

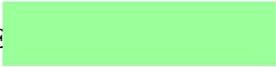
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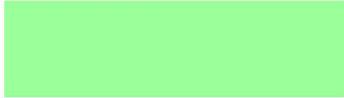


U.S. Citizenship
and Immigration
Services



JUN 27 2014

DATE: Office: VERMONT SERVICE CENTER FILE 

IN RE: Petitioner: 
Beneficiary:

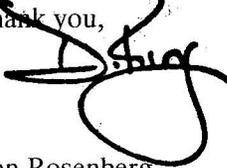
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 petitioner later filed a motion to reconsider with the Vermont Service Center. The director granted the motion, but affirmed his denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition on August 9, 2012, seeking to extend the beneficiary's status 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 is a Florida corporation, established in 2010, engaged in the business of industrial automation. The petitioner states it is an affiliate of [REDACTED] which is located in Venezuela. The beneficiary was previously granted one year in L-1A nonimmigrant status as the petitioner's commercial manager in order to open a "new office" in the United States. The petitioner now requests a two-year extension of the beneficiary's status.

The director denied the petition on November 19, 2012, finding that the petitioner had failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

The petitioner filed a timely motion to reconsider with the director. On June 10, 2013, the director granted the petitioner's motion to reconsider, but ultimately affirmed his previous decision to deny the petition. The director again concluded that the petitioner had failed to establish that the beneficiary would act in a qualifying managerial or executive capacity with the foreign entity.

The matter is now before the AAO on appeal. On appeal, counsel contends that the petitioner has submitted a sufficiently detailed descriptive duty description for the beneficiary, and other supporting evidence, demonstrating that the beneficiary will primarily manage professional subordinates and an essential function of the organization.

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, Petition for a Nonimmigrant Worker, 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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a "new office" petition must submit the following:

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

II. THE ISSUE ON APPEAL

The sole issue addressed by the director was whether the petitioner established that the beneficiary would be employed in a qualifying executive or managerial capacity.

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.

A. Facts

The petitioner states that it is an industrial automation company that uses "knowledge and expertise in the selection and use of equipment and software to solve problems or make improvements in industrial processes of our customers." The Form I-129 indicated that the petitioner earned \$61,233 in annual income in 2011 and that it currently has two employees. Submitted evidence demonstrates that the petitioner was established by [REDACTED] fifty percent owner of the foreign affiliate and the petitioner, and that the beneficiary is the petitioner's only other employee. The petitioner's business plan states that Mr. [REDACTED] has twelve years of experience in "PLC programming and ten years [sic] experience in S-88 based systems" and that the beneficiary "holds six years [sic] experience in sales and marketing" and "ten years [sic] experience as a programmer in database connectors with industrial connectors with industrial controllers."

In the Form I-129, the petitioner described the beneficiary's duties in the United States as follows:

[The beneficiary] is responsible for establishing marketing goals and executes duties of research and operations.

- Developing market strategies for our products and services.
- Create commercial image for new products to be developed and marketed.
- Create a sales team to promote and sell our products among selected customers.

A support letter from the general manager of the foreign entity, dated June 20, 2012, stated that the beneficiary “was currently in the process of starting our marketing network which involves hiring professionals who will be responsible to him.” The letter further indicated that the petitioner’s expansion plans involved the hiring of two salespersons in the first two years and continuing capital investment. The letter explained that “[the beneficiary] has had a key role in start-up and expansion plans, and his continuing presence is essential to bring the expansion effort to a successful conclusion.”

In addition, the petitioner submitted a business plan updated in January 2012. The plan included a proposed organizational chart for the petitioner showing the beneficiary with two subordinate employees, including a “salesperson” and a “secretary.” The chart further indicated that Mr. [REDACTED] would act as a technical manager, overseeing two project leaders and two project engineers. The business plan provided hiring projections for the company. It specified that the petitioner planned on hiring the following employees at projected times in the future: two project engineers in August 2012; a programmer in August 2012; a salesperson in June 2012; and a secretary in February 2013. In the operations section of the business plan, the petitioner explained that “all of the programming work is done by [REDACTED] and [the beneficiary], but with the functional specs and process description of the modules, they can be done by other programmers, or outsourced when necessary.” In the business plan, the petitioner stated that its goal was to sell a full license of [REDACTED] software by the end of 2012, get involved in three new projects with customers valuing over \$20,000 by October 2012, and secure an additional two clients by the end of 2012. The petitioner explained that one of weaknesses was that “[the petitioner] ha[s] a limited amount of money so we have to get results quickly.”

The amendment to the business plan further stated that the petitioner had not met its objective to hire engineers and sales representatives within the first year of operations. The petitioner stated that “the staff originally assigned to managerial tasks will share features that normally correspond to their subordinates, until the company can financially support the entry of new staff.”

The director later issued a request for evidence (RFE) advising the petitioner that the evidence submitted was insufficient to establish that the beneficiary had been acting in a qualifying managerial or executive capacity. As such, the director requested that the petitioner submit: (1) a breakdown of the number of hours the beneficiary devotes to each of his duties on a weekly basis; (2) an explanation of how many subordinates supervisors were under the beneficiary’s management and their job duties, (3) an explanation of how much time the beneficiary devotes to executive or managerial functions and his degree of discretionary authority; (4) an organizational chart for the petitioner; and (4) IRS Forms 941 Employer’s Quarterly Tax Returns for the first two quarters of 2012.

In response, the petitioner provided a duty description for the beneficiary which read as follows:

[The petitioner] Commercial Manager is expected to oversee company needs, handle daily business issues, manage company associations, and recognize business opportunities. He must be constantly communicating and negotiating with clients or business associates. He has to be also continuously working to strategically expand, preserve or improve the company's procedures, standards or policies while sticking to business edicts and regulatory guidelines. His position will cover also developing marketing strategies for new customers, and handle the client accounts and corporate relationships. He has final word on verify, oversee or approve [sic] commercial agreements and documentation. He has authority to hire personnel under his management, and require services of external consultants or contractors.

The position description further indicated that the commercial manager is responsible for "working with project leaders;" "reviewing, scrutinizing, and developing operational flows;" and "ensuring that all stakeholders, such as administration, operations and finance understand and adhere to contractual obligations."

The petitioner provided the following breakdown of the number of hours the beneficiary spends on his various tasks:

Marketing tasks- 34.09%
Supervision of matters of accounting- 4.55%
Supervision of legal affairs- 2.27%
Sales tasks- 40.9%
Technical tasks- 18.8%

Furthermore, the petitioner submitted a letter from Mr. [REDACTED] dated October 5, 2012, stating that the petitioner was a member of the [REDACTED] Business Incubator Program as of October 2012, and that pursuant to this arrangement the company had secured office space through the university for the purpose of developing the business. The letter stated that the petitioner received "an array of business development services and resources to help accelerate growth," including strategic and tactical working sessions to help define the business, marketing and capital strategies and a business plan. Mr. [REDACTED] explained that the beneficiary was in charge of gaining the petitioner's admittance to this program.

In an accompanying letter, dated October 5, 2012, Mr. [REDACTED] stated that "[the petitioner] has deferred recruitment of new staff for both technical and commercial areas until first and second quarters of 2013." Mr. [REDACTED] also indicated that the beneficiary devoted 80% of his time to "management tasks," and 20% to "technical work in his capacity as a specialist in database programming." The petitioner noted that the beneficiary supervises outsourced accounting and legal functions, and consistent with his sales and marketing duties, he hires "specialized resources to delegate day-to-day responsibilities on these activities."

The petitioner submitted 2012 IRS Forms 941 for the first and second quarters indicating that the petitioner had no employees during the first quarter of this year and one employee in the second. A provided budgetary estimate projected that the petitioner would earn \$142,000 in revenue during 2012 and a

petitioner bank statement from September 2012 showed a negative balance of \$879.46. Submitted proposals, contractual documents, emails and invoices confirmed that the petitioner was providing professional automation services to a handful of clients, including [REDACTED] and [REDACTED].

The petitioner submitted revised hiring plans in an updated business plan, which indicated that the petitioner now planned on hiring two project engineers and a programmer in August 2012, and a salesperson and secretary in February 2013.

In addition, the petitioner submitted two organizational charts which both indicated that the beneficiary oversaw a legal consultant (counsel in this matter) and “accounting services- accounting professional group.” However, the first organizational chart indicated that the beneficiary oversaw a “sales team,” “industrial automation,” “general software,” and “batch software,” each such position being shown as filled by the beneficiary. The second organizational chart showed the beneficiary managing a sales manager and sales representatives for an industrial automation group, a general software group, and a batch software group, with each position marked as “to be hired.”

Lastly, the petitioner submitted a general ledger for the company as of December 31, 2011 which indicated various checks paid to the beneficiary in differing amounts. For instance, the ledger showed that the beneficiary was paid amounts of \$500, \$600, \$200, and \$3,000 on November 31, 2011. Further, the petitioner submitted pricing proposals submitted by the beneficiary to clients.

In denying the petition, the director stated that the petitioner had not demonstrated that it had sufficient employees to relieve the beneficiary from primarily performing non-qualifying operational duties. The director noted that the petitioner did not submit evidence sufficient to establish the operation of the business, as requested.

The petitioner filed a timely motion to reconsider with the director. On motion, counsel contended that the petitioner had submitted a detailed duty description for the beneficiary indicating that he primarily performed qualifying executive or managerial duties. Counsel stated that the director failed to consider that the beneficiary qualified as a function manager through his oversight of major components of the business. Further, counsel asserted that the petitioner had established that the beneficiary has a professional subordinate abroad, and independent contractors, that relieve him from primarily performing non-qualifying operational duties. Specifically, the petitioner stated that the beneficiary is the leader of the foreign entity’s software development team and that he has been “supervising activities abroad over the Venezuelan Project Engineer, [REDACTED] with [the foreign entity] regarding the testing proves to determine the applicability of [the petitioner’s] Simple Patch on a painting plant located in Venezuela.”

Counsel also submitted additional evidence on motion, including the following duty description and an indication of the time the beneficiary spends on these tasks weekly:

Marketing tasks

- Minimum Viable Product definitions for our software development- 9.09%
- Adaptation of product specifications of our software developments to specific market segments requirements- 6.82%

- Identify exhibitions and trade shows convenient for showing our products. Contact the organizers and negotiate the participation of our company- 6.82%
- Definition of policies of content for our website and print advertising- 6.82%
- Identify our associations, chambers and trade associations whose membership may be in the interests of our company. Negotiate our registration with their representatives- 4.55%

Supervision of matters of accounting- 4.55%

Supervision of legal affairs- 2.27%

Sales tasks

- Define pricing schemes and volume discounts for the sale of software licenses- 4.55%
- Delimitation of market segments of interest to focus our sales efforts- 6.82%
- Creating a contact network amongst production and purchase managers of companies of market segments identified as of interest to our company- 9.09%
- Search for potential partners for the commercialization of our software in the form of original equipment manufacturer (OEM). Contact representatives and negotiate the distribution. Definition of market segments- 4.55%
- Creating a policy of customers relationship management (CRM) to provide complete and accurate information about the companies that interest us contact our sales effort- 6.82%
- Direct sales activities- 9.09%

Technical tasks- 18.18%

On June 10, 2013, the director granted the petitioner's motion to reconsider, but affirmed his decision to deny the petition. The director stated that the duty description submitted on motion indicated that the beneficiary was primarily performing non-qualifying operational duties. Further, the director stated that the petitioner had only one other employee beyond the beneficiary. The director found that the petitioner's asserted independent contractors, including an attorney and an accountant, were not shown to be under the oversight and control of the beneficiary. The director concluded that the petitioner had not established that it had sufficient employees to relieve the beneficiary from primarily performing non-qualifying tasks. The director stated that the regulations required the petitioner, as a new office seeking an extension of the beneficiary's visa, to demonstrate that it had developed sufficiently to support the beneficiary in a qualifying capacity. However, the director found that the petitioner did not meet this burden, pointing to the fact that the petitioner had not hired additional employees due to referenced financial difficulties.

On appeal, counsel contends that the director's decision is contrary to the evidence presented. Counsel states that the petitioner has provided a comprehensive duty description for the beneficiary indicating that he primarily performs managerial tasks. Further, counsel states that there is no requirement for subordinates to be on the petitioner's payroll to be considered part of its corporate hierarchy, pointing to the

beneficiary's asserted supervision of a software development team abroad. Based on this, counsel states that the beneficiary supervises professionals as necessary to qualify him as a manager. Further, counsel contends that the beneficiary at least should be found to be a manager of an essential function of the organization. Counsel emphasizes that the beneficiary is second in the petitioner's corporate hierarchy and that he has the ability to hire and fire employees and bind the company contractually. In support his assertions, counsel resubmits the evidence provided in support of the motion to reconsider.

1. Analysis

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

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). Additionally, 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 company'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 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 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

First, the beneficiary's submitted duty descriptions include various discrepancies, leaving question as to whether the beneficiary is primarily performing qualifying tasks. For instance, the duty description submitted in response to the director's RFE indicates that the beneficiary will "work with project leaders." However, the evidence presented demonstrates that the petitioner does not employ any project managers, suggesting that the beneficiary, and his lone colleague Mr. [REDACTED] are performing the operational tasks inherent to these proposed positions. In fact, the submitted organizational charts indicated that Mr. [REDACTED] will supervise project managers, not the beneficiary. Further, this duty description states that the beneficiary is "continuously working to strategically expand, preserve or improve the company's procedures, standards, or policies." However, the petitioner fails to specifically describe these procedures, standards, or policies, and it is questionable that the beneficiary would spend a significant amount of his time formulating such procedures, standards, or policies without subordinate employees to whom he can delegate these directives.

On motion and again on appeal, the petitioner submits a completely different duty description for the beneficiary, emphasizing the performance of managerial tasks such as defining policies for web content and print advertising, formulating pricing schemes and volume discounts for the sale of software licenses, defining market segments, and creating a policy for customer relationship management. However, the petitioner has not submitted any supporting evidence to substantiate the beneficiary's performance of these

managerial tasks. 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)).

In fact, to the extent specific evidence of the beneficiary's activities has been provided, it reflects the beneficiary performing the non-qualifying operational tasks of a sales representative, such as providing quotations and services directly to customers. For instance, an email from the Mr. [REDACTED] dated December 10, 2012 refers to the beneficiary "developing a Service for the application," and indicates the beneficiary testing of this application for "several nights." The petitioner indicates on appeal that the beneficiary supervises a team of software developers abroad, but his most recent duties make no mention of this supervision. In fact, the beneficiary's most recent duties suggest that he is performing software development independently. 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).

In sum, the totality of the record demonstrates that the beneficiary is primarily engaged in non-qualifying operational tasks rather than qualifying duties. First, as previously stated, the beneficiary is one of only two employees working for the petitioner, as indicated in submitted IRS Forms 941 and organizational charts. The record indicates that the petitioner has approximately five clients to which it provides regular professional services. Therefore, in the absence of employees beyond the beneficiary and Mr. [REDACTED] it is reasonably deduced that they are performing the operational tasks inherent to the provision of these services. Indeed, the organizational chart submitted in response to the director's RFE suggests that the beneficiary is fulfilling all of the responsibilities of the "sales team," "industrial automation," "general software," and "batch software" functions and the petitioner projects to hire employees to perform the operational tasks inherent to these functions. The business plan submitted in response to the director's RFE directly states that the beneficiary and Mr. [REDACTED] perform all of the programming work for the petitioner, consistent with their previous engineering experience. Although the petitioner asserts a number of times on the record that it employs independent contractors to relieve the beneficiary from performing operational tasks, no supporting evidence has been submitted to substantiate this assertion. For instance, the petitioner has submitted no evidence to support a conclusion that the referenced independent contractor attorney and accountant, and other vaguely referenced contractors, are engaged sufficiently to relieve the beneficiary from primarily performing non-qualifying operational tasks.

The petitioner now asserts on appeal that the beneficiary supervises [REDACTED] a project engineer based with the foreign entity, who is asserted to perform testing to determine the applicability of [the petitioner's] Simple Patch software on a painting plant located in Venezuela. But, the petitioner fails to provide supporting evidence to corroborate the regular engagement of this employee by the petitioner or her supervision by the beneficiary, beyond simply submitting her payroll records with the foreign entity. In addition, the petitioner only states that Ms. [REDACTED] is engaged in working on the above referenced project in Venezuela, and makes no mention of her performance of duties in the United States to relieve the beneficiary from performing non-qualifying tasks. Further, the record prior to motion questionably does not reference the beneficiary's supervision of employees abroad. Although this office concurs that there is no distinct requirement that a beneficiary's subordinates be directly employed by the petitioner, the

petitioner has not submitted sufficient evidence to establish that it engages contractors or employees abroad as necessary to relieve the beneficiary from primarily performing non-qualifying operational tasks. 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)).

On appeal, counsel further states that the petitioner has submitted sufficient evidence to establish the foreign entity's investment, its ability to remunerate the beneficiary, and that it has a detailed and credible business plan. Counsel contends that this evidence demonstrates that "the beneficiary has the intent and the financial ability to hire, supervise and control the work of subordinate professional consultants." The petitioner references regulations applicable to a new office, not those relevant to a new office requesting an extension. Despite counsel assertions, the petitioner may not be granted a second "new office" L-1A visa approval. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. 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.

However, as previously discussed, the petitioner has not established that it has developed sufficiently to support the beneficiary in a qualifying managerial or executive capacity. The petitioner has not hired any additional employees during the first year to relieve the beneficiary from primarily performing non-qualifying operational tasks. Further, as specified in the petitioner's business plan, the company's plans to hire subordinates to the beneficiary have been pushed back beyond the aforementioned one year period to the first or second quarter of 2013. In addition, the petitioner's bank account records indicate that it has exhausted its \$40,000 initial investment from the foreign employer and its most recent bank account record from September 2013 shows a negative balance. Indeed, a letter from the foreign employer dated in June 2012, a mere month from when the petitioner was required to be sufficiently operational to support the beneficiary, states that the beneficiary was only "in the process of starting" to hire professionals to support the company. Therefore the petitioner not established that it has developed an organizational structure sufficient to support the beneficiary in a managerial or executive capacity after its first year of operations, and this prospect does not appear imminent given the evidence submitted. For these reasons, counsel's references to prospective hiring and business development are not convincing. With the exception of the new office petitions, a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Counsel also contends that the petitioner qualifies based upon his supervision of professional employees, including a project engineer with the foreign entity, an attorney and an accountant. The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line

supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner has not demonstrated, nor does it contend, that it employs other managerial or supervisory employees subordinate to the beneficiary. As such, the question is whether the beneficiary supervises professional subordinates, as that term is defined by the regulations. 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).

The petitioner has not established with sufficient evidence that the beneficiary primarily supervises professional employees as necessary to qualify him as a personnel manager. First, the beneficiary's duties do not reference the beneficiary's supervision of professional subordinates abroad, but demonstrate that the beneficiary only spends a marginal amount of time engaging the asserted attorney and accountant. Further, the petitioner has not submitted any evidence to demonstrate its direct engagement of the project engineer abroad and has not provided any evidence as to the educational credentials of Ms. [REDACTED] as required to demonstrate that she has at least a baccalaureate level degree. Although it is likely that the petitioner's attorney and accountant do have professional level degrees, the evidence submitted does not demonstrate that these employees can be considered subordinates under the supervision and control of the beneficiary. Again, 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)).

Furthermore, counsel asserts that the beneficiary "at a minimum" qualifies based on his primary management of an essential function of the organization. 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish 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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered

to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988)).

In this matter, the petitioner has not demonstrated that the beneficiary manages an essential function. Indeed, it is not clear from counsel’s assertions, and the evidence presented, the nature of the essential function managed by the beneficiary. The beneficiary’s title is “commercial manager,” but the evidence presented demonstrates that the beneficiary is engaged in all manner of tasks with the petitioner, including the provision of engineering services and sales, and not devoted to one particular function within the organization. In addition, as previously discussed, the totality of the evidence presented indicates that the beneficiary is primarily performing non-qualifying operational tasks rather than managerial tasks. Therefore, the petitioner has not established that the beneficiary acts, or will act, as a function manager with the petitioner.

Lastly, counsel submits on appeal two non-precedent decisions of this office to support his assertion that the beneficiary will act as a qualifying manager or executive. But, 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. Further, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the submitted unpublished decisions.

Based on the foregoing, the petitioner has not established that the beneficiary will act in a qualifying managerial or executive capacity under the instant petition. For this reason, the appeal must be dismissed.

III. Conclusion

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

ORDER: The appeal is dismissed.