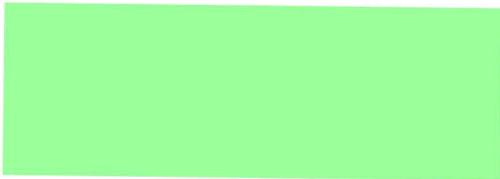




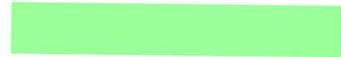
U.S. Citizenship
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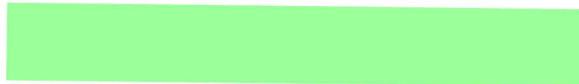
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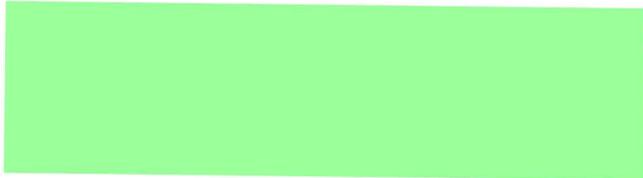
Petitioner:

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.¹

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a 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, states that it operates a car rental business. The petitioner claims to be an affiliate of Representaciones Rena 2001, C.A., located in Venezuela. The petitioner seeks to employ the beneficiary as its general and operations manager for a period of three years.

On September 12, 2012, 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 at the U.S. company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial or executive capacity. 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.

¹ On April 5, 2013, the AAO summarily dismissed the petitioner's appeal based on the petitioner's failure to identify an erroneous conclusion of law or statement of fact on the part of the director as a basis for the appeal. The AAO has since determined that the petitioner did in fact timely submit a brief in support of the appeal and will re-open the matter on Service motion pursuant to 8 C.F.R. § 103.5(a)(5). The AAO's decision dated April 5, 2013 is withdrawn and the appeal will be adjudicated on its merits.

- (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 it would employ the beneficiary in a qualifying managerial or executive capacity.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 18, 2011. In its initial letter of support, the petitioner indicated that the beneficiary would perform the following duties for its car rental business:

Upon transfer of [the beneficiary] to the United States, as General and Operations Manager, [the beneficiary] will fulfill the managerial position and thus will manage the organization; will supervise and control the work of other supervisory, professional, or managerial employees; will have the authority to hire and fire or recommend personnel actions such as promotions, leave authorizations, etc; and will exercise discretion over all day-to-day operations.

[The beneficiary] will fulfill his duties as General and Operations Manager by successfully managing the operations of our company. In this case, [the beneficiary] will oversee activities directly related to making products or providing services; direct and coordinate activities of businesses or departments concerned with the production, pricing, sales, or distribution of products; review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement; manage staff, preparing work schedules and assigning specific duties; direct and coordinate organization's financial and budget activities to fund operations, maximize investments, and increase efficiency; establish and implement departmental policies, goals, objectives, and procedures, conferring with board members, organization officials, and staff members as necessary; determine staffing requirements, and interview, hire and train new employees, or oversee those personnel processes; plan and direct activities such as sales promotions, coordinating with other department heads as required; determine goods and services to be sold, and set prices and credit terms, based on forecasts of customer demand; and locate, select, and procure merchandise for resale, representing management in purchase negotiations.

[The beneficiary] will have a key role in the expansion plans, and his presence is essential to bring the expansion effort to a successful conclusion.

Counsel for the petitioner provided the same description of the beneficiary's position in the United States and added the following:

In this case, it has been established that [the beneficiary] will plan for, develop, establish and implement policies and objectives and thus dictate the direction of the U.S. business. He has had full discretion to make all decisions in that capacity in the Venezuelan affiliate and will

have full discretion with the United States Business Entity. Furthermore, he will coordinate all aspects of the Petitioner's business to ensure that all operations and financial goals and objectives are met. Also he will plan the Petitioner's fiscal budget, review activity reports and financial statements to determine progress and status in accomplishing objectives. Moreover, [the beneficiary] will coordinate formulation of financial programs to provide funding for new operations, supervise the accounting process so targets are met and negotiate and is authorized to enter into and bind the Petitioner contractually.

The petitioner did not submit any additional information about the beneficiary's proposed position in the United States or its organizational structure. The petitioner indicated on the Form I-129 that it had two employees at the time of filing.

The director issued a request for evidence (RFE), instructing the petitioner to submit evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, the director requested a comprehensive description of the beneficiary's proposed duties; a list of all U.S. employees, including position descriptions and a breakdown of the number of hours devoted to each of the employees' job duties and educational requirements for each position; and copies of the petitioner's Internal Revenue Service (IRS) Forms 941 for all quarters of 2011, and IRS Forms W-2 and 1099.

In response to the RFE, counsel for the petitioner submitted a letter describing the U.S. company's current staff as follows:

Please kindly note that the United States Business Entity does have two (2) employees, to wit, an Office Clerk who will be the future Office Manager and a Vehicle Rental Representative who will be the future Vehicle Rental Manager. Due to the nature of the business activity in question, these Managers will have employees under them.

Upon approval of the L-1A Visa Petition, the Beneficiary will be in a position to hire more employees given the fact that the nature of the United States business demands it. This is a rental car business that needs almost around the clock, supervision and presence of more employees to make reservations for car rentals in order to have the business grow.

Counsel indicated that the petitioner currently employs an office clerk who performs the following duties:

1. Collect, count, and disburse money, do basic bookkeeping and complete banking transactions.
2. Communicate with customers, employees, and other individuals to answer questions, disseminate or explain information, take orders and address complaints.
3. Answer telephones, direct calls and take messages.
4. Compile, copy, sort, and file records of office activities, business transactions, and other activities.
5. Complete and mail bills, contracts, policies, invoices, or checks.
6. Operate office machines, such as photocopiers and scanners, facsimile machines, voice mail systems and personal computers.

Counsel indicated the vehicle rental representative is responsible for coordinating the delivery and collection of rental vehicles to customers and is required to have administrative and IT skills, as well as excellent knowledge of the local road network.

The petitioner submitted an organizational chart for the U.S. company, depicting the beneficiary as "general and operations manager," supervising the two claimed employees. It is noted that the organizational chart states that the office clerk position is the "future office manager," and the vehicle rental representative position is the "future vehicle rental manager."

In a table of contents submitted in response to the RFE, counsel indicated that exhibit W includes a comprehensive description of the beneficiary's duties indicating how the beneficiary's duties will be managerial or executive in nature, and an organizational chart. However, the only evidence included at exhibit W is the organization chart for the U.S. company. The petitioner's response to the RFE did not include any additional description of the beneficiary's duties.

The petitioner submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for 2011 and indicated that it did not pay any salaries and wages, compensation of officers, or costs of labor. The petitioner did not submit any of its IRS Forms 941, Employer's Quarterly Federal Tax Return, for 2011 and failed to provide an explanation as to why. In its letter response, counsel states that the petitioner has two employees but has not had to issue Forms W-2, Wage and Tax Statement, to these employees yet. The petitioner did submit copies of checks paid to each of the employees as follows:

[Redacted]

- 2/17/2012 \$735.80 Memo reads: 2/6-2/17
- 3/2/2012 \$719.80 Memo reads: 2/20-3/2
- 3/16/2012 \$719.80 Memo reads: 3/5-3/16
- 3/30/2012 \$719.80 Memo reads: 3/19-3/30
- 4/13/2012 \$719.80 Memo reads: 4/2-4/13

[Redacted]

- 1/12/2012 \$2,500.00 Memo does not provide date range for period paid; memo notes appear to be erased.
- 4/3/2012 \$4,000.00 Memo does not provide date range for period paid.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive position in the United States. In denying the petition, the director found that the duties presented for the beneficiary are general managerial duties that fail to specify what the beneficiary will be doing in the context of the petitioner's current staffing arrangement. The director further found that the beneficiary would not be involved in the control of the work of professional employees who would relieve him from performing non-qualifying operational duties. The director noted that, although specifically requested, the petitioner failed to provide an hourly breakdown of the duties of those employees who are to be subordinate to the beneficiary.

On appeal, counsel for the petitioner provides a list of all the evidence previously provided with the petition and in response to the RFE. Counsel states that "the beneficiary has only owned the Petitioner for 13 months . . . [and] the beneficiary's visa has not been approved" and asks "how would it be possible for this beneficiary to legally hire employees?" Counsel further asserts that the petitioner "had already specified that the current employees would be attaining a more professional level upon approval of the beneficiary's L-1A visa." Neither counsel nor the petitioner provided any additional evidence on appeal.

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.

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

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its general and operations manager. However, 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").

In the instant matter, the petitioner characterized the beneficiary's role as general and operations manager, noting he will "manage the organization"; "supervise and control the work of other supervisory, professional, or managerial employees"; "have the authority to hire and fire or recommend personnel actions"; and "exercise discretion over all day-to-day operations." Those duties merely paraphrase the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The remaining duties attributed to the beneficiary were similarly vague and offered little insight into what he would do as the general and operations manager of a car rental business. For example, the petitioner stated that the beneficiary will "oversee activities directly related to making products or providing services"; "direct and coordinate activities or departments concerned with the production, pricing, sales, or distribution of products"; "implement departmental policies, goals, objectives and procedures; "coordinate with other department heads as required"; "determine goods or services to be sold"; and "locate select, and procure merchandise for resale." 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. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Although specifically requested by the director, the petitioner did not submit a comprehensive description of the beneficiary's duties in the United States; nor did the petitioner submit a breakdown of the amount of time the beneficiary will devote to specific tasks. This failure of documentation is important because the vague position description provided at the time of filing does not fall directly under traditional managerial or executive duties as defined in the statute. The petitioner's description of the beneficiary's job duties does not establish the actual tasks to be completed by the beneficiary or what proportion of his duties would be managerial or executive in nature, and what proportion would be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). As such, the petitioner failed to establish that the beneficiary would perform primarily managerial duties.

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

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Further, in response to the RFE and again on appeal, counsel for the petitioner states that the beneficiary's current subordinates will occupy managerial positions (in title alone) once the beneficiary's L-1A visa is approved. However, as those employees will be promoted after the filing of the petition, their promotions cannot be considered in this proceeding. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In 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 organizational chart shows that the beneficiary will supervise an "office clerk" and a "vehicle rental representative." In response to the RFE, the petitioner submitted a vague list of duties for each position and indicated that those individuals would be promoted to managerial positions once the beneficiary's L-1A visa is approved. However, in promoting the "office clerk" to "office manager" and the "vehicle rental representative" to "vehicle rental manager," the petitioner does not indicate any changes in their duties or responsibilities. The position descriptions for these subordinates include tasks that not indicative of a managerial, supervisory, or professional position. The petitioner has not established that either of the beneficiary's subordinates requires a bachelor's degree, such that they could be classified as professionals. Nor has the petitioner shown that any of the beneficiary's subordinates supervise subordinate staff members, or manage a clearly defined department or function of the petitioner, such that he or she could be classified as a manager or supervisor. Thus, the petitioner has not shown that the beneficiary's subordinate employees would be supervisors, professionals or managers, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted an organizational chart depicting the beneficiary as general and operations manager supervising an office clerk and a vehicle rental representative, the petitioner has not shown how the subordinate employees would free the beneficiary from performing non-qualifying operational and administrative duties. The petitioner has not provided 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.

The petitioner has not established, in the alternative, that the beneficiary would be 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. one that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function

manager and did not provide a breakdown indicating the amount of time the beneficiary would devote to duties that would clearly demonstrate that he would manage an essential function of the U.S. company.

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

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

Furthermore, the Form I-129 was filed on November 18, 2011 and the petitioner is required to establish that the beneficiary is eligible at the time of filing the petition. The petitioner did not provide sufficient evidence that it actually employed the two subordinates at the time of filing. The petitioner failed to submit any IRS Forms 941 or Forms W-2 indicating the wages it paid to its employees in 2011. The petitioner submitted copies of paychecks issued to the employees in 2012. The petitioner did submit its Form 1120 for 2011 and indicated that it did not pay any salaries and wages, compensation of officers, or costs of labor in 2011. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice

unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner stated that it cannot hire employees until the beneficiary's L-1A visa petition is approved; however, the petitioner was established in May 2010, indicates that it purchased an existing business in 2011, and does not claim to be a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements as of the date of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The petitioner has not established that the beneficiary will be employed in a primarily managerial or primarily executive capacity or as a function manager. Accordingly, the appeal will be dismissed.

III. MANAGERIAL OR EXECUTIVE CAPACITY ABROAD

Although not addressed by the director, the petitioner has not 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)(iv).

On the Form I-129, the petitioner did not provide any information regarding the beneficiary's employment with the foreign entity; instead, the petitioner instructed the director to its attached support letter. In its letter of support, the petitioner stated that the beneficiary commenced employment with the foreign entity in 2000 and has served as its general and operations manager. Counsel and the petitioner allude that the beneficiary performed the same duties abroad as those that are proposed for the position at the U.S. company.

The petitioner submitted a letter signed by the beneficiary appointing another employee to carry out his duties and responsibilities at the foreign entity while he is employed at the petitioning company in the United States. The petitioner also submitted payroll information for the foreign entity for the months of January 2011 to August 2011.

The petitioner did not submit any additional details about the beneficiary's duties abroad. The director issued an RFE requesting additional evidence to establish that the foreign entity employed the beneficiary in a managerial or executive capacity.

In response to the RFE, counsel for the petitioner provided a brief statement regarding the beneficiary's foreign employment. Counsel stated:

In addition to his title and position as General and Operations Manager within the Foreign Business Entity in Venezuela, the Beneficiary also held the position of Administrative Manager who, among other duties and responsibilities, analyze internal processes and recommend and implement procedural or policy changes to improve operations, such as

supply changes or the disposal of records; and plan, administer and control budgets for contracts, equipment and supplies.

The petitioner submitted additional payroll records for the foreign entity for the months of September 2011 to March 2012.

The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as general manager, sharing the position with [REDACTED]. According to the chart, the position supervises a secretary, an administrative manager, a sales manager, and an advertising manager. According to the chart, the administrative manager supervises one administrative assistant; the sales manager supervises one sales person; and the advertising manager supervises one advertising designer.

In its RFE, the director instructed the petitioner to answer a series of questions about the beneficiary's position abroad. The petitioner provided the following responses:

1. How many supervisors were under the supervision of the beneficiary?

R: No supervisor is under the supervision of the beneficiary, only the administrative assistant.

2. What are the position titles and the responsibilities of the Management in the company?

R: General Manager: [REDACTED] and [the beneficiary]. The responsibilities of the general manager are to: Monitors the compliance of the rules of the company, and executes the processes for the smooth running of the company. The General Manager facilitates meetings with executives of others companies [*sic*] that have a direct relation with ours, such as material suppliers.

* * *

3. What Executive and Technical abilities are required to perform the job in the company abroad?

R: It is required a person with Administrative experience. The activity of thee [*sic*] company in USA in totally different from the one in Venezuela, but, in both the Administration experience is an important requirement.

4. How much time has been employed [*sic*] for Executive and Non-executive duties by the beneficiary?

R: Since the beginning of [the foreign entity] on April 17, 2000, approximately 11 years. All the activities of [the beneficiary] have been of Executive nature.

5. What was the degree of authority of the beneficiary in the operations of the foreign company?

R: The beneficiary has all the authority that requires the position that he occupies in the foreign company. The beneficiary has a great amount of responsibility in the foreign company.

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

The petitioner has provided a vague description of the beneficiary's position at the foreign entity. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates his time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. Further, the petitioner also submitted inconsistent information regarding his job title and level of responsibility. The petitioner indicated that the beneficiary served as both general/operations manager and as administration manager, but when asked specific questions regarding his supervisory duties, the petitioner's responses appeared to pertain to only the administration manager position. 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).

Moreover, the petitioner did not provide a position description for the administration manager position or clarify how the beneficiary allocated his time between the two claimed positions. 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)).

Based on these deficiencies, the petitioner has not submitted sufficient evidence to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved.

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