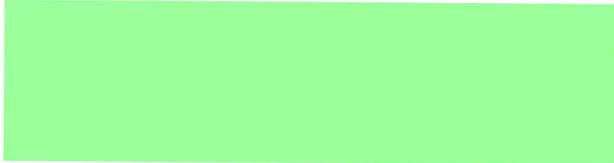




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **DEC 08 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

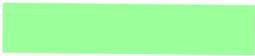
Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision.

Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office



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

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Massachusetts corporation established in March [REDACTED] states that it engages in the sale and manufacture of material handling equipment. The petitioner claims to be a branch of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as its president and director for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

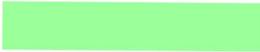
The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the beneficiary will be employed in a managerial capacity at the U.S. company. Counsel submits a brief in support of the appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.



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

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

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

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

II. THE ISSUE ON APPEAL

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

The petitioner filed the Form I-129 on March 14, 2014, indicating that it had four current employees and a gross annual income of "\$222,570,80.00." In support of the petition, the petitioner submitted a letter that included a list of job duties for the beneficiary's proposed position, its staffing plan, and a brief list of job duties for its current employees in the United States, a finance and operations manager, a sales manager, and a

warehouse employee. In its letter of support, dated March 2, 2014, the petitioner described the beneficiary's duties in the United States as follows:

As President and Director of [the petitioner], [the beneficiary's] responsibilities and duties will be as follows:

1. To supervise present and future employees of the company;
2. To expand the [redacted] presence and business in the United States;
3. To manage the recruiting, selecting, orienting, and training of sales employees for the United States branch which will include three (3) regional sales managers[:] one (1) for the southern part of the United States, one (1) for the mid-western states in the USA and one (1) for the east coast of the United States.
4. Establish technical support centers for the United States market
5. Manage and increase the effectiveness and efficiency of support services provided by our company
6. Supervise and coach department managers and employees.
7. Implement national sales programs by developing field sales action plans in the United States
8. Complete national sales operational requirements by scheduling and assigning employees and following up on work results.
9. Liaising and networking with a range of stakeholders including customers, colleagues, suppliers and partner organizations
10. Evaluating marketing campaigns and monitoring competitor activities
11. Mr. [redacted], Mrs. [redacted] and Mr. [redacted] will all report directly to [the beneficiary]
12. To review and approve the annual budget produced by the Finance and Operations Manager
13. To approve, review and edit any marketing decisions or techniques proposed by the Sales Manager.
14. Oversee any and all executive or discretionary decisions made by the company's present or future employees.
15. Report all the ongoing activities, milestone achievements, etc. to the Board of Directors and Shareholders of [the foreign entity].

In the same letter of support, the petitioner described its staffing plan and current employees as follows:

Presently we employ three (3) full-time employees and one (1) independent contractor. Once the beneficiary is transferred to the United States, we will employ four (4) full-time employees with our focus on hiring new employees when we expand company revenues, etc.

Our present three (3) full-time employees are as follows:

1. [redacted] who graduated . . . in Germany and passed her C.P.A. exam in 2007 in California Her present job responsibilities as our Finance and Operations Manager consist of the following:
 - Handles accounts payable and accounts receivable for the company

- Records and generates financial records and statements
 - Provides key financial data analysis for the company
 - Prepares the company's annual budget
 - Manages our company's administrative issues
 - Assists in the development of growth opportunities by identifying internal and external opportunities
 - Helps bridge gap between the United States operation and our Chinese parent company
 - Implements company marketing strategy on media
2. [REDACTED] is our Sales Manager. . . . At [the petitioner] his job responsibilities include the following:
- Determines annual unit and gross-profit plans by implementing marketing strategies; analyzing trends and results.
 - Establishes sales objectives by forecasting and developing annual sales quotas for regions and territories;
 - Projecting expected sales volume and profit for existing and new products.
 - Implements national sales programs by developing field sales action plans.
 - Maintains sales volume, product mix, and selling price by keeping current with supply and demand, changing trends, economic indicators, and competitors.
 - Establishes and adjusts selling prices by monitoring costs, competition, and supply and demand.
 - Attends trade shows for getting update market information and to promote our products
3. [REDACTED] joined [the petitioner] in January, 2014. . . . In addition, to his daily tasks, he receives technical training from our headquarter's technical department. Mr. [REDACTED] job responsibilities consist of the following:
- Maintains receiving, warehousing, and distribution operation
 - Controls inventory levels by conducting physical counts;
 - Records inventory data in account system;
 - Maintains physical condition of warehouse by planning and implementing new design layouts; inspecting equipment;
 - Receives technical training from headquarter technical department

The petitioner submitted its organizational chart, with the top half titled "current organization structure in 2013," depicting the beneficiary at the top tier of the hierarchy as "president (work remotely per video/phone)," supervising a full-time "operation manager," a full-time "sales manager," and a "third party technical service from [REDACTED] company." The bottom half of its organizational chart is titled "proposed organization structure for 2014," depicting the beneficiary at the top tier of the hierarchy as "president (planning to transfer to US)," supervising an "operation manager," a full-time "sales manager," and a "warehouse stuff [*sic*] (under training for technician)." Below the tier of employees supervised by the beneficiary, the organizational chart states that it plans to recruit new regional managers in the south coast, east coast, and mid-west region in 2014. The petitioner submitted its employment agreement with [REDACTED] dated January 6, 2014, indicating that his position is "warehouse keeper" and briefly outlining his essential job functions.

The petitioner submitted its Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2012 and the second quarter of 2013 indicating that it had zero employees but paid \$21,450.00 in wages, tips, and other compensation in each quarter. The petitioner also submitted its 2013 IRS Form W-2, Wage and Tax Statement, demonstrating that it employed [REDACTED] and [REDACTED] in 2013.

The petitioner submitted its employment agreement with [REDACTED] dated January 6, 2014, indicating that his position is "warehouse keeper" and his essential job functions and duties are as follows:

Shipping and Receiving; Inventory management;

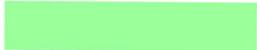
Employee shall also perform such other duties as are customarily performed by other persons in similar such positions, as well as such other duties as may be assigned from time to time by the Employer.

The director issued a request for additional evidence ("RFE") on March 22, 2014, advising the petitioner that the description of duties provided for the beneficiary's position at the U.S. company lacked sufficient detail to convey the beneficiary's day-to-day tasks and lacked supporting documentation to show that the beneficiary will primarily perform in a managerial or executive capacity. The director instructed the petitioner to submit additional evidence to demonstrate that the beneficiary's proposed position in the United States will be managerial or executive and that he has sufficient subordinate employees to relieve him from performing non-qualifying duties.

In response to the RFE, the petitioner submitted a letter, dated March 31, 2014, describing the beneficiary's duties in the United States as follows:

[The beneficiary] will direct the management of the organization by completing the following: These activities will take up about 50% of the beneficiary's time:

1. To supervise present and future employees of the company.
2. He will directly oversee management employees and will have indirect supervisory authority over lower level employees when they are hired. The management staff under his direction will have direct supervisory authority over the lower level employees in the future as the company grows.
3. Supervise and coach department managers and employees (10%)
4. Complete national sales operational requirements by scheduling and assigning employees and following up on work results
5. Evaluating marketing campaigns and monitoring competitor activities
6. Report all the ongoing activities, milestone achievements, etc. to the Board of Directors and Shareholders of [the foreign entity].
7. Assign weekly job assignment to the sales/operation/and warehouse departments. For the employee in California office he will be available for face to face meeting with employees weekly dedicating at least 1 hour per week with each employee to review their job progress. For the employee in the Massachusetts office, he will be available by phone at least 5 hours per week to check the job progress. He will be available through



- phone, emails at all times to employees all over the country for any questions to do the following:
- a. Oversee any and all executive or discretionary decisions made by the company's present or future employees
 - b. Approve, review and edit any marketing decisions or techniques proposed by the Sales Manager
 - c. Review and approve the annual budget produced by the Finance and Operations Manager
 - d. Review and approve the programs for inventory management, parts distributions, freight, customer technical support, warehouse improvements generated by the warehouse manager
 - e. Oversee the development and implementation of employee incentive/promotion plans
 - f. Have the authority to hire the employees for business expansion and have the authority to fire employees according to [REDACTED] employee handbook
8. Hire, Recruit and train managers to oversee sales, etc. throughout the United States which includes but is not limited too [sic] the following:
- a. Recruiting, selecting, orienting, and training of sales employees for the United States branch which will include three (3) regional sales managers[:] one (1) for the southern part of the United States, one (1) for the mid-western states in the USA and one (1) for the east coast of the United States.
 - b. Establish technical support centers for the United States market
 - c. Oversee the vigorous training of [REDACTED] so that Mr. [REDACTED] will be competent and capable of hiring future warehouse staff such as shelf stockers, shippers, receivers, etc. when our business expands.

The beneficiary will establish the goals and policies of our company as set forth by our investors, shareholders and board of directors as follows (40%)

9. Establish more regional product distribution centers all over the country[.] Fine [sic] Key Dealer locations for distribution and freight minimization. We already have set up production distribution centers in California, Florida and Illinois. Areas we are focusing on increasing presence and entering into dealership agreements include the following:
 - a. Denver
 - b. New Orleans
 - c. [REDACTED] Kentucky.
 - d. Philadelphia;
10. Work closely with consulting companies on market promotion, sales team training, and facility openings.
11. To expand the [REDACTED] presence and business in the United States
12. Establish technical support centers for the United States market
13. Manage and increase the effectiveness and efficiency of support services provided by our company
14. Implement national sales programs by developing field sales action plans in the United States

15. Liaising and networking with a range of stakeholders including customers, colleagues, suppliers and partner organizations

In all of the above, [the beneficiary] as President and Director of our company and as former Chief Executive Officer of our foreign parent company he will have a substantial amount of latitude in discretionary decision making. [The beneficiary's] discretion is not unfettered through. He will spend about 5% of his time doing the following:

16. Report all the ongoing activities, milestone achievements, etc. to the Board of Directors and Shareholders of [the foreign entity].
17. Fly frequently between the United States and China to attend regular board of directors and shareholder meetings. It is at these meetings [the beneficiary] will receive overall direction and general supervision from our parent foreign company leaders.

Please note that the percentage of time [the beneficiary] will devote to one particular duty will vary according to the needs of our company on a weekly basis that is why the percentages are broken down to include a number of duties.

The petitioner submitted a new organizational chart, titled "organization structure in 2014," depicting the beneficiary as the president, supervising an "operation and finance manager," a "sales manager," and a "warehouse manager." The organizational chart briefly described the beneficiary's and his subordinates' duties as follows:

[Beneficiary]

President

Job duty: supervise departments and make decisions on daily operation; hire and fire employees; expanding the organization in US branch, sales and market plan development and force the implementation

[Redacted]
Operation and finance manager

Job duty: administration; invoices, pay bill, financial statements, budgets

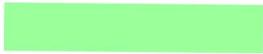
[Redacted]
Sales Manager

Job duty: Develop distribution channel, sales forecast, price strategy, customer contact

[Redacted]
Warehouse manager

Job duty: Shipping and receive, inventory count, product regular maintenance

The petitioner submitted its payroll records from January 17, 2014 to March 20, 2014, showing that it employed [Redacted] during that time. The petitioner also submitted its IRS Form 941 for the fourth quarter of 2013, indicating that the petitioner had zero employees but paid \$24,690.00 in wages, tips, and other compensation during that period.



The petitioner submitted copies of the beneficiary's subordinates' resumes and an unsigned consulting proposal from [REDACTED] for a "marketing development support program sales development of [REDACTED]" dated February 24, 2013.

The director denied the petition on April 14, 2014, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the description of the beneficiary's subordinates' duties do not establish that a bachelor's degree or higher is actually necessary to perform their functions and as such, it has not established that the beneficiary will be supervising professional employees. The director further found that the petitioner failed to establish that it has an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

On appeal, counsel for the petitioner asserts that the beneficiary's proposed position in the United States meets the requirements for managerial capacity and describes his duties and position exactly as described in response to the RFE. Counsel further addresses the beneficiary's subordinates' position and states, "the employees currently employed by the company our [sic] "professional" individuals as these persons are the managers of different departments who will be assisting the beneficiary in hiring persons to fulfill their departments." Counsel goes on to describe the beneficiary's subordinates' duties almost exactly as described at the time of filing the petition, and adds the following:

1. [REDACTED] . . .
 - * * *
 - Provides all Accounting Services to our company including preparing reports for tax filing purposes as well as keeping up to date on new tax regulations and reporting requirements;
 - Supervise and manage future employees in our human resource and finance department.
2. [REDACTED] . . .
 - * * *
 - Supervise and manage future sales employees of the company
3. [REDACTED] . . .
 - * * *
 - Supervise and manage all future warehouse employees at our California location.

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

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, 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 director and briefly described his duties in very broad terms, noting that he will supervise present and future employees of the company; expand the company's presence and business in the U.S.; manage the recruiting, selecting, orienting, and training of sales employees for the U.S. branch; establish technical support centers for the U.S. market; manage and increase the effectiveness and efficiency of support services; supervise and coach department managers and employees; implement national sales programs; develop field sales action plans in the U.S.; schedule and assign employees and follow up on their work results; liaise and network with stakeholders, including customers, colleagues, suppliers, and partner organizations; evaluate marketing campaigns and monitor competitor activities; review and approve the annual budget produced by the Finance and Operations Manager; approve, review, and edit any marketing decisions or techniques proposed by the Sales Manager; oversee any and all executive or discretionary decisions made by the company's present or future employees; and report all the ongoing activities, milestone achievements, etc. to the Board of Directors and Shareholders of the foreign entity. The initial description in the petitioner's letter of support indicated that the beneficiary would perform a combination of qualifying and non-qualifying duties.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this matter, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial or what proportion would be executive functions and what proportion would be non-executive. The petitioner listed the beneficiary's duties as including both managerial or executive tasks and administrative or operational tasks, but failed to quantify the time the beneficiary would spend on them. This failure of documentation is important because several of the beneficiary's proposed daily tasks do not fall directly under traditional managerial duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the RFE, and again on appeal, the petitioner provided a brief and equally vague list of job duties for the beneficiary's proposed position, including an allocation of percentages of time the beneficiary would spend on groupings of duties. The duties listed in response to the RFE were very similar to those

submitted in the initial letter of support but also included a combination of qualifying and non-qualifying additional duties. The petitioner explained that the beneficiary would devote 50% of his time to managerial responsibilities in that he will be responsible for supervising present and future employees; directly overseeing management employees and have indirect supervisory authority over lower level employees; supervising and coaching department managers and employees (10%); completing national sales operational requirements by scheduling and assigning employees; evaluating marketing campaigns and monitoring competitor activities; reporting all the ongoing activities, milestone achievements, etc. to the Board of Directors and Shareholders of the foreign entity; assigning weekly job assignment to the sales/operation/and warehouse departments; overseeing any and all executive or discretionary decisions made by the company's present or future employees; approving, reviewing, and editing any marketing decisions or techniques proposed by the Sales Manager; reviewing and approving the annual budget produced by the Finance and Operations Manager; reviewing and approving the programs for inventory management, parts distributions, freight, customer technical support, warehouse improvements generated by the warehouse manager; overseeing the development and implementation of employee incentive/promotion plans; authorized to hire and fire employees; hiring, recruiting, and training managers to oversee sales, etc. throughout the U.S.; recruiting, selecting, orienting, and training sales employees for the U.S. branch; establish technical support centers for the U.S. market; and overseeing the vigorous training of the current warehouse manager.

The petitioner also explained that the beneficiary's position includes executive responsibilities in that he will establish more regional product distribution centers all over the U.S.; work closely with consulting companies on market promotion, sales team training, and facility openings; expand the company's presence and business in the U.S.; establish technical support centers for the U.S. market; manage and increase the effectiveness and efficiency of support services; implement national sales programs by developing field sales action plans in the U.S.; and liaise and network with a range of stakeholders, including customers, colleagues, suppliers, and partner organizations. The petitioner went on to explain that the beneficiary will have a substantial latitude in discretionary decision making and will spend an additional 5% of his time reporting all the ongoing activities, milestone achievements, etc. to the Board of Directors and Shareholders of the foreign entity; and flying frequently between the U.S. and China to attend regular board of directors and shareholder meetings, by which he will receive overall direction and general supervision from the parent foreign company leaders. Although the petitioner provided a percentage of time the beneficiary would devote to clusters of duties, it did not include any additional details or specific tasks related to each duty, nor did it indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or executive. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*.

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

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

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

Here, the petitioner indicated that the beneficiary will devote 50% of his time partly to directing and managing his direct reports, overseeing their development of sales policies, and each employee's performance. The U.S. organizational chart lists a finance and operation manager, a sales manager, and a warehouse manager as the beneficiary's direct subordinates; however, the broad and vague lists of job duties for the subordinate positions do not support a finding that they hold a professional, managerial, or supervisory position. Although the petitioner states that the finance and operations manager has obtained a bachelor's degree and the nature of that position requires a bachelor's degree, the list of duties provided are not indicative of actual positions requiring a bachelor's degree, such that they could be classified as professional. Further, the organizational chart does not indicate that any of the beneficiary's subordinates supervise other employees, and therefore the positions do not qualify as supervisory or managerial. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Further, the petitioner submitted payroll and tax documentation that casts doubt as to whether it employs the beneficiary's subordinate employees. Specifically, it submitted 2013 IRS Forms W-2 for [REDACTED] and [REDACTED] but claimed zero employees on its Forms 941. 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).

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

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 will qualify as a function manager. As discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that he performs primarily managerial duties associated with these functions or that the petitioner's employees or other staff sufficiently relieve the beneficiary from involvement in the day-to-day operations of the company.

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

Here, the petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although the petitioner stated that the beneficiary will devote 40% of his time to establishing goals and policies of the company, none of the beneficiary's listed duties, presented at the time of filing, in response to the RFE, and on appeal, include duties

that correspond to the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. In addition, the petitioner has not established that the beneficiary's subordinate employees would relieve him from performing non-qualifying operational and administrative duties. The job duties provided for the beneficiary fail to demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Here, the petitioner provides brief job descriptions for the beneficiary's subordinates in the U.S. The listed duties are not sufficient to establish that the subordinate employees relieve the beneficiary from performing tasks related to producing a product or providing a service of the business.

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

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.