner has shown that some of the beneficiary's subordinates have been hired, the petitioner has not established that the beneficiary's subordinate employees relieve him from performing non-qualifying operational duties, particularly those administrative duties that are the only duties performed at his current work location in [REDACTED] NY. The job duties provided for the beneficiary and his subordinates fail to demonstrate that the beneficiary will focus primarily on executive duties rather than the day-to-day operations of the business.

The AAO notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner has hired three additional employees, the office manager, the warehouse/equipment manager, and the bookkeeper, and states that these individuals work at the [REDACTED] MA location, where all customer service related business is conducted. The petitioner indicated on the Form I-129 that the beneficiary will be employed at the [REDACTED] NY location, but its payroll records indicate that the beneficiary is actually also employed at the [REDACTED] MA location. The petitioner provided a brief list of job duties for each of the beneficiary's subordinates but failed to demonstrate that the beneficiary has sufficient staff to relieve him from performing the labor, services, sales, delivery, and installation functions of the business. As such, the petitioner has failed to show that the beneficiary's subordinate staff relieves him from performing non-qualifying operational duties.

Further, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the

petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. Here, the petitioner indicates that it plans to hire additional staff, such as a sales manager, sales/marketing staff, delivery personnel, in-house mechanic, and installation crew; however, a visa petition may not be approved based on speculation of future eligibility. 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). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily managerial or primarily executive capacity or as a function manager. 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 established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign entity on July 1, 2008 as its owner and managing director. Where asked to describe the beneficiary's duties abroad for the 3 years preceding the filing of the petition, the petitioner stated the following:

- Analyze operations to evaluate performance of a company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy chang[e]
- Appoint department heads or managers, and assign or delegate responsibilities to them.
- Confer with board members, organization officials, and staff members to discuss issues, coordinate activities, and resolve problems.
- Coordinate the development and implementation of budgetary control systems, recordkeeping systems, and other administrative control processes.
- Direct and coordinate an organization's financial and budget activities in order to fund operations, maximize investments, and increase efficiency.
- Direct human resources activities, including the approval or human resource plans and activities, the selection of directors and other high-level staff, and establishment and organization of major departments.
- Direct, plan, and implement policies, objectives, and activities of organizations or businesses in order to ensure continuing operations, to maximize returns on investments, and to increase productivity.
- Establish departmental responsibilities, and coordinate functions among departments and sites.
- Implement corrective action plans to solve organizational or departmental problems.

In its letter of support, the petitioner specifically stated that the beneficiary's duties at the U.S. company will be the same as the duties he performed at the foreign entity and described them as follows:

- Lead company meetings to make all executive business decisions including financial, marketing, and legal;
- Liaison between parent company and branch;
- Oversee operations to evaluate performance of the company;
- Appoint department heads or managers, and assign or delegate responsibilities to them;
- Determine company goals;
- Oversee staffing decisions;
- Oversee the establishment of contacts;
- Direct and oversee all meetings and sales;
- Oversee the development of a routine and efficient system of daily business; [and]
- Approve budgets and significant financial expenditures[.]

The Beneficiary will establish many of the same managerial and technical duties that he already performed for the parent company abroad, as enumerated above.

The petitioner did not provide any additional information about the foreign entity's organizational structure or the beneficiary's duties abroad.

In the RFE, the director instructed the petitioner to submit, *inter alia*, evidence to establish that the beneficiary's position abroad was managerial or executive in nature. The director specifically requested that the petitioner submit payroll records as evidence of the beneficiary's employment abroad; a letter describing the nature of the beneficiary's employment, including a complete position description identifying all the duties performed by the beneficiary and the managerial decisions made by the beneficiary on behalf of the foreign entity; and answers to several specific questions listed in the RFE.

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

As the founder and owner of [the foreign entity], [the beneficiary] has been employed full time, continuously with [the foreign entity] since its inception in July 1, 2008. As the Managing director of [the foreign entity], [the beneficiary] has been solely responsible for the following duties:

- Lead company meetings to determine all executive decisions including financial and marketing decisions.
- Oversee the Analysis of the operations and budget to determine areas of potential cost reduction, program improvement, or policy change.
- Hire and fire personnel, determine salaries. Appoint and manage department heads or managers, and assign or delegate responsibilities to them.
- Confer with staff members to discuss issues, coordinate activities, and resolve problems.
- Coordinate the development and implementation of budgetary control systems, recordkeeping systems, and other administrative control processes.

- Direct and coordinate an organization's financial and budget activities in order to fund operations, maximize investments, and increase efficiency.
- Direct human resources activities, including the approval of human resource plans and activities, the selection of directors and other high-level staff, and establishment and organization of major departments.
- Direct, plan, and implement policies, objectives, and activities of organizations or businesses in order to ensure continuing operations, to maximize returns on investments, and to increase productivity.
- Establish departmental responsibilities, and coordinate functions among departments and sites.
- Implement corrective action plans to solve organizational or departmental problems.

The petitioner did not submit an organizational chart for the foreign entity, but instead submitted a list of employees. The list includes the beneficiary as general manager, a financial manager, and three salesmen. The list also includes an accountant. The petitioner did not include any position descriptions or duties for the foreign entity's employees.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary's primary duties with the foreign entity were executive in nature. In denying the petition, the director found that the duties provided for the beneficiary's employment abroad are vague and do not detail the day-to-day tasks he performed. The director further found that the petitioner failed to respond to the managerial/executive questions that were included in the request for evidence.

The petitioner filed a motion to reopen and reconsider the denied petition. The director granted the motion to reopen and reconsider and subsequently affirmed the denial of the petition making the same observations as in the initial denial.

On appeal, counsel for the petitioner does not address the issue of the beneficiary's qualifying employment at the foreign entity.

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

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary may exercise discretion over the foreign entity's day-to-day operations as its general manager, the petitioner has failed to show that the beneficiary's actual duties are primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Here, the petitioner provided a vague description of the beneficiary's job duties abroad. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates his time

to specific duties, the record does not establish that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. Furthermore, the petitioner indicates that the beneficiary's duties abroad are identical to his proposed duties in the United States, which, for the reasons discussed above, do not establish that he will be employed in primarily managerial or executive capacity. Again, the position description and job duties provided by the petitioner do not include any details or specific tasks related to each duty, nor does the petitioner indicate how such duties qualify as managerial or executive in nature. Further, the petitioner failed to identify the organizational structure of the foreign entity and establish that the beneficiary had sufficient subordinate staff to carry out the day-to-day operations of the business. Although the petitioner provided a list of five employees at the foreign entity, it failed to show where these employees fall in the overall organizational structure of the business and how they relieve the beneficiary from performing non-qualifying administrative and operational duties. Furthermore, as noted by the director, the petitioner failed to respond to five specific questions listed in the RFE, which would establish the beneficiary's placement in the organizational hierarchy of the foreign entity.

Based on the foregoing, the petitioner has not established that the beneficiary has been employed in a primarily managerial or primarily executive capacity at the foreign entity. Accordingly, the appeal will be dismissed.

### III. QUALIFYING RELATIONSHIP

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner stated on the Form I-129 that it is a branch office of the foreign entity based on the foreign entity's ownership of 100% of the petitioner's shares. Throughout the record, the petitioner claims it is wholly owned by the foreign entity; however, the record contains contradictory and inconsistent evidence as to the petitioner's actual ownership. In support of the petition, the petitioner submitted its Certificate of Incorporation indicating that it is authorized to issue 200 shares of common stock with "no par value" and a handwritten, undated share certificate number two issuing 200 shares to the foreign entity. In response to the RFE, the petitioner stated that share certificate number two is the only certificate it has issued and that certificate number one was "voided due to a typographical error." The petitioner then submitted a new copy of share certificate number two listing a handwritten issue date of "06/21/2011." The petitioner also submitted a letter, dated January 15, 2013, from [REDACTED] accountant, stating that "stock certificate #1 was cancelled due to a typographical error in the certificate. Stock certificate #2 was issued in its place on June 21, 2011. . . . No other stock certificates have been issued to date."

In support of the petition, the petitioner submitted copies of its 2011 IRS Form 1120, U.S. Corporation Income Tax Return. The 2011 Form 1120 at Schedule K, which includes questions related to the petitioner's ownership and control, are marked "no" at question 4 which asks, "[a]t the end of the tax year: a. [d]id any foreign or domestic corporation, partnership (including any entity treated as a partnership), trust, or tax-exempt organization own directly 20% or more, or own, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote?" In this case, the record fails to demonstrate the actual

ownership of the petitioner. 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).

Due to the deficiencies and inconsistencies detailed above, the petitioner has not met its burden to corroborate its claimed qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

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

#### IV. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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 burden has not been met.

**ORDER:** The appeal is dismissed.