



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: FEB 27 2014

OFFICE: VERMONT SERVICE CENTER

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner filed this 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 corporation, states that it engages in information systems consulting as applied to project development. The petitioner claims to be an affiliate of [REDACTED]. The petitioner seeks to extend the beneficiary's employment as its general manager for a period of six years.

On April 8, 2013, the director denied the petition on three alternative grounds, concluding that the petitioner failed to establish that: (1) the beneficiary had at least one year of full-time employment with a qualifying foreign entity within the three-year period preceding the filing of the petition and that the employment was in a managerial or executive capacity; (2) the beneficiary will be employed in a primarily managerial or executive capacity at the U.S. company; and (3) the petitioner has secured sufficient physical premises to house the new United States office.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner contends that the beneficiary was employed for one year at the qualifying foreign entity, that he will be employed in a managerial capacity at the foreign entity, and that the petitioner has acquired sufficient physical premises to house the new office. Counsel submits a brief and duplicate evidence in support of the appeal.

#### I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

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

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

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (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 ISSUES ON APPEAL

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

The first issue to be addressed is whether the petitioner established that the beneficiary would be employed in a primarily managerial or executive capacity at the U.S. company.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 26, 2013. On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

As General Manager of [the petitioner], [the beneficiary] has the discretionary power to determine the development and direction of all operational and administrative activities of the business with an emphasis on implementing the operational policies and the creation of quality standards. Moreover, [the beneficiary] is the person responsible for overseeing the selection, placement and supervision of all corporate staff that will allow the business to continue growing in a structured way.

In support of the petition, the petitioner submitted a letter describing the beneficiary's accomplishments at the U.S. company for the previous year. The petitioner went on to describe current staffing as follows:

In November 2012, [redacted] was hired by [the petitioner] as Sales Consultant to handle [redacted] seeking agreements with companies in USA and LATAM to provide services technology consultants in the area of telecommunications. Also added to the [redacted] to handle business development for the technology

solutions component of our business. As part of the hiring process, both [redacted] and [redacted] underwent a comprehensive 15 day training program in [redacted] activities: [redacted]

\* \* \*

With the new year (2013), we entered into an Agreement with two universities, [redacted] [redacted] to incorporate interns into [redacted] as part of our efforts to be involved in the community. [redacted] our first intern, began working with us and was assigned the task of market research.

\* \* \*

In Mexico, which directly feeds our US operations, we currently have a staff of 2 people, but we expect to be at 4 within the next two months. We are looking for new office space to establish an operations center in [redacted] a. By July 2013, we will have a staff of 5 people (3 consultants and 2 technicians).

In Miami we are now 3 full-time employees, plus 1 intern. We are interviewing for interns, and would ideally like to have two at all times. In the next three months, we anticipate adding 2 more business development consultants and 1 administrative assistant. Thus, by March 2013 we expect 3 full-time employees and 2 interns. By June 2013, we expect to have 5 full-time staff and 2 interns working at the US office.

In the next two years, [the beneficiary] plans to continue the growth of the business in the United States and Latin America. His main duties will continue to be the managements and direction of all essential functions within the organization, including negotiating sales, agency, commission and employment contracts, as well as the successful completion of all work orders; to make the final decision in the hiring of personnel as needed, and to supervise and control the work of the managerial employees employed by [the petitioner].

The petitioner submitted document describing the beneficiary's duties at the U.S. company as follows:

In the next year, as Director of Operations, [the beneficiary] will be responsible for the following during the course of an average 40 hour-plus work week:

I. Managing the onsite team (30%)

Ensure compliance with project standards and quality assurance procedures.

Review project status and project metrics on a weekly/monthly basis with the clients.

Review and revise project plan to meet changing requirements in the projects.

Supervising the individual team members for improved performance.

Hiring and Firing responsibilities based on changes to business plans and individual performance.

Performance appraisals, Career planning, Promotions and Salary increase recommendations for all direct[sic] reports within the Customer Relationship Mgmt team[.]

II. Interfacing with work teams in the US, Spain and Mexico to ensure quality and timely project delivery (20%)

Accountable for delivering projects as per specifications of the contracts with the clients.

Review and approve standard project status reports prepared by employees.

Ensure effective and clear communication regarding projects with employees in Spain, Mexico and the US.

Ensure that our services meet the clients' requirements, expectations and report feedback on clients' satisfaction to the team.

III. Planning and Strategy (20%)

Maintain a good relationship with key executives and managers at Client and work towards strengthening them.

Close coordination with Client site directors and operations managers to ensure good understanding and alignment with Client IT goals.

Cultivate key client relationships, which lead to new business opportunities.

IV. Identify new opportunities / assignments which will contribute to the growth of the account and ensure revenue targets are met (10%)

Meeting with the key managers and executives to understand key client issues.

Translate client issues into opportunities for development of new services.

Analyze strengths and weakness of key competitors and be aware of the latest trends in business[.]

Write or assist in the writing of new project proposals and statement of works and formally present the same to client[.]

V. Drafting and execution of Contracts on behalf of the organization (20%)

Work with the organization's technical team to finalize the effort/cost estimates, schedules and milestones[.]

Participate in effort, cost discussions with Clients[.]

Write or assist in the writing of new project proposals and statement of works and formally present to prospects[.]

IV. Overall Duties

[The beneficiary] would be managing the business (in terms of revenue, profitability, quality of service to the customer) and team of Professionals involved in providing services to the customer. He would be involved in:

1. Providing outstanding service for the client
2. Achieving revenue target for the organization
3. Achieving profitability target
4. Managing a team of professionals engaged in providing service to the client

The petitioner also submitted a document describing the beneficiary's subordinates' duties as follows:

- [REDACTED] is a full-time staff member.
- Sales Consultant to handle [REDACTED] seeking agreements with companies in USA and LATAM to provide services technology consultants in the area of telecommunications. Also added to the [sic]
  
- [REDACTED] is a full-time staff member.
- Handle business development for the technology solutions component of our business. Job tasks include marketing, product development and distribution, writing contract proposals and presentations and meeting with potential new clients within his field of expertise.
  
- [REDACTED] is a student intern. Input, message [sic], interview, set-up appointments with clients. Generate sales contract reports. Data entry and other related tasks[.]
  
- Anticipated hires:
  - Vacant – full-time, Administrative Assistant. Expected to handle administrative duties. Duties will include fielding telephone calls, receiving and directing visitors, word processing, filing, and faxing. Extensive software skills are required, as well as Internet research abilities and strong communication skills. Bookkeeping, payroll, payables and receivable.
  
  - Sales Staff – full-time, inside and outside staff. Follow-up with leads, lead generation, etc. Telephone sales, setting up appointments with more senior staff, sorting through leads.

The petitioner submitted an organizational chart for the U.S. company, depicting the beneficiary as "owner and director of operations," supervising the following positions:

- [REDACTED] Business Development; IT Solutions & Programming
  - Vacant; In-house IT Person; Maintain and update IT
  - [REDACTED] Intern, Assist Staff various duties
  - [REDACTED] Sales and Marketing Manager; In charge of marketing and sales
    - Vacant; Administrative Assistant; Clerical assignments, payables and receivables
    - Vacant; Outside/Inside Sales; Handle direct sales

The organizational chart makes a brief statement at the bottom about its staff in Mexico: "We have a staff of two in Mexico who currently feed business and support our operations in the USA, they answer directly to [the beneficiary]."

The petitioner submitted its Forms UCT-6, Florida Department of Revenue Employer's Quarterly Report, for the third and fourth quarters of 2012. In the third quarter of 2012, the petitioner indicated that it had one employee, the beneficiary, during each month in the quarter and paid him a total of \$14,162.70 for the quarter. In the fourth quarter of 2012, the petitioner indicated that it had two employees the first month and three

employees, the beneficiary, [REDACTED], the remaining two months in the quarter and paid them a total of \$19,900.00 for the quarter. The petitioner also submitted payroll summaries for [REDACTED] for January 2013 indicating that they were employed by the petitioner at the time of filing the petition.

The petitioner submitted a copy of its nondisclosure agreement with [REDACTED] the student intern, dated January 24, 2013. The petitioner also submitted copies of employment agreements with [REDACTED] commencing October 1, 2012, and [REDACTED] commencing September 10, 2012, its employees located in Mexico.

The petitioner submitted position descriptions for the following vacant positions: HSS/HLR Node Specialist; IMS Engineer; Telecom Engineer, Sales Consultant, Project Manager, Internship Tasks for Graphic Designer, Internship Tasks for Market Research Analyst, and Office Administrative Assistant.

On March 11, 2013, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence to establish that the beneficiary will be performing the duties of a manager or executive at the U.S. company. Specifically, the director requested a statement describing the beneficiary's duties for the previous year and those to be performed on the extended petition. The director advised the petitioner that a review of the submitted statements referencing the beneficiary's and his subordinates' duties are insufficient to establish that his subordinates will relieve him from performing day-to-day operational duties.

In response to the RFE, the petitioner submitted a new job description for the beneficiary's position at the U.S. company as follows:

Plan, direct and coordinate the operations of the organization; formulating policies, managing operations activities, and planning use of materials and human resources toward maximum productivity.

Daily job duties for this position include reviewing financial statements and sales and activities reports, overseeing production or service delivery, managing the activities of sales and distribution departments, or establishing long-term goals and objectives for the organization.

Determining needs, reducing costs and analyzing areas requiring improvement are additional director of operations activities. The director of operations must strive to maximize efficiency and improve profitability and direct and coordinate financial and budget processes. Establish and implement department goals, procedures and policies.

\* \* \*

As General Director of Operations of [the petitioner], in the next phase of operations, [the beneficiary] will be responsible for:

I. Given that [the petitioner] now has three employees; a Sales Manager, a Director of Business Development, and an Administrative Assistant, [the beneficiary] will dedicate his time to directing the overall business activities and to the planning and strategy of the business (100% of time his time [*sic*] will be dedicated to this type of work)[.]

- Execute and adjust the current comprehensive business plan.
- Build and lead an effective and cohesive team, establishing a basic personnel policy, initiating and monitoring policies relating to personnel actions and training and professional development programs.
- Build and motivate a world-class sales & marketing team. Responsible for all elements of sales compensation, tools, planning, organization and structure.
- Establish and implement short and long-term goals, objectives, policies, and operating procedures.
- Close deals with industry partners as well a[s] new clients.
- Ensure that operating objectives and standards of performance are understood by employees.
- Ensure that the company and its businesses comply with all applicable legal and regulatory requirements and, where appropriate, best practice.
- Ultimate hiring and firing responsibilities based on goals and individual performances.
- Participate in relationship reviews and contract reviews with vendors, potential clients, etc.
- Analyze strengths and weakness of key competitors and be aware of the latest trends in business segment.
- Establish, achieve and report milestones to the company owners.
- Oversee operating plan, budgets, cash flow and overall company finances.
- Ensure invoicing and revenue collection are done on time.

Assuming a 40 hour work week[,] all 40 hours will be spent on Management, Planning and Strategy, i.e. executive/managerial functions.

The petitioner submitted a list of current employees and "anticipated hires for 2013-2014" and brief job duties for each position. The job duties previously submitted for [REDACTED] the administrative assistant position, and the sales staff position are all identical to those previously submitted. The new document clarifies that [REDACTED] is the sales manager, [REDACTED] is the director of business development, an additional student intern has been hired, [REDACTED], and the administrative assistant position has been filled by [REDACTED]. The new document also states that the sales staff will consist of two employees and adds the new position for marketing director as follows:

Marketing Director – To be responsible for developing and maintaining marketing strategies to meet agreed company objectives. To evaluate customers research, market conditions, competitor data and implement marketing plan alterations as needed. To oversees [*sic*] all marketing, advertising and promotional staff and activities.

The petitioner submitted a copy of its nondisclosure agreement with [REDACTED], the student intern, dated March 5, 2013. The petitioner also submitted a copy of its employment agreement with T: [REDACTED]

for the administrative assistant position, commencing March 11, 2013. The employment agreement contains a list of job duties to be performed by the administrative assistant that is somewhat consistent with the previously submitted job duties.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed primarily in a qualifying managerial or executive position in the United States. In denying the petition, the director found that the beneficiary's listed duties do not show that his primary duties will be executive or managerial. The director further found that the duties listed for the beneficiary's subordinates do not establish that the beneficiary will be supervising professional employees, or that they will be relieving him from performing the day-to-day tasks of operating the business.

On appeal, counsel for the petitioner contends that the beneficiary's duties are primarily managerial in nature in that he supervises and controls the work of subordinate professional employees and exercises authority to hire and fire employees under his supervision. Counsel further states that the beneficiary also manages a subdivision, function, or component of the organization as he manages the petitioner's business in Mexico. Counsel states that the beneficiary spends 60% of his time on managerial duties, such as "management, planning and strategy including communication with [the foreign entity] and determining direction of the Company in the US and Latin America." Counsel also references the beneficiary's subordinates and states that the purpose of the current subordinates is clearly to relieve the beneficiary from performing day-to-day tasks of operating the business. The petitioner submits the same list of job duties for the beneficiary as submitted in response to the RFE.

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 in the United States.

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

After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." *See* 8 C.F.R. § 214.2(l)(14)(ii)(B). In the instant matter, counsel for the petitioner contends that the U.S. company is still in a start-up phase and that the director placed an undue emphasis on the amount of time the beneficiary devotes to non-qualifying duties. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year

period. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

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, 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 manager and owner. 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 manager and continuously referred to him as "director of operations," noting he will devote 60% of his time to "management, planning and strategy including communicating with [the foreign entity] and determining direction of the company in the U.S. and Latin America;" 10% of his time to "reviewing credentials, interviewing and hiring new employees in the US and Mexico, as well as hiring of accountant, legal counsel, etc.;" 10% of his time to "socializing, marketing, meeting with potential customers;" 15% of his time to "negotiating collaboration agreements;" and 5% of his time to "administrative tasks such as purchasing office equipment [and] obtaining services." The petitioner then provided an additional list of tasks and stated that since hiring his subordinates, the beneficiary will devote 100% of his time to directing the overall business activities and to the planning and strategy of the business. While these tasks are undoubtedly necessary in order to continue operations, the petitioner has not indicated how the majority of these duties qualify as managerial or executive in nature.

Given the vague and general descriptions of the beneficiary's duties, the record reflects that the beneficiary would more likely than not allocate more than 50% of his time to duties that are non-qualifying. 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). 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).

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." See section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act. In this matter, the petitioner provided position descriptions for future hires and posted them on Monster.com. In response to the RFE, the petitioner indicated that it hired an additional employee, the administrative assistant, and an additional student intern. However, as the future positions have not yet been filled and the two additional employees were hired after the filing of the petition, they 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 petitioner indicates that the beneficiary supervises a sales manager, a director of business development, and a student intern, none of which have any subordinates. The list of job duties for each of the beneficiary's subordinates do not list any managerial or supervisory duties or include tasks which are indicative of a managerial, supervisory, or otherwise professional position. Additionally, the petitioner has not established that any of the beneficiary's subordinates require a bachelor's degree to perform their duties, such that they could be classified as professionals. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree in a specific field of study is actually necessary to perform the duties assigned to the beneficiary's subordinates. 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.

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 the "owner and director of operations" supervising business development and a sales and marketing manager, 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.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* 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 section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9<sup>th</sup> Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the petitioner indicates that the beneficiary had two direct subordinates and a student intern at the time of filing. 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.

Further, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. The petitioner's future hiring plans are not relevant to this determination. 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). Here, the petitioner indicates that the beneficiary has two direct subordinates and a student intern. 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 administrative and operational 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.

#### B. Employment Abroad for One Year in a Managerial or Executive Capacity

The second issue to be addressed is whether the petitioner established that the beneficiary had at least one year of full-time employment with a qualifying foreign entity within the three-year period preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign entity on February 27, 2007. Where asked to describe the beneficiary's duties for the past three years, the petitioner stated the following:

Principal & Managing Director, overseeing sales and marketing of services. Responsible for the overseeing of client development, commercialization of services, project design, and quality control of all projects. Handle managerial day to day operations as well as primary responsibility for all personnel decisions[.]

The petitioner submitted the beneficiary's resume listing his professional experience and achievements as follows:

[REDACTED]	2011 –
[REDACTED]	2010 - 2011
[REDACTED]	2009 - 2010
[REDACTED]	2006 - 2008
[REDACTED]	2003 - 2006

The petitioner did not provide any evidence pertaining to the beneficiary's employment with a qualifying foreign entity. In the request for evidence, the director instructed the petitioner to submit evidence that the beneficiary was performing work for the foreign entity and that the beneficiary's position was managerial or executive.

In response to the RFE, the petitioner submitted a new copy of the beneficiary's resume adding the U.S. company and the foreign entity to his list of professional experience and achievements as follows:

[REDACTED]	2012 – Present
In charge of opening a new office of [REDACTED] Consulting in the US to expand to the American market. Plan, direct and coordinate the operations of the organization; formulating policies, managing operational activities, and planning use of materials and human resources toward maximum productivity.	
[REDACTED]	2007 – 2012

Plan, direct and coordinate the operations of the organization; formulating policies, managing operational activities, and planning use of materials and human resources toward maximum productivity. Oversee and direct various projects that [the foreign entity] had been contracted to undertake.

The beneficiary's resume went on to list the same previous positions for the beneficiary as initially submitted and detailed above adding an end date of 2011 for [redacted] and adding a parenthetical reference stating [redacted]." for his positions with [redacted]. Additionally, the beneficiary's position with [redacted] Center was removed from the newly submitted resume.

The petitioner submitted an organizational chart for the foreign entity, without translation, depicting the beneficiary as "director/consultor," supervising the following positions:

- [redacted] sistente
- [redacted] onsultor
- [redacted] onsultor
- [redacted]; Consultor
- [redacted] Jefe Proyecto

The petitioner also submitted a document listing the beneficiary's subordinates at the foreign entity along with brief job duties for each position as follows:

[redacted]  
Position: Administrative Assistant.

\* \* \*

[redacted]  
Position: Senior Telecommunications Consultant  
Description:  
Telecom Engineer with working knowledge and experience on the GSM/ GPRS/ EDGE/WCDMA/ IMS/ HSS/ HSPA+/ LTE Technologies, mainly Ericsson, for projects in USA and LATAM regions.

\* \* \*

[redacted]  
Position: Senior Telecommunications Consultant  
Description:  
Telecom Engineer with working knowledge and experience on the GSM/ GPRS/ EDGE/WCDMA/ IMS/ HSS/ HSPA+/ LTE Technologies, mainly Ericsson, for projects in USA and LATAM regions.

\* \* \*

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Position: Senior Telecommunications Consultant

Description:

HSS Node Specialist will responsible [sic] for configuration and support activities on HSS and HLR nodes during 3G and 4G network rollout projects, mainly in LATAM region.

\* \* \*

Position: Project Manager

Description:

Project Manager is responsible for leading IT Projects, services and product developments to meet quality, cost, schedule and requirements according to customer expectations.

The petitioner submitted thirteen pay stubs indicating that the beneficiary was paid by the foreign entity from February 1, 2011 through February 29, 2012. The pay stubs state that the beneficiary's position was "director."

The petitioner did not submit any information about the beneficiary's actual duties at the foreign entity.

The director denied the petition based on the petitioner's failure to establish that the beneficiary had at least one year of full-time employment with a qualifying entity within the three-year period preceding the filing of the petition. In denying the petition, the director found that the beneficiary's resume, initially submitted with the petition, failed to include the beneficiary's employment with the foreign entity and the new resume, submitted in response to the RFE, listed his employment with the foreign entity along with coinciding employment at other companies through a contract with the foreign entity. The director noted that the petitioner submitted pay stubs for the beneficiary from the foreign entity; however, the director was unable to determine whether the beneficiary was an actual employee of the foreign entity or merely an independent contract employee.

On appeal, counsel for the petitioner contends that the pay stubs provided for the beneficiary's prior year of employment at the foreign entity was sufficient to establish his eligibility for the initial petition to open the new office and therefore should be sufficient to establish that he was employed for one year by the foreign entity on extension. Counsel further contends that a resume is not an official document, and therefore the director should give more credence to the foreign entity's official pay stubs than to the beneficiary's assumptions of important information placed on the resume.

In support of the appeal, the petitioner submits copies of two contracts between the foreign entity and [redacted], dated January 1, 2009 and January 15, 2010, and one contract between the foreign entity and [redacted], dated October 25, 2011.

Upon review, counsel's assertions are not persuasive. Although the petitioner submitted pay stubs from the foreign entity indicating that the beneficiary was paid from February 2011 to February 2012, the petitioner

has not shown that said payment was for the beneficiary's employment at the foreign entity, rather than contracted work or dividends paid as a shareholder. Ultimately, even though the pay stubs state "director" as the beneficiary's position, the petitioner has submitted inconsistent evidence throughout the record referencing the beneficiary's actual employment abroad.

Here, the beneficiary's resume, initially submitted with the petition, indicates that he was still employed by [REDACTED] as it stated "2011 –" for the period employed and does not list the foreign entity anywhere in the document. Even the beneficiary's personal email address listed on the resume is "[REDACTED]". The resume submitted in response to the RFE lists his employment at the foreign entity from 2007 to 2012 and the U.S. company from 2012 to the present. It also revises his period of employment at [REDACTED] from 2011 to 2011 and adds a parenthetical reference to a contract with the foreign entity for his employment at [REDACTED]. That, and the lack of information pertaining to the beneficiary's actual duties while "employed" at the foreign entity, raises serious doubts as to the beneficiary's actual employment. 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).

Due to the inconsistent accounts of the beneficiary's actual employment at the foreign entity, the petitioner failed to establish that the beneficiary had at least one year of full-time employment with a qualifying foreign entity within the three-year period preceding the filing of the petition. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner also failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

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.* Here, the petitioner has failed to present a consistent account of the beneficiary's role with the foreign entity.

At the time of filing, the petitioner characterized the beneficiary's role at the foreign entity as managing director and identified his duties as described above. Those duties initially submitted with the petition, and in response to the RFE, do not provide any indication that the beneficiary's position at the foreign entity was managerial or executive. In fact, although the petitioner submitted brief position descriptions for the beneficiary's alleged subordinates at the foreign entity, the petitioner failed to provide any details about the beneficiary's actual duties at the foreign entity. Additionally, his resume listed duties performed for other companies while he was "employed" at the foreign entity, which are not managerial or executive. 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)).

Absent a consistent and detailed description of the beneficiary's actual duties at the foreign entity, 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 appeal 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).

### C. Physical Premises

The last issue to be addressed is whether the petitioner established that it had acquired and maintained physical premises to conduct business.

At the time of filing, the petitioner submitted copies of two leases; one lease commenced February 27, 2012 for one year, and the second lease commenced July 26, 2012 for 18 months. The second lease lists the petitioner's current address and is considered the active lease. The petitioner submitted photos of its office space showing the outside of the building, the entrance to the building, its company name on the billboard, and its employees' work space.

In response to the RFE, the petitioner submitted new photos consistent with those initially submitted of its employees' work space. The photos show two offices with a single desk and a third office with three large desks and ample space for the employees to work.

The petitioner also submitted a statement describing its office space as follows:

The office space rented by [the petitioner] at [REDACTED] features approximately 1000 square feet of office space, the space is leased as office and service space. The office is divided up into three separate offices with a conference room and space for storage. The office gives us plenty of space for meeting with clients, holding office meetings and attending to all of our current needs.

In denying the petition, the director found that the photographs of the petitioner's office space does not show the exact location of said space or that it is of sufficient size to house all of the petitioner's employees now and in the future.

On appeal, counsel for the petitioner contends that the petitioner's physical premises are sufficient for its current staff and that the petitioner is not required to have sufficient physical premises to accommodate any future employees. Counsel states that the office space is 537 square feet and easily accommodates five employees with the potential of expanding to eight employees by eliminating the existing conference room.

Upon review, counsel's assertions are persuasive. The AAO finds sufficient evidence to establish that the petitioner has acquired sufficient physical premises to conduct its business. The director's statement about housing employees now and in the future was misplaced. The petitioner is not required to demonstrate that it can accommodate future employees; and it has clearly demonstrated that its current office space is sufficient for the petitioner's employees to perform their duties and conduct the business of the U.S. company.

The petitioner need only establish that sufficient physical premises to conduct business have been secured. The petitioner has met that burden.

### III. QUALIFYING RELATIONSHIP

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

Throughout the record, the petitioner claims that the beneficiary owns 100% of the U.S. company. In response to the RFE, the petitioner submitted a copy of its Electronic Articles of Incorporation indicating that the U.S. company is authorized to issue 100 shares of stock. The petitioner submitted three copies of stock certificates, each undated and unsigned. Stock certificate number 01 provides the beneficiary 100 shares of the U.S. company at .01 par value. A second stock certificate number 01 provides the beneficiary 99 shares of the U.S. company at .01 par value.; the AAO notes that this stock certificate is crossed out at INC. for the U.S. company's name and the letters "GP" are written in blue ink. Stock certificate number 02 provides [REDACTED] 01 share of the U.S. company at .01 par value. The petitioner also submitted a stock ledger for the U.S. company listing a sole stock certificate number 01 for 100 shares of the U.S. company to the beneficiary. The stock ledger column titled "time became owner" (which is presumably the date of issue of the stock certificate) is blank.

In this case, the record fails to demonstrate the actual ownership of the petitioner. Accordingly, it is not possible to discern that the petitioner is in any way affiliated with the foreign entity. The inconsistent evidence presented to confirm the petitioner's claims of ownership and affiliation to the foreign entity raises serious doubts regarding the claimed affiliation. 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).

Due to the inconsistencies detailed above, the petitioner has not met its burden to establish that the petitioner is an affiliate of the foreign entity. For this additional reason, the petition cannot be approved.

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

#### IV. CONCLUSION

The 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, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.