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

U.S. Citizenship and Immigration Services

DATE: JUN 0 5 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 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 Maryland corporation established in December 2012, states that it engages in the sale of new and used motors and transmissions for Japanese cars. The petitioner claims to be a subsidiary of Inc., d/b/a Inc., located in Quebec, Canada. The petitioner seeks to employ the beneficiary as the general manager of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish: (1) the beneficiary has been performing in a managerial or executive capacity with the foreign entity; and (2) 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 is performing in a managerial capacity at the foreign entity and that the United States petitioner will within one year support a managerial position. 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 of 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. U.S. Employment in a Managerial or Executive Capacity

The first issue we address in this matter is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

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

> As General Manager for the US company:
>
> [The beneficiary] will manage all of the employees. He will be responsible for overseeing the daily operations of [the petitioner], determining inventory and staff requirements and overseeing the maintenance of client relations in the U.S. and abroad. He will also develop marketing strategies for expanding the company's client base and increase sales, review the company's budget and authorize expenditures. Furthermore, he will be the representative of the company when signing leases, signing contracts with large suppliers, dealings [*sic*] with government officials and financial institutions.

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

> [The petitioner] wishes to employ [the beneficiary] as General Manager to ensure the success and expansion of the business in the U.S. This position is both an executive and a managerial position.

> As General Manager at [the petitioner], [the beneficiary] will manage all of the employees. He will be responsible for overseeing the daily operations of [the petitioner], determining inventory and staff requirements and overseeing the maintenance of client relations in the U.S. and abroad. He will also develop marketing strategies for expanding the company's client base and increase sales, review the company's budget and authorize expenditures. Furthermore, he will be the representative of the company when signing leases, signing contracts with large suppliers, dealings [*sic*] with government officials and financial institutions.

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

The petitioner submitted an organizational chart for the U.S. company, depicting the beneficiary as "general manager," reporting to an unnamed president. The chart showed that as general manager, the beneficiary will supervise the "facility maintenance/shipping department" with two unnamed employees, an "administration" department with one unnamed "part time book keeper," and a "sales department" with two unnamed employees. At the time of filing, counsel stated that the petitioner currently has one full-time employee since February 1, 2013, and submitted evidence to show that he is a U.S. citizen; however, neither counsel nor the petitioner indicate what position this person holds within the U.S. petitioning company as he is not named in the organizational chart provided.

The director issued a Notice of Intent to Deny ("NOID") on June 27, 2013, advising the petitioner that Montreal Pre-Clearance found that "the evidence [presented] did not establish that[,] within one year[,] the organization will support someone employed in a primarily managerial or executive position. It was Montreal Pre-Clearance's belief that the beneficiary would be entering the United States not to open a new office to hire U.S. workers[,] but to run the new business himself on behalf of his family which owns the foreign entity." The director instructed the petitioner to submit, *inter alia*, evidence to establish that the beneficiary's position abroad at the qualifying foreign entity was managerial or executive and that the proposed position involves authority over the new office and that the proposed U.S. office will support an executive or managerial position within one year.

In response to the NOID, the petitioner submitted a July 29, 2013 letter from the foreign entity describing the U.S. company's current employees and organizational structure, as well as the beneficiary's proposed position, as follows:

> [The petitioner] currently has two employees: Mr. , as warehouse worker in the Facility Warehouse Maintenance and Shipping Department and Mr. as sales representative in the Sales Department. [The petitioner] anticipates that it will hire two other employees (one in each department) and a part-time book keeper in the near future. ([The petitioner] had previously employed another worker, but unfortunately that employee left.)
>
> Currently, [the petitioner] is managed from Canada, which is not an ideal situation. Since our business in the US has been growing, we urgently need a General Manager who can work on the premises of our US company. [The petitioner] wishes to employ [the beneficiary] as

> General Manager to ensure the success and expansion of the business in the U.S. This position is both an executive and a managerial position.
>
> * * *
>
> As General Manager at [the petitioner], our U.S. subsidiary, [the beneficiary] will determine staffing requirements and manage all employees. He will also be responsible for overseeing the daily operations of [the petitioner] such as final determination, inventory requirements and authorizing expenditures. He will oversee the maintenance of client relations in the U.S. and abroad. He will also develop marketing strategies for expanding the company's client base and increasing sales as he has done for our Canadian company. Together, we will review our company's budget.
>
> His duties will be similar to his current responsibilities, including holding the positions of Manager of the Facility (Warehouse) Maintenance and Shipping Department and also Manager of the Sales Department. He will make all decisions concerning these two departments, including final decision on purchasing inventory and hiring/firing staff. He will continue to work with me to establish goals for the growing the [*sic*] US company, including reviewing financial statements and helping to establish the annual budget.
>
> Furthermore, he will be the representative of the company when signing leases, signing contracts with large suppliers, dealings [*sic*] with government officials and financial institutions.

The petitioner submitted a new organizational chart for the U.S. company including named employees filling three of the positions listed. The organizational chart lists as president, supervising the beneficiary, and as "warehouse worker" in the "Facility (Warehouse) Maintenance/Shipping Department" and as "sales representative" in the "Sales Department," both subordinate to the beneficiary. The organizational chart also includes a brief list of duties for each of the listed positions, including the beneficiary's supervisor, the beneficiary, and the three positions subordinate to the beneficiary, "warehouse worker," "sales representative," and "part time book keeper."

The organizational chart lists the beneficiary's duties as follows:

- Oversees internet sales transactions (through Ebay, company website and all social media that deal with customer orders);
- Oversees layout of inventory in warehouse;
- Deals with customer service complaints;
- Determines inventory needs;
- Determines staffing requirements and hires and fires as necessary;
- Overseeing sales persons and verifies that shipping is carried out;
- Authorizes expenditures for inventory;
- Manages to [*sic*] warehouse facility maintenance department and shipping department;
- Meeting and maintaining a close relationship with suppliers in Japan;
- Ordering inventory from suppliers in Japan.

The petitioner also submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2013, the quarter in which the petition was filed, indicating that it had one employee and paid $6,252.50 in wages, tips, and other compensation. However, the Form lists two individuals and as employees of the U.S. company.

In response to the NOID, counsel for the petitioner also submitted an additional letter describing the beneficiary's duties at the foreign entity and stating that his duties at the U.S. company will be the same. Counsel submits the following breakdown of the beneficiary's duties abroad and compares them to his duties at the U.S. company as follows:

> Beneficiary answers only to the President, His duties as Manager include managing the Warehouse Maintenance and Shipping Department and Sales Department. Each Department has one employee. . . .
>
> Daily duties, approximate percentages of time in carrying them [*sic*] out these duties, and the way that he accomplishes these tasks are:
>
> - Reviewing inventory requirements on a daily basis (5%, done by walking through the warehouse to review inventory requirements and reviewing shipping records on a daily basis to see what is on the shelves and what is missing;
> - Dealing with customer complaints or other customer issues such as delivery problems, etc. (5%), done by telephone or email contact with customers and/or delivery companies (such as FedEx) to solve problems that cannot be solved by staff in the Sales Department or Shipping Dep't;
> - Arranging for new shipments from Japan as required (5%), done by phone and email communication with suppliers in Japan, and travelling to Japan as required (5%);
> - Overseeing employee in Warehouse Maintenance and Shipping Department (30%), done by inspecting placement and organization of inventory, reviewing shipping schedules and other documents related to shipping;
> - Overseeing employee in Sales Department (30%), done by reviewing employee's email communication, meeting with employee to tell him about sales promotions, new protocols for taking orders, and new systems for maintaining client relations, and other matters related to sales;
> - Meetings with President to discuss executive decisions including monthly and annual budgets based upon a review of sales/cost of sales/profit numbers, develop marketing and other business improvement plans (25%), done by meetings at office or by phone as required, reviewing sales figures documents, reviewing results of sales promotions to decide what is effective, going to meetings with company accountant, alone or with President as required.
>
> The daily duties, approximate percentages of time in carrying them [*sic*] out these duties, and the way that he will accomplish these tasks will be the same except that the President will not be physically present working in the US. Therefore, the Beneficiary will be the General Manager, and he will therefore make more decisions on [his] own. He alone will authorize

all expenditures including those for inventory, oversee all sales agreements, determine staff requirements, hire/fire as required, manage employees in Warehouse Maintenance/Shipping Department and Sales Department, and order inventory.

It is expected that he will hire three other employees within 3-6 months: one additional employee in each department plus one part-time bookkeeper.

The AAO notes that the above percentages amount to 105%.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary has been performing in a managerial or executive capacity with the foreign entity and will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the description of the beneficiary's duties is insufficient to support the beneficiary's position is in a managerial or executive capacity. The director found that the statements concerning the beneficiary's duties identify some managerial functions, but the duties to not specify exactly what the beneficiary will be doing which are bona fide as a manager or executive in the context of the prospective staffing arrangement. The director further found that the evidence fails to show that the beneficiary would be supervising subordinates occupying supervisory, managerial, or professional positions.

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 manages two essential departments of the organization and has the discretion to make all decisions concerning the two departments, including purchasing inventory and the authority to hire and fire staff in each department. Counsel briefly lists the same duties presented with the petition and in response to the NOID (listed above) for the beneficiary's position in the U.S. and contends that they meet the requirements identified in the statutes.

Counsel also submits the same organizational chart for the U.S. company, which includes the brief list of job duties for the beneficiary, his supervisor, and three subordinate positions, and a copy of her letter listing the beneficiary's duties with percentage of time allocations.

Upon review, and for the reasons stated herein, the petitioner has not established that the U.S. office will support an individual in a managerial or executive capacity within one year.

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

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, 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 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 general manager and briefly described his duties in very broad terms, noting that he will manage all of the employees; be responsible for overseeing daily operations; determine inventory and staff requirements; oversee the maintenance of client relations in the U.S. and abroad; develop marketing strategies for expanding the company's client base and increase sales; review the company's budget and authorize expenditures; and be the representative of the company when signing leases, signing contracts with large suppliers, and dealing with government officials and financial institutions. The initial description indicated that the beneficiary would perform a combination of qualifying and non-qualifying duties.

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 NOID, the petitioner provided a list of job duties for all of its employees on the organizational chart and counsel provided an additional list of duties for the beneficiary's proposed position, including a brief description of how the duty is carried out and an allocation of percentages of time the beneficiary would spend on each duty. The duties listed on the organizational chart also included a combination of qualifying and non-qualifying duties, such as oversee internet sales transactions; oversee layout of inventory in warehouse, and determine inventory needs. Counsel indicated that the beneficiary would spend 5% of his time reviewing inventory requirements on a daily basis; 5% of his time dealing with customer complaints or other customer issues; 5% of his time arranging for new shipments from Japan; 5% of his time traveling to Japan; 30% of his time overseeing the employee in the warehouse maintenance and shipping department; 30% of his time overseeing the employee in the sales departments; and 25% of his time meeting with the president to discuss executive decisions including budgets and developing marketing and other business improvement plans. 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. In particular, the petitioner failed to distinguish the beneficiary's 60 percent of time spent on oversight of the two employees in the sales department and the warehouse maintenance and shipping department from first-line supervisory duties. The petitioner failed to show how, within one year, the beneficiary's oversight of these two departments and the administration department with one part-time bookkeeper would develop into a primarily managerial or executive role as set defined in the statute and regulations. 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).

While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its general manager, 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*.

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.

In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. The petitioner is required to describe the nature of the office, the anticipated scope of the entity, its proposed organizational structure and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. In its response to the NOID, the petitioner provided a brief, one-sentence statement referring to its staffing plan for the U.S. company. However, the record does not contain a business plan, hiring plan, or other evidence that would indicate the timeframe for hiring the proposed staff. As such, it is impossible to determine, based on the lack of evidence submitted, that the beneficiary would be relieved from performing primarily non-qualifying duties within one year of commencing operations. The regulations require the petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position. The petitioner has failed in this regard. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The 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, 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 indicated that the beneficiary will devote 60% of his time to managing the warehouse worker and sales representative. The 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 petitioner clearly indicates that each of its current employees (at the time of response to the NOID) have only acquired a high school diploma. The organizational chart lists two warehouse workers, two sales representatives, and one part-time bookkeeper as the beneficiary's direct subordinates; however, the lists of job duties for the subordinate positions do not support a finding that they hold a professional, managerial, or supervisory position. 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. 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, within one year. 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 did not indicate that the beneficiary qualifies as a function manager. Although counsel briefly stated that the beneficiary manages two essential departments of the U.S. company, 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.

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 petitioner has not established that it has or will employ or contract with others who will carry out the day-to-day non-executive functions of the organization. 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 and the petitioner state that the beneficiary will be a manager and an executive, none of the beneficiary's listed duties, presented at the time of filing and in response to the NOID, include duties that correspond to the statutory definition of executive capacity at section 101(a)(44)(B) of the Act. In addition, the petitioner has not established that the beneficiary's subordinate employees would relieve him from performing non-qualifying operational duties. The job duties provided for the beneficiary fail to demonstrate that the beneficiary will focus the majority of his time on executive duties rather than the day-to-day operations of the business.

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

Counsel further refers to two unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification. However, counsel has furnished no 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.

Based on the deficiencies discussed above, the petitioner has not established that the U.S. office will support a qualifying managerial or executive position within one year. Accordingly, the appeal will be dismissed.

B. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The petitioner also has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, the petitioner stated that the beneficiary commenced employment with the foreign entity on January 31, 2003 as "manager." Where asked to describe the beneficiary's duties abroad for the 3 years preceding the filing of the petition, the petitioner stated the following:

> As Manager for the Canadian company:
>
> [The beneficiary] is responsible for determining staffing requirements and hiring of staff. He also manages daily operations such as overseeing sales and deliveries to clients in the U.S. and Canada. Over the years, [the beneficiary] has developed a privileged business relationship with our suppliers and distributors in Japan which has been a great asset to our company. He authorizes expenditures for inventory. Together we determine the company's annual budget.

At the time of filing, counsel stated that the beneficiary has been the manager of the foreign entity since its incorporation in January 2003 and that he will perform mainly the same duties at the U.S. company that he performs as manager of the foreign entity.

In support of the petition, the petitioner submitted a letter from the foreign entity describing the beneficiary's employment abroad as follows:

> I, president of [the foreign entity], hereby confirm that [the beneficiary] has been working on a full time basis as Manager since the starting of our company in January 2003. . . .
>
> As Manager of our company, [the beneficiary] is responsible for determining staffing requirements and hiring of staff. He also manages daily operations such as overseeing sales and deliveries to clients in the U.S. and Canada. Over the years, [the beneficiary] has developed a privileged business relationship with our suppliers and distributors in Japan which has been a great asset to our company. He authorizes expenditures for inventory. Together we determine the annual budget.
>
> As Manager, [the beneficiary] has helped expand our business in Canada. . . . He would perform the same duties for [the petitioner] as he has done for our company in Canada in order to ensure the success of our business operations in the US.

The petitioner did not submit any additional details about the beneficiary's duties abroad.

The petitioner also submitted an organizational chart for the foreign entity, depicting the beneficiary as "manager," reporting to an unnamed president. As manager, the beneficiary supervises the "facility maintenance and shipping department" with one unnamed employee, and a "sales" department with one unnamed employee.

In the NOID, the director instructed the petitioner to submit, *inter alia*, evidence to establish that the beneficiary's position abroad at the qualifying foreign entity was managerial or executive in nature.

In response to the NOID, the petitioner submitted a letter from the foreign entity describing the beneficiary's position abroad as follows:

> [The beneficiary] has been working for Canadian company on a full time basis as Manager since it was incorporated in January 2003.
>
> His duties in Canada include holding the positions of Manager of the Facility (Warehouse) Maintenance and Shipping Department and also Manager of the Sales Department. He has the discretion to make all decisions concerning these two departments, including purchasing inventory and the authority to hire and fire staff in these departments. He also works with me to establish goals for the growing company, which includes reviewing financial statements and helping to establish the budget.
>
> With his ability to speak Japanese, [the beneficiary] has a close relationship with our Japanese suppliers. When in Japan on purchasing trips, he has the executive authority to sign contracts on behalf of the company and authorize payments for shipments, as required.

The petitioner submitted a new organizational chart for the foreign entity, including named employees filling the three remaining positions listed. The organizational chart lists as president, supervising the beneficiary, and as "warehouse worker" in the "Facility (Warehouse) Maintenance and Shipping Department" and as "sales representative" in the "Sales Department," both subordinate to the beneficiary. The organizational chart also includes a brief list of duties for each of the listed positions, to include the beneficiary's supervisor, the beneficiary, and the two positions subordinate to the beneficiary, "warehouse worker," and "sales representative," all of which are identical to the duties listed for the same positions at the U.S, company. Thus, the beneficiary's duties at the foreign entity are identical to those listed above as proposed duties at the U.S. company.

In response to the NOID, counsel for the petitioner also submitted an additional letter describing the beneficiary's duties at the foreign entity, allocating percentages of time spent on each duty, and stating that his duties at the U.S. company will be the same. Thus, again, the beneficiary's duties at the foreign entity are identical to those listed above as proposed duties at the U.S. company.

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

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). While the information provided by the petitioner indicates that the beneficiary may exercise discretion over the foreign entity's day-to-day operations as its general manager, the petitioner has failed to show that the beneficiary's actual duties are primarily managerial or executive in nature. The actual

duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Here, the petitioner provided a vague description of the beneficiary's job duties abroad. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates his time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. Furthermore, the petitioner indicates that the beneficiary's duties abroad are identical to his proposed duties in the United States, which the director and the AAO have found do not establish that he will be employed in primarily managerial or executive capacity. Again, the position description and job duties provided by the petitioner do not include any details or specific tasks related to each duty, nor does the petitioner indicate how such duties qualify as managerial or executive in nature. Specifically, the petitioner failed to distinguish the beneficiary's 60 percent of time spent on oversight of the single employee in the sales department and single employee in the facility warehouse maintenance and shipping department from first-line supervisory duties. The petitioner failed to show how the beneficiary's oversight of two employees, one in each department, qualifies as a primarily managerial or executive role as set defined in the statute and regulations. Furthermore, the very brief list of duties provided for the sales representative and warehouse worker at the foreign entity is not sufficient to establish that they relieve the beneficiary from performing non-qualifying operational duties at the foreign entity, such as overseeing layout of inventory in warehouse, determining inventory needs, verifying shipping was carried out, and ordering inventory from suppliers in Japan, which are duties listed for the beneficiary's position abroad. For this additional reason, the petition cannot be approved.

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

III. CONCLUSION

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

ORDER: The appeal is dismissed.