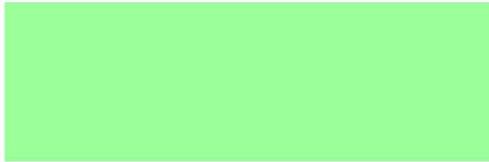
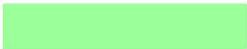


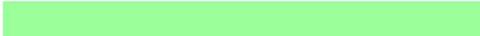


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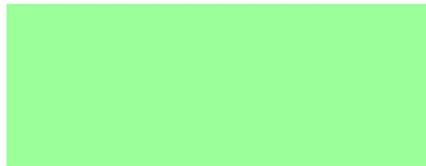


DATE: **JUL 03 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

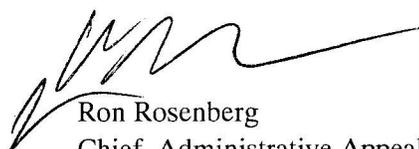


INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Michigan corporation established in June 2012, states that it engages in the manufacture and sale of industrial balancing and electrical machinery. The petitioner claims to be an affiliate of [REDACTED] located in South Africa. The petitioner seeks to employ the beneficiary as its vice president for a period of three years.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity as he will primarily manage a subdivision, function, or component of the organization. Counsel submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

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

II. THE ISSUE ON APPEAL

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

A. Facts and Procedural History

In an addendum to the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated:

As the Vice President for [the petitioner], [the beneficiary] will primarily be responsible to oversee and manage the entire manufacturing process of our proprietary balancing machines, as well as all electronic and computerized measuring systems for balancing machines in the United States. He will be responsible for the design, as well as research and development, of our [REDACTED] and all other balancing machines. [The beneficiary] will also manage and oversee the installation and commissioning of our balancing machines.

In addition, [the beneficiary] will manage and oversee all day-to-day business functions and exercise discretionary decision-making authority over [the petitioner's] employees. [The beneficiary] will report directly to the President, and will initially have (2) direct reports, the current Sales Manager, Mr. [REDACTED] as well as a technician to be hired immediately in 2013. As also mentioned in the attached Business Plan for [the petitioner], [the beneficiary] is expected to have six (6) additional direct reports (4 sales agents, an administrative assistant and another technician) within the next couple of years.

[The beneficiary] will manage the business financials, including but not limited to cash flow, payments, and stock orders, as well as exports, and imports. He will be responsible for all technical aspects of sales and marketing activities for the company's products, including web marketing and trade exhibitions, as well as manage client relations and provide technical training. [The beneficiary] will direct and oversee all other daily administrative, financial and technical aspects of the business in the United States.

In its initial letter of support, the petitioner described the beneficiary's proposed position and duties in the United States identical to the description submitted with the Form I-129 above.

The petitioner submitted an organizational chart for the U.S. company, dated 2013, depicting the beneficiary as vice-president, reporting to the president, [REDACTED]. The chart showed that as the vice-president, the beneficiary will supervise a sales manager, [REDACTED] and a technician, to be hired in 2013. There are no additional employees listed on the chart.

The petitioner also submitted an organizational chart for the U.S. company, dated 2014 projected, depicting the beneficiary as vice-president, reporting to the president, [REDACTED]. The chart showed that as the vice-president, the beneficiary will supervise a sales department, a technical department, and an administrative department. The sales department consists of a sales manager, [REDACTED] who will supervise four sales agents, all to be hired in 2014. The technical department consists of two technicians, one to be hired in 2013 and the other in 2014. The administrative department consists of an administrative assistant, to be hired in 2014.

The petitioner submitted a business plan describing its personnel plan and projected staffing plan as follows:

2013:

[The petitioner] appointed Mr. [REDACTED] in August, 2012 to handle all sales in the U.S. and Canada. Mr. [REDACTED] receives . . .10% commission on all machine sales.

Once [the beneficiary] is working in the U.S., he will immediately appoint a technician to do all installation, refurbishing and calibration work of the machines.

2014:

[The petitioner] intends to appoint another technician to do installations, refurbishing and calibration work of the machines. As [the petitioner] will also have an in-house balancing shop, a permanent balancing technician will be appointed.

An administrative assistant will also be appointed to do general office work, including answering phones, client correspondence, filing, etc.

[The petitioner] will also appoint approximately 4 independent sales agents across the U.S., including Western Side California area, Southern Side Texas area, South Eastern Side Atlanta region and Eastern Side New York area.

The director issued a request for additional evidence ("RFE") on August 13, 2013, advising the petitioner that the description of duties provided for the beneficiary's position at the U.S. company is insufficient as it was vague and did not provide a percentage of time that the beneficiary would dedicate to his tasks. The director noted that the petitioner did not provide any evidence to support the current employment of the beneficiary's proposed subordinates at the U.S. company. The director instructed the petitioner to submit evidence of the beneficiary's managerial or executive position at the U.S. company and quarterly tax reports to demonstrate that there are additional employees at the U.S. company to relieve the beneficiary from performing non-qualifying duties.

In response to the RFE, counsel for the petitioner submitted a letter describing the beneficiary's proposed duties as follows:

. . . [the beneficiary] will clearly manage the organization and essential functions of the organization as Vice President. Specifically, he will be responsible for directing, coordinating, managing and supervising all activities related to the operations of the organization in the United States, including the manufacturing process, administration, distribution and sales of our products, customer service, financial affairs, technical and personnel issues.

* * *

An important part of managing the organization in the United States is directly managing and directing essential functions, including manufacturing, technical research and development, sales and servicing. [The beneficiary] will have all of these responsibilities, and will continue in his role of directing the technical aspects of manufacturing abroad.

. . . the vast majority of his time will be spent on tasks that clearly involve acting in a managerial capacity.

* * *

. . . [the beneficiary] will supervise and control the work of other supervisory, professional, or managerial employees. . . . As he will be directing and managing the organization and multiple functions in the United States, he will be the direct supervisor for all employees, and will only report directly to the President, Mr. [REDACTED]

* * *

[The beneficiary] will be the senior level employee functioning in a managerial/executive capacity in the organizational hierarchy for U.S. operations. He will also continue to direct technical activities in South Africa as well. As detailed in the previously submitted Organizational Charts, he will report directly to the President, and will manage and supervise all manufacturing activities and departmental functions including Administration, Technical and Sales.

In response to the RFE, the petitioner expanded on the beneficiary's duties and submitted the following breakdown of duties for his position in the United States:

As the Vice President, [the beneficiary] will be responsible for directing, coordinating, managing and supervising all activities related to the operations of our organization in the United States, including the manufacturing process, administration, distribution and sales of our products, customer service, financial affairs, technical and personnel issues. As requested, we hereby submit the following job duties including the percentage of time to be spent on each task:

1. Manage and direct the entire manufacturing process of our proprietary balancing machines, as well as all electronic and computerized measuring systems for balancing machines in the United States, including all day-to-day operations of production. (50%)
2. Plan, direct and manage activities related to the manufacturing and production of our balancing machines and electronic and computerized measuring systems for the balancing machines, including providing technical direction for design, research and development, and manufacturing of all products with responsibility to ensure quality and continuous improvement of products and services, as well as competitive pricing. (10%)
3. Establish and implement policies, goals, objectives and procedures related to manufacturing and production process, servicing, sales, and distribution of our products, conferring with President and staff members as necessary. (5%)
4. Manage and direct the import/export of balancing machines and electronic and computerized measuring systems to and from [the petitioner], as well as to and from affiliate, [the foreign entity], to current and potential customers worldwide. (5%)
5. Manage and direct the technical installation, commissioning and servicing of our balancing machines, working with customers and staff members to ensure the proper

- installation of products purchased, training related to use of product, and addressing and resolving any technical issues that arise. Negotiate contracts with customers. (10%)
6. Exercise discretionary decision-making authority over [the petitioner's] employees. Determine staffing requirements, and interview, hire and train new employees. Directly supervise activities of employees, including the Sales Manager, technical staff, administrative staff, and sales agents with authority to hire and fire all employees. Report directly to President. (5%)
 7. Manage daily business financial and budget matters, including but not limited to cash flow, payments, stock orders, and inventory to fund operations and increase efficiency. Review financial statements, sales and activity reports, and other performance data to measure productivity and achievement of goals and to determine areas needing cost reduction and improvement. (10%)
 8. Oversee and direct sales and marketing activities for our products, providing technical expertise for such activities, including web marketing and representing the company at trade exhibitions. (5%)

The director denied the petition on November 7, 2013, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that, based on the organizational structure provided, it appears that the beneficiary's position is primarily assisting with the day to day non-supervisory duties of the business and the performance of those tasks precludes the beneficiary from being considered a manager or executive. The director observed that the beneficiary's duties consist of "managing and directing the manufacturing process" and "providing technical direction for design, research, and development;" however, the organizational chart demonstrates that there is only one subordinate to the beneficiary, the sales manager, and therefore it is unclear who the beneficiary will "manage and direct" in regards to the manufacturing process and who he will "provide technical direction" for in regards to the design, research, and development. The director also noted that the petitioner failed to submit quarterly wage reports, as requested in the RFE, to support the current employment of any subordinates with the U.S. company. The director further found that the petitioner failed to show that the beneficiary manages or directs the management of a department, subdivision, function, or component of the U.S. company, such that he can be considered a function manager; instead, it appears that the beneficiary is primarily involved in the performance of routine operational activities of the entity rather than in the management of a function of that business.

On appeal, counsel for the petitioner asserts that the beneficiary's proposed position in the United States meets the requirements for managerial capacity in that he "primarily manages a subdivision, function or component of the organization. Specifically, he is the senior-level employee primarily responsible for directing and managing the U.S. company's operations." Counsel clarifies that [redacted] sales manager, is a contracted employee and that the U.S. company does not have any employees on payroll, which is why it did not submit quarterly tax reports. Counsel states that [redacted] sales manager, is responsible for the daily activities involving sales and marketing, supervised by the beneficiary. Counsel contends that the director is erroneously focusing on the number of employees at the U.S. company and overlooking the managerial job duties of the beneficiary, who will be primarily performing high-level managerial duties. Counsel further asserts that the beneficiary is a functional manager in that his responsibility is to run the U.S. operations for the entire organization which clearly qualifies as an extremely important purpose.

In support of the appeal, the petitioner submits a duplicate copy of its RFE response letter listing the beneficiary's proposed duties with allocated percentages of time, an IRS Form 1099-MISC, Miscellaneous Income, showing that the U.S. company paid [REDACTED] \$22,350.00 in 2012 (counsel states that [REDACTED] is [REDACTED] company, thus the Form 1099 shows that the U.S. company employed [REDACTED] services in 2012), and Robert Edwards' resume listing the following duties for his recent employment with the petitioner:

[REDACTED], MI.

- VP of Marketing & Sales, 2012 to Present.
- International Sales Manager for [the petitioner] [REDACTED], MI.
- Corp Office located in South Africa.
- Market and sell balancing systems for [the petitioner].
- Open US marketing for [the petitioner].
- Help to develop market strategy for US market.
- Manage [the petitioner's] sales office in [REDACTED] MI.

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

B. Analysis

As the director noted, when examining the executive or managerial capacity of the beneficiary, U.S. Citizenship and Immigration Services (USCIS) looks first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(I)(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.

As the director also noted, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The petitioner first characterized the beneficiary's role as vice president and described his duties in very broad terms, noting that he will oversee and manage the entire manufacturing process of the petitioner's proprietary

balancing machines, be responsible for the design and research and development of all balancing machines, manage and oversee the installation and commissioning of balancing machines, manage and oversee all day-to-day business functions and exercise discretionary decision-making authority over employees, manage the business financials, be responsible for all technical aspects of sales and marketing activities for the company's products, manage client relations, provide technical training, and direct and oversee all other daily administrative, financial and technical aspects of the business in the U.S. The initial description indicated that the beneficiary would perform a combination of qualifying and non-qualifying duties. For example, the broad description appeared to have the beneficiary designing and researching and developing the balancing machines as well as being responsible for all technical aspects of the sales and marketing activities including client relations and providing technical training. In addition, although the petitioner claimed the beneficiary would oversee the installation and commissioning of the balancing machines and would manage and oversee the day-to-day business financials and oversee all other daily administrative, financial and technical aspects of the U.S. business, the petitioner did not provide evidence of other employees or services who would relieve the beneficiary from actually performing the duties related to these activities.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his or her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this matter, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. 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 submitted an additional list of duties for the beneficiary's proposed position, including an allocation of percentages of time the beneficiary would spend on each duty. The duties listed in response to the RFE also included a combination of qualifying and non-qualifying duties. The petitioner indicated that the beneficiary would spend 50% of his time managing and directing the entire manufacturing process of its proprietary balancing machines, including all day-to-day operations of production; 10% of his time planning, directing, and managing activities related to the manufacturing and production of balancing machines, including providing technical direction for design, research and development, and manufacturing of all products with responsibility to ensure quality and continuous improvement of products and services, as well as competitive pricing; 5 % of his time establishing and implementing policies, goals, objectives and procedures related to manufacturing and production process, servicing, sales, and distribution of products; 5% of his time managing and directing the import/export of balancing machines to and from the U.S. company and foreign entity to potential customers worldwide; 10% of his time managing and directing the technical installation, commissioning and servicing of balancing machines, working with customers and staff members to ensure the proper installation of products purchased, training related to use of product, and addressing and resolving any technical issues that arise, and negotiating contracts with customers; 5% of his time exercising discretionary decision-making authority over employees, determining staffing requirements, interviewing, hiring and training new employees, and directly supervising activities of employees, including the sales manager, technical staff, administrative staff, and sales agents with authority to hire and fire all employees; 10% of his time managing daily business financial and budget

matters, reviewing financial statements, sales and activity reports, and other performance data to measure productivity and achievement of goals and to determine areas needing cost reduction and improvement; and 5% of his time overseeing and directing sales and marketing activities for products, providing technical expertise for such activities, including web marketing and representing the company at trade exhibitions. The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Again, the petitioner did not provide evidence of other employees or services, other than one sales manager, who would relieve the beneficiary from actually performing the duties related to these activities.

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

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

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

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

Here, the petitioner indicated that the beneficiary will devote 5% of his time to supervising employees in the United States. The organizational chart dated 2013 shows that the beneficiary will supervise a sales manager, and a technician, who will be hired in 2013. The petitioner also submitted an organizational chart dated 2014, showing that he will supervise a sales department, technical department, and administrative department, all of which have no employees with the exception of the sales manager when the petition was filed. A petitioner, however, must establish eligibility at the time of filing the nonimmigrant visa petition. See 8 C.F.R. § 103.2(b)(1). 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).

Moreover, 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 record does not demonstrate that the beneficiary's subordinate employee or potential 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. In the instant matter, the petitioner failed to submit credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Furthermore, the petitioner has failed to submit evidence that the beneficiary's subordinate employees will relieve him from performing non-qualifying operational duties.

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

Here, counsel for the petitioner claims that the beneficiary is a function manager in that he manages and directs all U.S. operations for the organization. Counsel claims that the beneficiary is providing the overall technical direction of the organization worldwide and directs and manages the sales of the organization's products in the U.S. and abroad by providing his technical expertise to the U.S. sales manager who is responsible for handling the daily sales and marketing activities. However, the petitioner has not demonstrated that the beneficiary primarily devotes his time to managing and directing U.S. operations, rather than performing the tasks required to carry-out the operation. According to the petitioner's organizational chart, the U.S. company solely employs a sales manager and plans to hire in technician in 2013. Since it has yet to do so, all technical duties, which are non-managerial functions, would reasonably be assigned to the

beneficiary as the resident expert. In the instant matter, it appears that the beneficiary will function as a first-line supervisor of one non-professional, non-managerial, non-supervisory employee and is directly involved in all functional areas of the business, as well as a number of administrative areas. In this instance, the petitioner has not provided any position descriptions or job duties for the beneficiary's subordinates, and therefore has not demonstrated that even his potential subordinates will relieve him from performing non-qualifying operational duties, such as operations relating to the manufacturing, production, installation, commissioning, and servicing of all balancing machines. The petitioner has not established that the beneficiary's daily duties involve primarily managing the function rather than performing the duties related to the function.

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

Counsel correctly notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)).

In the instant matter, the petitioner indicated that the beneficiary currently has one subordinate, the sales manager, at the U.S. company and plans to hire a technician in 2013. The petitioner failed to submit any position descriptions or job duties for the beneficiary's listed employees in order to establish that they would relieve him from performing non-qualifying operational duties. Regardless, the fact that the petitioner does not have any current employees to perform the duties of manufacturing, production, installation, commissioning, and servicing of all balancing machines, raises the question as to who will be performing such duties other than the beneficiary himself, as the resident expert. On appeal, counsel for the petitioner states that the beneficiary will retain his position as technical director at the foreign entity while in the U.S. and continue to supervise five employees in South Africa: two engineers, an assembly contractor, a manufacturing manager, and a foreman/supervisor. However, the petitioner failed to provide position descriptions or job duties for each of the positions and, more importantly, failed to demonstrate that those listed employees abroad perform work for the U.S. company such that they can be considered subordinates who will relieve the beneficiary from performing non-qualifying operational duties at the U.S. company.

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

III. CONCLUSION

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

ORDER: The appeal is dismissed.