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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



U.S. Citizenship
and Immigration
Services

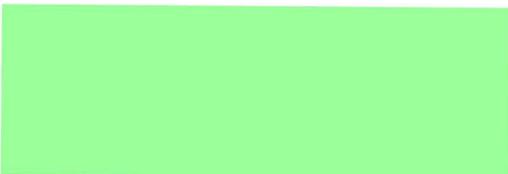


DATE: FEB 24 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 appeal will be dismissed.

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, an Illinois corporation, states that it operates as "a software company dealing with supply chain management and forecasting." The petitioner claims to be an affiliate of [REDACTED] located in [REDACTED]. The petitioner seeks to employ the beneficiary as its "services manager" for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying 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 for review. On appeal, counsel for the petitioner asserts that the beneficiary will manage and supervise his staff to accomplish the overall project and not spend the majority of his time executing the individual tasks to integrate the petitioner's software. Counsel further asserts that the beneficiary supervises professional employees, including two with bachelor's degrees and one with a master's degree. Counsel for the petitioner submits a brief and additional evidence on 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 would be employed primarily in a qualifying managerial or executive capacity in the United States.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 14, 2013. The petitioner stated on the Form I-129 that the beneficiary will be employed as "services manager" and indicated that the company had 13 employees and a gross annual income of \$3,211,330 as of the date of filing.

On the Form I-129 and in its letter of support, the petitioner described the beneficiary's proposed duties in the United States as follows:

We require [the beneficiary] to serve as the Services Manager at [the petitioner]. As such, [the beneficiary] will manage the Services Team of consultants and thereby head communications with clients. He will also review managed billing and supervise 6 employees: 1 in Help Desk which provides support for customers currently running applications and 5 SCCs (supply chain consultants); and help in the hiring of such employees.

The Services Manager must maintain and coordinate multiple projects with the team of supply chain consultants by assigning tasks, ensuring SCCs are on target, and reviewing their performance. He must communicate with clients to analyze supply chain issues and anticipate clients' needs. He should also meet with clients to introduce new offerings appropriate for their supply chain planning and have them engage additional products/services from [the petitioner]. The Services Manager will also coordinate with QA (application quality control) at [the foreign entity] to help develop solutions based on client needs and feedback. Thus, the Services Manager must be knowledgeable on the technology side about the full life cycle of software development and implementation as well as about the substance of demand planning, supply chain, and forecasting in the business world.

The petitioner submitted an organizational chart for the U.S. company showing the beneficiary's proposed position as "services manager" directly reporting to the CEO & President. According to the organizational chart, the services manager supervises four consultants, a supply chain consultant, and a help desk position.

On February 25, 2013, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, evidence that it will employ the beneficiary in a managerial capacity. The director requested an organizational chart listing all of the beneficiary's subordinates by name, job title, summary of duties, education level, and salary. The director also

requested employment agreements entered into by any newly hired employees who will be managed by the beneficiary.

In response to the RFE, the petitioner submitted the following information about the beneficiary's proposed position and duties in the United States:

Since we originally submitted ou[r] petition . . . several factors have changed. . . . While the duties of the position have not changed, the title of the position has changed from Services Manager to Services Team Technical Manager, which is the same as [the beneficiary's] current job title with our affiliate in Ecuador. Due to the restructuring, [the beneficiary's] team has been reduced from five active employees to three active employees; consequently his salary has been adjusted

[The beneficiary], as the Services Team Technical Manager, will manage three employees and the entire support function which [the petitioner] provides to clients. The Services Team Technical Manager will spend the majority of his time, approximately 55%, supervising the integration of [the petitioner's] software with clients' systems. The Support/Services team designs and implements ETL (extract, transform, and load) processes to accommodate our applications data needs and to export from our application into other ERP systems such as Oracle, AS/400, MISys Manufacturing, BPCS and others. The team uses SQL Server Integration Services to build most of our ETL processes which vary in size and complexity. Where customers require more tailored processes, those are built from the ground up using SSIS and SQL stored procedures and functions. Such tasks can only be performed by professionals with a degree in computer sciences or a related field. Thus, all three Technical Associates managed by the Services Team Technical Manager are professionals with a salary this year of \$40,000-\$70,000 that perform specialized duties within [the petitioner].

The Services Team Technical Manager will spend approximately 12% of his time supporting the cloud servers. Many of our clients prefer to move their operations into the cloud for the convenience as well as the savings in IT-related costs. [The petitioner's] software may be installed on and used from the cloud. He will manage all of the maintenance hosted servers and lead the team in designing and implementing how the servers will interface with clients' networks so that clients only need to feed the data into the cloud where it can be seamlessly accessed and exported.

The Services Manager will spend approximately 10% of his time working with the QA Manager of [the foreign entity] and meeting with clients. The Services Manager and the QA Manager will develop testing strategies and review test results gained by the QA Analyst to ensure that all [the petitioner's] tests directly link to the way clients actually use the software. The Services Manager will also confer with clients, including via travel onsite to client locations, in order to document new clients'

requirements, and to gain a deeper understanding of how clients use [the petitioner's] applications.

Approximately another 10% of the time will be spent heading the content creation and updating for [the petitioner's] applications. The Services/Support team uses Microsoft Word, Microsoft PowerPoint, and/or Adobe FrameMaker for the content. The Services Team Technical Manager will also spend approximately 4% of his time working with the Sales team to help them build customized demos of the applications for sales presentations based on his knowledge of the tool.

The Services Manager will spend approximately 3% of the time meeting with his team at the beginning of each week to discuss project focus, to assign tasks, and to assess progress by the team. Another 3% will be spent on directly testing new or enhanced application features which then may be used as our acceptance tests (in addition to the testing related work with the QA manager). He will also meet with other managers to discuss the implementation options for the features or enhancements.

The remaining 3% of time will be spent on HR tasks such as interviewing potential candidates for the company (not limited to the Services/Support team) and working on performance reviews. At [the petitioner], we base goals and reviews mostly on large milestones. For example, upon the release of a new version of the software, the Services Manager would help set the expectations and then do the employee's review based on the completion of features and the number of bugs it has.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary in a position titled "Services/Support," reporting directly to the CEO & President, and supervising three positions titled "Associate":

The petitioner also submitted a document titled "position details" summarizing the services team technical manager's duties as: "define QA testing strategies with QA manager[;] estimate, define, oversee and/or implement technical aspects of implementations[; and] review and compile system documentation." The document also summarizes the "technical associate's" duties as: "help desk and support[; and] customer upgrades. New work on existing systems."

The petitioner submitted its IRS Forms W-2, Wage and Tax Statement, for 2012 indicating payments to the three employees identified as "associates" on the organizational chart. The petitioner also submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2012.

On May 31, 2013, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. In denying the petition, the director found that the duties described are more indicative of an employee who will be performing the necessary tasks to provide a service or to produce a product. The director observed that the petitioner indicates that the beneficiary's position is managerial in that he supervises subordinate professional employees who have acquired a bachelor's degree or higher; however, the petitioner's

description of the subordinates' duties lacked sufficient detail to establish that a bachelor's degree of higher is actually necessary to perform the functions of any of their positions. The director further found that the petitioner failed to establish that the U.S. business 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 indicates that the detailed job descriptions for the proposed position and for the beneficiary's current position abroad are almost identical and the director found the same listed duties to be sufficiently managerial for the beneficiary's employment abroad. Counsel states that the beneficiary will manage and supervise the "Support/Services" team thereby managing the entire "Support/Services" function of the company. Counsel states the following:

Along with his supervisory role and day-to-day control over the employees he manages, [the beneficiary] will recommend personnel actions and partake in the hiring, firing, and/or reviewing process. He will also have input over such personnel actions taken for employees outside his team as one of the managers of this collaborative company. [The beneficiary's] only supervisor will be the President and sole shareholder of the company. As the job description and the duties highlighted above indicate, [the beneficiary] will work in a managerial capacity as the Services Team Technical Manager in the U.S. performing duties nearly identical to his current position abroad which has been accepted by the Service as managerial.

Furthermore, [the beneficiary] will be a first-line supervisor of professional employees. Two employees to be supervised by the Beneficiary have bachelor's degrees and one employee has a masters degree. They work as professionals utilizing their specialized knowledge and experience. The Associate – Help Desk and Associate – Implementation Consultant positions require programming knowledge and an understanding of software development that is gained in a bachelor's degree in IT or a related field. The Associate – Account Manager requires finesse in managing business and client relations, often working as a bridge between the other Associates and the client.

The petitioner submits more detailed position descriptions for each of the above-referenced subordinate positions in support of the appeal.

B. Analysis

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

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

indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, 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.

Further, 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). Here, while it appears that the beneficiary would have some discretionary authority over the technical services area of the business, the petitioner failed to establish that his actual day-to-day duties would be primarily managerial or executive in nature.

The petitioner first characterized the beneficiary's role as "services manager" and described his duties in very broad terms, noting that he will manage the Services Team of consultants; head communications with clients; supervise six employees; help in the hiring of such employees; maintain and coordinate multiple projects with the team of five SCCs; communicate with clients to analyze supply chain issues and anticipate clients' needs; meet with clients to introduce new offerings appropriate for their supply chain planning; and coordinate with QA (application quality control) at [the foreign entity] to help develop solutions based on client needs and feedback. The initial description indicated that the beneficiary would perform a combination of qualifying and non-qualifying duties. The petitioner did not define the beneficiary's project coordination duties or explain how his client interactions, requirements gathering and product development responsibilities would rise to the level of managerial duties.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner listed the beneficiary's duties as including both managerial 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, as noted above, did 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 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, the petitioner changed the beneficiary's position title to Services Team Technical Manager and indicated that his duties remained the same. The petitioner presented

additional job duties and a breakdown of how the beneficiary allocates his time, noting that he will spend 55% of his time supervising the integration of [the petitioner's] software with clients' systems; 12% of his time supporting the cloud servers; 10% of his time working with the QA Manager of [the foreign entity] and meeting with clients; 10% of his time heading the content creation and updating for [the petitioner's] applications; 4% of his time working with the Sales team to help them build customized demos of the applications for sales presentations based on his knowledge of the tool; 3% of his time meeting with his team at the beginning of each week to discuss project focus, assign tasks, and assess progress by the team; 3% of his time directly testing new or enhanced application features; and 3% of his time on HR tasks such as interviewing potential candidates for the company (not limited to the Services/Support team) and working on performance reviews.

While these tasks are undoubtedly necessary for the successful operation of the company, the petitioner has not indicated how such duties qualify as managerial or executive in nature. Further, although the petitioner provided a more detailed description in response to the RFE, the petitioner's claims that there was no change in the beneficiary's proposed duties despite the company's restructuring and his change in job title, is not persuasive. The two job descriptions provided do not appear to describe the exact same position, given the initial description's focus on customer interactions and the second description's focus on supervisory duties.

Here, the petitioner indicates that the beneficiary will spend the majority of his time, 55%, "supervising the integration of [the petitioner's] software." The petitioner indicates that the technical tasks required to perform these functions are carried out by the beneficiary's professional subordinates, thus the beneficiary spends 55% of his time managing professional employees. However, the petitioner failed to provide any detailed information about the beneficiary's subordinate staff, such as job duties, position descriptions, or educational levels, in response to the RFE. Therefore, the daily breakdown of duties to be performed by the beneficiary does not include primarily managerial or executive duties. Rather, it appears that the beneficiary will function as a first-line supervisor of non-professional employees and will be directly involved in all functional areas of the business, including integrating the petitioner's software with clients' systems, supporting cloud servers for clients, client services, sales and other non-qualifying functions. 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). Further, the petitioner's organizational chart was accompanied by a brief summary of duties for the beneficiary's position which included only the following tasks: "Define QA testing strategies with QA manager; Estimate, define, oversee and/or implement technical aspects of implementation; Review and compile system documentation." These duties are more indicative of a senior technical specialist rather than an employee who is performing primarily managerial or supervisory duties.

An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). While the petitioner indicates that the beneficiary will delegate some tasks to

subordinates, the petitioner failed to specify what these tasks are and, as discussed further below, failed to submit any description of the beneficiary's subordinates' duties in response to the RFE. Therefore, the petitioner has not demonstrated that those subordinates will relieve the beneficiary from performing non-qualifying operational 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.

In evaluating whether the beneficiary manages professional employees, USCIS 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 submitted at the time of filing shows that the beneficiary would supervise six individuals. In response to the RFE, the petitioner submitted a new organizational chart indicating that the beneficiary would supervise three individuals. Although the petitioner stated numerous times that the beneficiary's subordinates held professional positions, 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. The petitioner merely presented three sentences describing the beneficiary's subordinates' positions in response to the RFE, which is not sufficient to establish that they are professional positions. On appeal, counsel for the petitioner asserts that the beneficiary's subordinates' positions require professional degrees as they utilize their specialized knowledge and experience in carrying out their duties and asserts that two of the three subordinates hold bachelor's degrees, and the third subordinate holds a master's degree. The petitioner now submits a document titled "role and responsibilities" for each of the beneficiary's subordinates:

Associate – Implementation Consultant, Associate – Account Manager, and Associate – Help Desk. Counsel for the petitioner indicates that the detailed job descriptions outline the beneficiary's subordinates' specialized roles as an Associate in the Support/Services team.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The director specifically requested that the petitioner provide a summary of duties and educational levels for all employees subordinate to the beneficiary and the petitioner failed to provide such information in response to the RFE. 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). Further, without documentary evidence to support the claim, counsel's unsupported assertions on appeal will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 that any of the beneficiary's subordinates require 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 are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Furthermore, 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 services/support manager, supervising three associates, the petitioner has not shown how the subordinate employees would free the beneficiary from performing the various non-qualifying operational duties that are included in the petitioner's description of his proposed day-to-day 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 is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary would devote to duties that would clearly demonstrate that he would manage an essential function of the U.S. company.

Further, while performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. As discussed herein, the petitioner's description of the beneficiary's proposed day-to-day duties fails to establish that such duties would be primarily managerial in nature.

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

Here, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, none of the beneficiary's listed duties, presented in response to the RFE and again 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 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.

Upon review of the totality of the evidence submitted, the petitioner has failed to establish that the beneficiary will perform primarily managerial or executive duties, in part, based on its failure to provide job duties for the beneficiary's subordinates and based on its failure to distinguish between the beneficiary's qualifying and non-qualifying duties. 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. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

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 stated that the beneficiary commenced employment with the foreign entity in January 2011 as services team technical manager and described his duties abroad similar to those for the proposed position in the United States. Specifically, the petitioner described the beneficiary's duties for the 3 years preceding the filing of the petition as follows:

Services Team Technical Manager. Direct all technical aspects of the Services Team according to the company's objectives and strategies. Supervise 4 professional employees: 1 in Help Desk and 3 in QA (application quality control) and help in the hiring of Help Desk and QA employees. Manage the help Desk which provides support for customers currently running applications. Guide QA team to develop testing options for, and direct the testing of, new and existing application features. Define and make necessary design decisions for client's implementation of application. Review and approve system designs for ongoing projects and customized code for ongoing implementations. Identify necessary software/hardware requirements of proposed design. Ensure current implementations follow predefined methodology.

The petitioner did not submit any additional details about the beneficiary's duties abroad. The petitioner submitted an organizational chart for the foreign entity but failed to submit the corresponding translation. Because the petitioner failed to submit certified translations of the

documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

In response to the RFE, the petitioner submitted a description of the beneficiary's duties abroad that was almost identical to that of the proposed position in the United States. On appeal, counsel for the petitioner pointed out that the position descriptions and job duties were the same, but the director only found that the proposed position in the United States was not primarily managerial in nature.

According to the petitioner's position descriptions, the beneficiary directly supervises four individuals at the foreign entity. However, the fact that the beneficiary manages or directs subordinate staff does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary may exercise authority over the support/services division of the foreign entity, the petitioner has failed to show that the beneficiary's actual duties are primarily managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Here, the petitioner has provided the same vague description of the beneficiary's job duties abroad as those proposed for the United States position. The petitioner also has not provided any information about the beneficiary's subordinates or how they relieve him from performing non-qualifying duties at the foreign entity. Absent a detailed description of the beneficiary's actual duties at the foreign entity and considering the exact similarities to the proposed position in the United States, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved.

In addition, although the petitioner asserts that the beneficiary has been employed abroad in a managerial capacity since January 2011, the beneficiary's resume indicates that his employment from January 2011 to the present has been as "Implementation Consultant / Technical Services Manager." The resume states:

Part of my duties was to meet with the customer and gather all the requirements and after that customize our applications to their needs. From a technical standpoint I would work with other consultants when they had specific technical issues and help and guide them to resolving them. From the Help Desk perspective I was also in charge of leading the newly appointed help desk personnel to address all of the customer needs from the Help Desk.

The beneficiary's description of his job duties appears to reflect his duties as an implementation consultant with perhaps some supervisory duties over newly-hired personnel, and it undermines the

claim that the beneficiary has been performing the duties of a Technical Services Manager since January 2011. 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).

For the foregoing reasons, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity for at least one year in the three years preceding the filing of the petition. 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. QUALIFYING RELATIONSHIP

Although not addressed by the director, the record contains insufficient evidence of a qualifying relationship between the petitioner and its claimed affiliate company in Ecuador.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner stated on the Form I-129 that [REDACTED] is sole shareholder and has managerial control" of the U.S. company and its affiliate, [REDACTED], located in [REDACTED]. In support of this assertion, the petitioner submitted an affidavit from [REDACTED] dated February 6, 2013, which states:

1. I serve as the President and Chief Executive Officer of [the petitioner], an Illinois corporation.
2. I am the sole shareholder of [the petitioner].
3. I am the majority shareholder of [the foreign entity], an Ecuadorian company, owning 760 shares out of a total of 800 outstanding shares.
4. I am able to exercise management authority over both [the petitioner] and [the foreign entity].

The petitioner provided a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2011, which indicates at Schedule K-1 that [REDACTED] owned 100% of the company's stock in 2011.

The petitioner submitted registry documents for the foreign entity indicating that it was registered in Ecuador in November 2009 and authorized to issue 800 shares at \$1 par value. The petitioner submitted three documents pertaining to shares of the foreign entity. One document, dated November 29, 2009, certifies that [REDACTED] holds 360 of 800 shares of the foreign entity. Two additional documents, both dated November 28, 2009, state the following: [REDACTED] transferred 400 ordinary shares at \$1 par value, paid up to 25%, to [REDACTED]. [REDACTED] transferred 360 ordinary shares at \$1 par value, paid up to 25%, to [REDACTED]. The petitioner did not submit any additional documentation related to ownership and control of the foreign entity.

Based on the limited evidence provided, the petitioner has not established that it had a qualifying relationship with the foreign entity as of the date the petition was filed on February 14, 2013. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Here, the petitioner has submitted no primary evidence of the foreign entity's actual ownership and control as of the date of filing. Rather it has submitted two internally prepared documents indicating that individual shareholders of the foreign entity transferred their shares to [REDACTED]. The record contains no stock certificates, no stock ledger, and no evidence that funds had been transferred to the transferring shareholders as of November 28, 2009. The letters submitted are not sufficient to establish that [REDACTED] actually acquired a majority ownership interest in the foreign entity. 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. Further, 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).

Based on these considerable evidentiary deficiencies, the petitioner has not adequately supported its claim that it is an affiliate of the beneficiary's foreign employer. 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)). For this additional reason, the petition cannot be approved.

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, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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 burden has not been met.

ORDER: The appeal is dismissed.