U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 11 2014 OFFICE: VERMONT 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, Vermont 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 the Form I-129, Petition for a Nonimmigrant Immigrant Worker (Form I-129), 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 New York limited liability company established in October 2012, states that it is a "Real estate development and management" business. The petitioner claims to be a subsidiary of Country Club, located in Egypt. The petitioner seeks to employ the beneficiary as the president of its new office in the United States.

The director denied the petition on two alternate grounds, concluding that the petitioner failed to establish that (1) it has acquired sufficient physical premises to house its operations in the United States, and (2) the beneficiary will be employed in a primarily managerial or executive capacity within one year of commencing operations 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 petitioner has acquired sufficient physical premises and that the beneficiary will be employed in an executive capacity at the U.S. petitioning company. 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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

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. Physical Premises

The first issue to be addressed is whether the petitioner established that it has secured sufficient physical premises to house the new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner filed the Form I-129, on June 25, 2013, and therefore must establish that it satisfied the requirements at 8 C.F.R. § 214.2(l)(3)(v)(A) as of this date. 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. 1978).

On the Form I-129, the petitioner indicated its address as New York The petitioner submitted a copy of its lease at the listed address for office suite #6 for a term of one year. The lease does not list the approximate square footage or size of the leased premises but includes the statement "use of a conference room on a scheduled basis at no extra charge."

The director issued a request for evidence ("RFE") on July 5, 2013, and advised the petitioner that the lease submitted is insufficient as it does not include the size of the office space or a floor plan of the office. The director requested that the petitioner submit the following documents to satisfy this requirement: (1) a complete copy of the U.S. company's lease indicating the total square footage of the premises, including all office, production, manufacturing, and warehouse spaces; (2) a statement defining the U.S. worksite, including an explanation of the type of building and how it is sufficient to conduct its business; (3) color photos of the U.S. company's premises along with a floor plan showing all work stations; and (4) copies of escrow documents or evidence of title if the premises are owned by the petitioner, including information about the square footage of the premises.

In response to the RFE, counsel for the petitioner indicated that the petitioner is submitting a complete copy of its lease, along with a floor plan and photos of the premises. Counsel also claimed that the petitioner will purchase and display a sign for its corporate office at the listed location to be displayed on the office directory and on the door of Suite #6.

The petitioner submitted a second copy of the same lease agreement, along with a handwritten drawing featuring a square with one vertical line showing 12'0" and one horizontal line showing 11'0". The drawing also includes what appears to be the location of a door and an indication that it is a drawing of Suite #6 at

The petitioner also submitted copies of photographs of the premises at New York. The first photo is of the front of the building premises, including the marquee at the front, printed from Google Maps. The second photo is of a door with a number six on the front. The petitioner then submitted three photographs of a room featuring a wallpaper border of a fence and a wagon all the way around with a single desk and office chair and two filing cabinets.

The director denied the petition on October 3, 2013 concluding, in part, that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director found that the floor plan and photos do not establish that the petitioner has sufficient physical premises for its new office as it indicated that it would have four employees within the first year of operations and the office space leased is only 132 square feet, which cannot accommodate four employees.

On appeal, counsel for the petitioner contends that the statute and regulations do not require a specific size and type of premises to house the new office, just that the physical premises be sufficient. Counsel explains that the company expects to employ four individuals by the end of the first year, the beneficiary as president, an office manager, and two property managers, who would manage the property located on in New York and the automotive service stations. Counsel claims that the property managers will oversee the operation of income-producing commercial property, handle financial operations of commercial properties, ensure that all financial obligations are paid on time, and be responsible for the hiring of any employees needed to run the day-to-day operations of income-producing properties. Counsel adds:

> On a day-to-day basis, based on the nature of the Petitioner's proposed activities, the only individuals who would be required to work out of the leased office space are the President and Office Manager. The Property Managers would not need work locations at the leased office space. They would be required to work out of the properties they are managing. Should the Property Managers need to meet with the Beneficiary to discuss the status of the properties they manage, there is sufficient space in the leased premises.
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> . . . As the business grows and additional employees are hired, the Petitioner will secure additional office space. By letter from the landlord of the Petitioner's leased premises . . . the Petitioner has available to it at least an additional 4,000 square feet of office space to accommodate the needs of the company's growth.

The petitioner submits an undated letter from property manager for , addressed to the beneficiary, stating the following about the petitioner's physical premises:

> Please allow this correspondence to confirm the present and ongoing availability of additional office space to support the growth of your business within our office park at In addition to the 300 sqft that [the petitioner] currently occupies within Suite 6, Suite 9 is available and encompasses 800 sqft. Additionally, Suites 2, 7, 16, and 16A are available to meet the needs of your business growth. Suites 16 and 16A are 1600 sqft each.

Upon review, we concur with the director's determination that the petitioner failed to submit evidence that it had secured sufficient physical premises to house the new office prior to filing the petition.

We acknowledge that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective, leaving United States Citizenship and Immigration Services (USCIS) some flexibility in adjudicating this legal requirement. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount, and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations.

Here, counsel for the petitioner explains, on appeal, that the physical premises will only be used by the beneficiary as president and the office manager. Counsel claims that the property managers will be required to work out of the properties they are managing. If this is the case, the petitioner must establish that it has acquired sufficient physical premises to house its operations, including a location for the property manager(s) to conduct business at the property location. In this matter, the petitioner has not provided a location for the property manager at the property already purchased by the petitioner. Additionally, the evidence presented relating to the physical premises in question demonstrates that it is a residential rental property. The petitioner has not explained how it would house its property manager employee at the rented location. 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)).

Further, there are inconsistencies in the record relating to the size of the leased physical premises. The lease does not indicate the size of suite #6 leased by the petitioner. In response to the RFE, the petitioner submitted a handwritten drawing of the office floor plan indicating that the office is 12' by 11', which is approximately 132 square feet. The photographs submitted of the leased office space correspond to the drawing in that the office can only accommodate a single desk and filing cabinet. The letter from the landlord, submitted on appeal, refers to the 300 square feet currently occupied by the petitioner within suite #6. This specific information is inconsistent with the information previously presented by the petitioner. In fact, the landlord's letter indicates that the petitioner's leased physical premises are more than double the size specified by the petitioner in response to the RFE. 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).

Further, counsel refers to one unpublished decision in which we determined that the petitioner's physical premises were sufficient as it could readily lease additional office space as it hired additional staff. However, based on the deficiencies in the record and the inconsistencies detailed above, we cannot determine that the petitioner's leased premises will be of sufficient size to accommodate its planned employees within the first year of operations. Furthermore, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

For the foregoing reasons, the petitioner has not established that it had secured sufficient physical premises to house the new office as of the date of filing the petition. Accordingly, the appeal will be dismissed for this reason.

B. Employment in an Executive or Managerial Capacity in the United States

The second 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.

In its initial letter of support, the petitioner described the beneficiary's duties in the United States as follows:

> As such, I will serve in the chief executive capacity of the company, directing the management of the company. I will establish the organizational goals and policies, and set forth the strategies by which to achieve those goals and ensure compliance with those policies. I will exercise wide latitude in discretionary decision-making, including complete discretionary authority to hire and fire all employees. Specifically, I will be responsible for:
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> - Planning, developing and establishing the policies, objectives and philosophy of the organization;
> - Creating and executing staff hiring and training procedures and processes;
> - Defining the company's strategic direction and growth management;
> - Hiring and firing all employees as necessary to achieve the objectives and goals of the organization;
> - Developing relationships with new clients and improving relationships with existing clients;
> - Evaluating the merits of and researching real estate acquisitions, including automotive service stations;
> - Researching and analyzing opportunities for growth of the company into strategic exports to Egypt from the United States, including automotive parts, medical supplies, and luxury goods;
> - Developing strategy for commercial real estate purchases, including a hotel with retail sales capability in Western New York.

The petitioner described its operations and its hiring plan as follows:

> The company plans to hire three individuals in its first year of operations, two individuals as property managers and one office manager. Additional hiring would proceed as the company expands its operations. Should the company purchase [redacted] it would need to

> hire two additional individuals to manage the property and run day-to-day operations of the hostel.

The petitioner submitted a business plan, which included an organizational chart for the U.S. company. The business plan indicates that the U.S. company "expects to require the services of one or more property managers, an office manager, and independent contractors for services such as accounting, legal compliance and marketing." The organizational chart depicts the beneficiary as president supervising an office manager and two property managers. The business plan goes on to indicate that if the U.S. company purchases the the organizational chart will expand to show the beneficiary as president, supervising two property managers, an office manager, and the which will have a property manager and someone in "day-to-day hostel operations."

The petitioner submitted the Operating Agreement of the U.S. company, dated May 1, 2013, describing its management as follows:

> 4.1 Management. Management of the Company shall be vested in [the beneficiary].
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> * * *
>
> 4.3 Powers of Managers. Except as set forth in this Agreement, the Managers shall have the power and authority, on behalf of the Company, to (a) purchase, lease or otherwise acquire from, or sell, lease or otherwise dispose to, any Person and property, provided such action has been approved in advance by a vote or written consent of one half (1/2) of all Membership Interests (b) open bank accounts or otherwise invest funds of the Company, (c) purchase insurance on the business and assets of the Company, (d) commence lawsuits and other proceedings, (e) enter into any agreement, instrument or other writing, (f) retain attorneys, accountants or other agents and (g) take any other lawful action that the Managers consider necessary or advisable in connection with the any [*sic*] business of the Company.

The Operating Agreement includes exhibit B, which identifies the managers of the U.S. company as the beneficiary.

The petitioner submitted a document titled, "Minutes of Meeting of Members of [the Petitioner]," dated March 10, 2013, stating the following about the beneficiary's position:

> RESOLVED, that the members have agreed that the Manager of [the petitioner], [the beneficiary], shall be appointed as an officer and director of [the petitioner] and serve as President thereof. Furthermore, it is
>
> RESOLVED that in addition to his powers as manager defined in the Operating Agreement of [the petitioner], the President shall have full authority to conduct business on behalf of [the petitioner] and direct its business operations in every respect, including but not limited to the

> management, hiring and discharge of personnel, and that all lawful actions of the President on behalf of [the petitioner] are ratified by the members as actions of [the petitioner].

The petitioner did not submit any additional information about the beneficiary's proposed position or duties in the United States.

In the RFE, the director advised the petitioner that the evidence submitted was insufficient as it did not include a duty description and requirements for the positions subordinate to the beneficiary and did not establish that after the first year of operations, the petitioner would support an executive or managerial position. The director instructed the petitioner to submit, *inter alia*, evidence to establish that the proposed position in the United States will be primarily managerial or executive.

In response to the RFE, the petitioner submitted the "Minutes of Meeting of Members of [the Petitioner]," dated November 2, 2012, authorizing the beneficiary to sign all drafts, checks, and notes of the petitioner and any resolutions required by the bank to effect the foregoing. The petitioner then submitted the "Minutes of Meeting of Members of [the Petitioner]," dated November 21, 2012, authorizing the beneficiary to execute any resolution and instrument to complete the acquisition of property on New York and to deliver any mortgages, security agreements, notes, and such related agreements as necessary.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States within one year of the approval of the instant petition. In denying the petition, the director found that the description of the beneficiary's duties is insufficient to support that the beneficiary's position is in a managerial or executive capacity. The director noted that the duties of the position show that the beneficiary will be doing research for real estate, working with clients, research on opportunities for growth, and other research and strategies. As such, the director found that the beneficiary will be performing the function of the position, rather than managing it. The director further found that the petitioner failed to establish that the beneficiary functions at a senior level within the organization other than in position title or that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity in the United States and provides the same list of job duties for the beneficiary as provided by the petitioner's initial letter of support. Counsel also asserts that the beneficiary is not required to devote all of his time to executive duties, but at least 51% of his time, which he does according to the job duties provided. Counsel claims that the petitioner will employ additional staff who will relieve the beneficiary from performing non-qualifying duties, such as the two property managers who will be responsible for the day-to-day operations of the residential property purchased by the petitioner and the automotive service stations the petitioner will purchase upon approval of the petition, and the office manager who will be responsible for clerical and administrative tasks necessary for the operation of the petitioner's office.

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.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by 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.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

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

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

In the instant matter, counsel for the petitioner indicates that the beneficiary will be employed primarily as an executive, pursuant to section 101(a)(44)(B) of the Act. The petitioner characterized the beneficiary's role as president and briefly described his duties in very broad terms, noting that he will direct the management of the company; set forth the strategies by which to achieve those goals and ensure compliance with those policies; exercise wide latitude in discretionary decision-making, including complete discretionary authority to hire and fire all employees; plan, develop and establish the policies, objectives and philosophy of the organization;

create and execute staff hiring and training procedures and processes; define the company's strategic direction and growth management; develop relationships with new clients and improve relationships with existing clients; evaluate the merits of and research real estate acquisitions, including automotive service stations; research and analyze opportunities for growth of the company into strategic exports to Egypt from the United States, including automotive parts, medical supplies, and luxury goods; and develop strategy for commercial real estate purchases, including a hotel with retail sales capability in Western New York.

The initial description shows the beneficiary will perform a combination of qualifying and non-qualifying duties. While these tasks are undoubtedly necessary in order to continue operations, the petitioner has not indicated how the majority of these duties will qualify as managerial or executive in nature within one year of approval of the petition. 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. While we do not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its president, 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 has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra*. 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).

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. Here, the petitioner failed to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. Similarly, the petitioner failed to document what proportion of the beneficiary's duties would be executive functions and what proportion would be non-executive. The petitioner listed the beneficiary's duties as including some managerial tasks, some general executive tasks, as well as administrative and 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, such as develop relationships with new clients and improve relationships with existing clients; evaluate the merits of and research real estate acquisitions; and research and analyze opportunities for growth of the company, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the petitioner has not established that the beneficiary will primarily perform duties in a managerial or executive capacity. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Overall, the position description alone is insufficient to establish that the beneficiary's duties will be primarily in a managerial or an executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company will realistically develop to the point where it will require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are

plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

Although counsel for the petitioner emphasizes that the petitioner intends that the beneficiary will perform in an executive capacity, for thoroughness, we will also discuss the beneficiary's potential managerial capacity. 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*).

Moreover, 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 it will hire three additional employees, subordinate to the beneficiary, within one year, two property managers and one office manager. The petitioner did not provide an actual position description or list of job duties for the beneficiary's subordinates, but merely stated that the property managers would be responsible for the day-to-day operations of the properties owned by the petitioner and the office manager would be responsible for the clerical and administrative tasks necessary to operate the petitioner's office. These very brief job duties provided by the petitioner for each of the positions listed in the organizational chart demonstrate that the positions themselves do not require a professional degree. The petitioner has not established that any of the beneficiary's claimed subordinates require a bachelor's degree, such that they could be classified as professional. Furthermore, the brief position descriptions for the subordinate positions do not support a finding that they are professional, managerial, or supervisory positions. 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.

We also note that 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 "management" position that is higher than a first-line supervisor of non-supervisory, non-managerial, and non-professional employees. The record simply does not support a contrary conclusion. Furthermore, the petitioner has failed to submit evidence that the beneficiary's subordinate employees will relieve him from performing non-qualifying operational duties.

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

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 record does not establish that the beneficiary will be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although counsel states that the beneficiary will be employed in an executive capacity, the petitioner's description of the beneficiary's

"executive" job duties list duties that paraphrase the statute. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner has not established that the beneficiary's subordinate employees would relieve him from performing non-qualifying operational duties. The job duties provided for the beneficiary fail to demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business. Again, the petitioner failed to document what proportion of the beneficiary's duties would be executive functions and what proportion would be non-executive. Although the petitioner listed some general executive duties, such as direct the management of the company; set forth the strategies by which to achieve goals; exercise wide latitude in discretionary decision-making; plan, develop and establish the policies, objectives and philosophy of the organization; and define the company's strategic direction and growth management, the petitioner failed to quantify the time the beneficiary would spend on them. Moreover, as we observed above, these general duties paraphrase the definition of executive capacity rather than providing an actual description of the beneficiary's proposed duties. In addition, this failure of documentation is important because several of the beneficiary's proposed daily tasks, such as develop relationships with new clients and improve relationships with existing clients; evaluate the merits of and research real estate acquisitions; and research and analyze opportunities for growth of the company, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, the petitioner did not establish that the beneficiary would primarily perform duties in an executive capacity.

We note 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, however, 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)).

Counsel further refers to two unpublished decisions in which we determined that the beneficiary in those decisions met the requirements of serving in a managerial capacity for L-1 classification. Although counsel submits copies of the decisions themselves, counsel has not furnished any evidence to establish that the facts of the instant petition are analogous to those in either of the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. However, in reviewing the two referenced decisions, we note first that the position petitioned for in both unpublished decisions was for a managerial position, not an executive position. More significantly, we note that, in both of those cases, the petitioner presented a thorough and extensively detailed description of the beneficiary's duties and provided the percentages of time the beneficiary would devote to each duty. The petitioner, here, has not provided comparable information. Therefore, counsel's assertion that the instant petition should be adjudicated in a similar manner is unpersuasive.

Based upon a thorough review of the record in this matter and the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed primarily in a qualifying managerial or executive capacity or as a function manager. Accordingly, the appeal will be dismissed.

III. CONCLUSION

The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.