U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 2 8 2014 Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

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 Florida limited liability company established in June 2013, states that will engage in the international export and import of scrap metal. The petitioner claims to be a subsidiary of , located in India. The petitioner seeks to employ the beneficiary as the managing director of its new office in the United States.

The director denied the petition on two independent and alternate grounds, concluding that the petitioner failed to establish that (1) it had secured sufficient physical premises to house the new office as of the date of filing the petition, and (2) the beneficiary was employed in a primarily managerial or executive capacity at the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that it has acquired sufficient physical premises for the new office and that the beneficiary was employed in a qualifying capacity as managing director at the foreign entity. 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.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

II. ISSUES ON APPEAL

A. Physical Premises

The first issue to be addressed is whether the petitioner established that it has secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

1. Facts and Procedural History

The petitioner filed the Form I-129 on July 1, 2013, indicating that it engages in the international export and import of scrap metal. In support of the petition, the petitioner submitted a commercial lease agreement for a single office, suite 130, and submitted photos of the office space. The commercial lease agreement does not prohibit the petitioner from storing any inventory for export or from import in the office suite. The petitioner's letter of support specifically states that the petitioner has explored options for warehouse space near the office space, which "will be leased to coincide with the need to stock inventory." The petitioner

further states that in "the short term, any requirements for small-volume stocking can be met at the premises already secured."

The director issued a request for evidence ("RFE") on July 15, 2013, instructing the petitioner to submit evidence indicating the square footage of the leased premises, along with an explanation of its use as office, production, manufacturing, or warehouse space.

In response to the RFE, the petitioner submitted an amended commercial lease agreement stating that suite 130 has an area of 650 square feet. The commercial lease agreement again, does not prohibit the petitioner from storing any inventory in the office suite. The petitioner submitted a floor plan and photographs of the office suite and again, stated that it can store a small volume of inventory within the office suite until larger space is needed.

The director denied the petition on October 23, 2013, concluding, in part, that the petitioner failed to establish that it has secured sufficient physical premises to house the new operation. In denying the petition, the director observed that the petitioner's business plan indicates that it will import jewelry to the United States and export agro products and scrap metals from the United States, but failed to indicate how it would purchase, move, and store products before they are exported from the United States. The director found that, given the nature of the business, it is reasonable to expect that it requires warehouse space or an arrangement for warehouse space in order to successfully conduct business and support the beneficiary in an executive capacity within one year. The director found that the physical premises presented are insufficient given the planned scope of the entity, its organizational structure, and its financial goals.

On appeal, the petitioner again emphasizes that it will lease warehouse space as the need arises and reiterates that a small volume of inventory can be stored within its current office space. The petitioner further states that stock can be shipped directly from the distributors' warehouses to customers without being routed through a warehouse space belonging to the petitioner.

2. Analysis

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

Upon review, the evidence in the record is persuasive. The AAO finds sufficient evidence to establish that the petitioner has acquired physical premises as required by 8 C.F.R. § 214.2(l)(3)(v)(A). The director's focus on the petitioner's need for warehouse space was misplaced. The petitioner has established that it may store small volumes of inventory within its current leased premises, as space permits, as it is not prohibited from doing so in the commercial lease agreement. The petitioner has further indicated that products can be shipped directly from distributors to customers alleviating the need for the petitioner to acquire warehouse space

immediately. The petitioner has recognized that warehouse space may be necessary in the future, but its current physical premises are sufficient to house its operations within the first year.

The petitioner need only establish that sufficient physical premises to house the new office have been secured. The petitioner has met that burden and we will withdraw the director's decision with respect to this issue.

B. Employment Abroad in a Managerial or Executive Capacity

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

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

(v) 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.

1. Facts and Procedural History

On the Form I-129 where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner stated that the "beneficiary is the managing director of the foreign entity." The petitioner indicated on the L Classification Supplement to Form I-129 that the beneficiary commenced employment with the foreign entity on December 1, 2010.

In support of the petition, the petitioner did not submit a description of the beneficiary's duties abroad. The petitioner submitted a company profile listing the beneficiary as a director of the foreign entity and describing his position as follows:

> A commerce graduate . . . joined . . . the Group in 2004 with a view to further consolidate existing businesses and further develop the Group Image through diverse projects and businesses. He has a significant contribution in the finance side of the Group businesses. He has conceived and successfully contributed in most strategic business relationships with a variety of new ventures. His aggression in development and clear vision has contributed substantially in the Group image and overall growth of the Group.

The petitioner also submitted the beneficiary's resume, listing his employment at the foreign entity as managing director from June 2010 to the present. The resume described the beneficiary's duties as managing director at the foreign entity as follows:

- Identifying, developing and directing the implementation of business strategy.
- Cultivating the company's reputation in the market & with customers & suppliers.
- Involved in planning & organising [*sic*] the organisation's [*sic*] activities to achieve targets.
- Responsible for the Profit & Loss responsibility for the business.
- In charge of leading, motivating and developing the management team.
- Liaising with officials of government departments and regulatory bodies.
- Managing multi-disciplined teams and resolving any conflicting priorities.
- Developing business plans and preparing comprehensive business reports.
- Improving margins and maintaining a high quality service to clients.
- Reviewing, refining and developing the strategy and direction of the company.
- Building client relationships that result in revenue and profitability growth.
- Responsible for the companies [*sic*] health and safety and legislative adherence.
- Creating and maintaining links with other trade and professional associations.
- Keeping control of business expenditure, ensuring it's within agreed budgets.

In the RFE, the director advised the petitioner that the initial evidence did not provide sufficient information regarding the executive/managerial duties performed by the beneficiary at the foreign entity. The director instructed the petitioner to submit evidence that the beneficiary's position abroad was in a managerial or executive capacity.

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

> [The beneficiary] was responsible for the performance of the Indian entity and he directly reported to the chairman and the Board of Directors. He was accountable to the Board for all company operations and took remedial action where necessary. His duties included monitoring the operating and financial results of the company, maintain the operational performance of the company and hire executives/talented personnel to ensure the growth of the company.
>
> Additionally, as the Managing Director, [the beneficiary] was required to ensure that:
>
> 1. The Company's activities were planned and directed to achieve affirmed targets, standards for financial performance, quality, culture and legislative adherence;
> 2. Decisions of the Executive and Management Committee were communicated to all levels of the Company and were implemented.
> 3. Meetings of the Executive Committee and the Management Committee were regularly held.

The petitioner submitted an organizational chart for the foreign entity but did not include the names of any employees. The organizational chart shows that the managing director reports to the chairman and oversees the "Group CEO," who has six subordinates, with corresponding subordinates, the "Group CFO," who has eight subordinates, and the "Senior Management Team."

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. In denying the petition, the director observed that the descriptions of the beneficiary's position at the foreign entity did not include a breakdown of the percentage of time the beneficiary allocations to specific duties. The director found that the beneficiary's position at the foreign entity was described in such a way that USCIS could not establish that the beneficiary was employed in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary was employed in an executive/managerial position at the foreign entity as the managing director. Counsel references a list of previously submitted evidence in support of the petition and states that the beneficiary was employed abroad continuously since at least the year 2010 in a managerial/executive capacity.

In support of the appeal, the petitioner submits a letter from the foreign entity, dated December 10, 2013, describing the beneficiary's position and duties at the foreign entity identical to the letter in response to the RFE. The petitioner submits a "Letter of Offer," dated June 2011, listing the beneficiary as managing director in numerous sections. The petitioner also submits the foreign entity's "26th Annual Report," dated 2009-2010, also listing the beneficiary as managing director in several sections.

2. Analysis

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

As the director stated, when examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the company's business, and any other factors that will contribute to understanding 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 abroad as managing director and failed to provide a description of the beneficiary's position at the foreign entity. The petitioner did not establish that the beneficiary primarily performed in the capacity of either an executive or a manager at the foreign entity, as those terms are defined in the statute and regulations. In his resume, the beneficiary provided a vague description of his duties at the foreign entity, such as developing and directing the implementation of business strategy, cultivating the company's reputation in the market, leading the management team, developing the strategy and direction of the company, and building client relationships, but the petitioner failed to provide sufficient information to illustrate what he primarily does on a day-to-day basis. 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 has failed to provide any detail or explanation of the beneficiary's 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the letter from the foreign entity in response to the RFE, and again on appeal, the foreign entity indicated that the beneficiary is responsible for "monitoring the operating and financial results of the company, maintain[ing] the operational performance of the company, and hir[ing] executives," but again, failed to provide an explanation of what he does on a daily basis. Although the foreign entity's letter noted that the beneficiary reports directly to the chairman of the board of directors, takes remedial action where necessary, and ensures that the company's activities are planned and directed to achieve affirmed targets, this information failed to convey an understanding of the beneficiary's routine daily duties. The petitioner did not include any additional details or specific tasks related to each duty. This lack of information is particularly important because specifics are a clear indication of whether a beneficiary's duties are primarily executive or managerial

in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act.

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

Here, the organizational chart provided for the foreign entity indicated that the position of managing director directly supervises the "group CEO," "group CFO," and the "senior management team." However, the petitioner did not provide any position descriptions or job duties for the beneficiary's subordinates to show that the positions are professional in nature. As such, the record does not demonstrate that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act. 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)).

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

description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties at the foreign entity as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate that he manages an essential function of the foreign entity.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, the petitioner failed to demonstrate that the beneficiary's duties abroad are primarily focused on the broad goals and policies of the organization. The petitioner repeatedly stated that the beneficiary is the managing director at the foreign entity, but failed to define his duties and responsibilities in embodying that role. The petitioner never described the beneficiary's duties sufficiently to demonstrate that his routine daily activities are executive in nature. Although the director specifically advised the petitioner that the description of the beneficiary's duties abroad was insufficient and provided examples of evidence to be submitted in the RFE, the petitioner failed to submit a description of the beneficiary's duties at the foreign entity that would demonstrate that he primarily performs executive duties and that he is relieved from involvement in the non-executive, day-to-day operations of the company. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, the petitioner again failed to submit a detailed description of the beneficiary's duties abroad to demonstrate that he is employed in a qualifying capacity at the foreign entity. Instead, the petitioner simply submitted documents listing the beneficiary as managing director of the foreign entity. Again, 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 petitioner must submit a detailed description of the beneficiary's duties and position to demonstrate that his routine daily activities are executive or managerial in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Employment in the United States in a Managerial or Executive Capacity

Beyond the decision of the director, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity within one year of approval of the petition. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

A. Facts

On the Form I-129, the petitioner indicated that it will engage in the import and export of agro commodities and metal scrap. Where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

> Formulate/implement strategies for international sales growth & cost-effective procurement, develop/manage strategic e-commerce plan for parent company. Provide support for the agreed design, development, implementation and continuous improvement of the company's processes as required to ensure customer focus; assist in the development of the strategic plan for all operational activity. Implement and monitor the annual and medium term operational plans, program and projects to meet overall objectives and agreed timings in accordance with a marketing and sale plan.

In its initial letter of support, the petitioner stated that the beneficiary will serve as president and "manage a team of in-house and independent contractors to develop new market territories, business models and acquire linkages to innovative suppliers." The petitioner further described the beneficiary's proposed duties as follows:

> The beneficiary's intended position in the United States firm involves a dual executive/managerial assignment, which mirrors the position held during his tenure at the foreign company. . . . authorizes the beneficiary to establish the US Company on behalf of the foreign employer with its official designation as a "subsidiary" of the foreign employer. Executive duties as assigned to the beneficiary's executive title of "President" are as follows:
>
> - President's authority to call special meetings of the Board of Directors.
> - Signing authority for certificates of stocks/shares held in the US Company.
> - Designation of the President's duties, including presiding over Board meetings, general supervision over the affairs of the company and other duties incident upon the position which are implied to include: responsibility for Federal, State, County and City annual tax and return filings, adherence to legality in all contracts and executive signing authority for opening bank accounts and credit facilities.

* * *

> In a managerial capacity, the beneficiary's intended position as "Director- International Procurement and Supplies" has been designated to utilize [the beneficiary's] expertise in business development by drawing upon his 10 years of experience at the foreign employer. . . The managerial duties of this position shall include:
>
> - Defining the goals, objectives and long-term plans of the US entity; specifically in the area of international sales and procurement of innovative products.
> - Managing a team of professional "Brand Managers" who will be responsible for formulating product strategies, keeping abreast of new technologies by attending product training seminars, defining new sales territories and ensuring that the marketing mix is well defined to meet the sales targets set by the President/Director of International Sales & Procurement . . . .
> - Ensure compliance with policies and standards set forth by the Board of Directors.
> - Manage the functional areas of finance and human resources through the Warehouse Manager/Logistics Coordinator . . . .
> - Manage the functional area of production and quality control through the Software/Hardware Support Engineer . . . .
> - Coordinate and communicate the Internet strategy of the US entity to the Webmaster (as an Independent Contractor) whose responsibility will be to design the scope and format of the company's website in its use as a primary tool for marketing and sales processing.
>
> The Director of International Procurement and Supplies will report to the Director of the foreign entity on matters of strategic planning, e-commerce development and financial reporting, as to the extent of these parameters relate to the overall goals of the parent company. . . . the beneficiary will have extensive latitude in day to day executive decision making and all senior human resource functions of the US entity.

The petitioner further discussed its staffing plan in the United States as follows:

> The hiring plan calls for the gradual and steady employment of staff (professional and operative, with first hiring to take place within 2 months of start-up) throughout the first year, to arrive at a targeted end-of-year structure shown on the organizational chart.
>
> . . . the beneficiary will oversee a subordinate staff of six professionals . . . and other employees who will gradually be hired.

The petitioner then listed the proposed subordinate positions outlining education requirements, hourly wages, and job duties with percentages of time allocated to each duty. The petitioner listed a "warehouse manager/logistics coordinator" to be hired the third month of operations, a "treasurer" to be hired the first month of operations, a "brand manager" to be hired the fourth month of operations, a "software/hardware support engineer" to be hired the fifth month of operations, a part-time "driver/courier" to be hired the first month, an independent contractor "webmaster" to be hired the first month, and an independent contractor "regional salesperson/team leader" to be hired the fourth month.

The petitioner submitted a business plan stating in the executive summary that it plans to employ six employees in the first year of operations, 10 employees in the second, and 15 employees in the third. However, the company description section and the management team section of the business plan both state that its "projection will include up to 12 employees after the first year of operations." The management team section includes an organizational chart showing "management" at the top tier, supervising a planning department, processing department, packing department, research department, finance department, and sales department. The planning department includes an engineer and a draughtsperson; the processing department includes a works engineer, team leader, tradesperson, apprentice, semi-skilled worked, and laborer; the packing department includes a warehouse manager, storeperson, and a packer; the research department includes a market section with an economist and a scientific section with a metallurgist scientist; the finance department includes an auditor, an accountant, a bookkeeper, and a clerical assistant; and the sales department includes a sales manager, sales representative, a carrier, a retailer, and an advertising manager. In total, there are 22 position titles identified on the proposed organizational chart.

B. Analysis

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

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

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

When examining the executive or managerial capacity of the beneficiary, we look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* In the case of a new office petition, beyond the description of the beneficiary's proposed duties, much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically

develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. See generally, 8 C.F.R. § 214.2(l)(3)(v)(C).

We do not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its managing director and partial owner. However, as discussed above, not only must the petitioner show that the beneficiary performs the high-level responsibilities that are specified in the definitions, the petitioner must establish that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). We again emphasize that the fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the petitioner characterized the beneficiary's role as both president and director of international procurement and supplies, stating he will perform executive duties, such as calling special meetings of the board of directors, signing stock certificates, opening bank accounts, and adhering to legality in all contracts, and managerial duties, such as defining goals and objectives, ensuring compliance with policies and standards, and managing the functional areas of finance, human resources, production, and quality control. The petitioner did not provide any additional information about the beneficiary's duties or how much time he will devote to each duty, especially given that he will occupy two positions within the company. Based on the current record, we are unable to determine whether the claimed executive and managerial duties would constitute the majority of the beneficiary's duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be managerial in nature, and what proportion will be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 has failed to provide any detail or explanation of the beneficiary's 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner has not clearly described its staffing plans and the nature of the proposed U.S. business. The petitioner provided position descriptions for five proposed employees and two proposed independent contractors: warehouse manager/logistics coordinator, treasurer, brand manager, software/hardware support engineer, driver/courier, webmaster, and regional salesperson/team leader. The business plan stated in one section that the petitioner will hire six employees in the first year of operations and in another section that it will hire twelve employees. Then, the organizational chart, included in the business plan, did not list any of the employees previously listed in the letter of support; instead, the organizational chart listed 22 proposed employees, where only the warehouse manager position is listed in both instances. Further, neither the petitioner's letter nor the organizational chart reflect any plans to hire procurement personnel to support the beneficiary in his role as Director of International Procurement. The petitioner has not clearly or consistently identified the number and types of employees to be hired during the first year of operations. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of

the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 592.

Due to the inconsistencies in the record, the petitioner has not established that the beneficiary would be responsible for supervising a subordinate staff of managers, supervisors or professionals within one year, or that the company would employ sufficient staff to relieve the beneficiary from primarily performing non-managerial and non-executive duties within that timeframe. The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted an organizational chart depicting the beneficiary's oversight over eight departments and 22 employees, the evidence as a whole does not establish that this proposed structure is credible, and does not consistently identify the number and types of employees to be hired during the first year of operations.

Based on the evidentiary deficiencies and discrepancies addressed above, we cannot conclude that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of the approval of the new office petition. For this additional reason, the petition cannot be approved.

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

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.