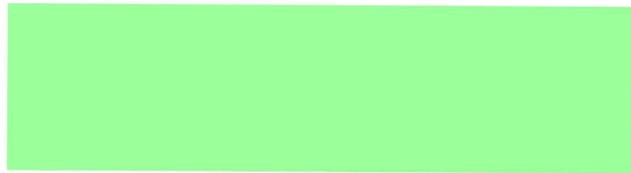




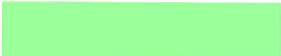
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 30 2014

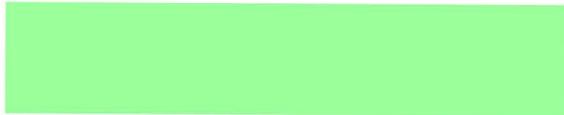
Office: VERMONT SERVICE CENTER

FILE: 

IN RE:

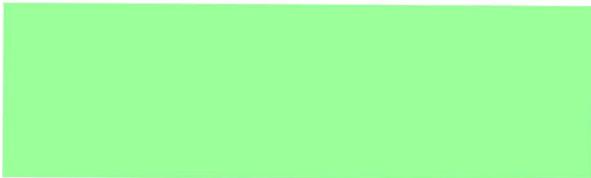
Petitioner:

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 appeal will be dismissed.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, states that it operates a business process outsourcing and medical transcription services business. The petitioner claims to be an affiliate of [REDACTED] located in [REDACTED]. The petitioner seeks to employ the beneficiary as the president/CEO of its new office in the United States.

The director denied the petition on two alternative grounds, concluding that the petitioner failed to establish that: (1) the beneficiary would be employed in a managerial or executive capacity within one year of the approval of the petition; and (2) it has secured sufficient physical premises to house the new operation.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be performing qualifying executive functions at the U.S. company. Counsel submits a brief and duplicate copies of previously submitted evidence in support of the appeal.

I. THE LAW

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

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

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

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

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

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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

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

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

II. THE ISSUES ON APPEAL

A. Employment in a Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition.

The petitioner filed the Form I-129 on June 21, 2013. The petitioner stated on the Form I-129 that the beneficiary would be employed as president/CEO of the U.S. company and indicated that the company has six "projected" employees and a "projected" gross annual income of \$270,000. In a letter dated June 10, 2013, the petitioner described the beneficiary's position as follows:

On a more specific level, his responsibilities involve the directing the overall [sic] organization of [the petitioner] while simultaneously protecting the investments of both the subsidiary and thus the parent company. In addition to ensuring profitability and efficiency of the businesses, [the beneficiary] will also take a broader approach in establishing the goals for the short- and long-term. Policies and procedures will need to allow room for growth and further diversification into the U.S. market while incorporating the needs, priorities, and advice of [the foreign entity]. As a President/CEO, one of his major responsibilities involves being a liaison between the subsidiary and the foreign company's shareholders and directors. .

Overall, [the beneficiary] will have the overall responsibility of planning and developing the U.S. investment, initially placing a management team to run the operations, determining [the petitioner's] future investments, conducting feasibility and market studies of future investments, advising owners of the Foreign Company on where to further invest, supervising all financial aspects of the company and developing policies and objectives for the company. Although [the foreign entity] will retain complete control over its subsidiary's ultimate financial and managerial decisions, [the beneficiary] will also have the responsibility to map

out consensual short and long-term goals, incorporating the input and advice of shareholders of [the foreign entity] in Pakistan.

To achieve the mission for this position, the President/CEO must produce the following critical actions and results:

- Creating, communicating, and implementing the organization's vision, mission, and overall direction.
- Leading, guiding, directing, and evaluating the work of other executive leaders including vice president and directors.
- Formulating and implementing the strategic plan that guides the direction of the U.S. business.
- Forming, staffing, guiding, leading, and managing the U.S. organization sufficient to accomplish the President/CEO's responsibilities and the strategic plan of the business.
- Overseeing the complete operation of an organization in accordance with the direction established in the strategic plans.
- Evaluating the success of the organization and answering to the Foreign Company's directors.
- Maintaining awareness of both the external and internal competitive landscape, opportunities for expansion, customers, markets, new industry developments and standards, and so forth within the [redacted] services realm.
- The President/CEO will frequently represent the U.S. Company in civic and professional association responsibilities and activities in the local community, the state, and at the national level. (Other managers may bear responsibility for these ventures as interested or assigned as well.)

* * *

[The beneficiary's] employment as President/CEO will afford him complete authority to establish goals and policies and exercise discretionary decision-making authority based upon policies and procedures developed by shareholders. He will further assume sole responsibility of all discretionary actions regarding profitable operations taken by this U.S.-based entity. [The beneficiary] will also supervise other professional and managerial employees, establish goals and policies for investment in the United States, and exercise wide latitude in discretionary decision-making under the mentoring of directors and shareholders of the Foreign Company. The beneficiary's duties, therefore, are clearly "Executive" in nature and are consistent with [the Act].

The petitioner submitted its business plan and listed its current "principal members" as follows:

[redacted] MD.: He is currently serving as the president of [the petitioner] and possess [sic] a vast experience in the field of medicine and health information management systems.

Mr. [REDACTED] He is the Director with a degree in business administration . . . and has vast experience in business development. He is overseeing the business development portfolio of the company.

Mr. [REDACTED] He is the Director with degree in Economics He is the advisor to [the petitioner].

* * *

[REDACTED] She is serving as Sales Manager. She has an associate degree and has vast experience in sales and marketing.

Mr. [REDACTED] He is the CPA of the company.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary as president/CEO directly supervising one vice president, Dr. [REDACTED] MD, and two directors, [REDACTED] MBA, and [REDACTED] MBA. The vice president supervises a sales manager, [REDACTED] a CPA, Mr. [REDACTED] and "project managers." The sales manager then supervises a sales department, admin department, and a marketing department. The organizational chart does not list the names or the number of persons under "project managers," or each of the three departments supervised by the sales manager.

On July 2, 2013, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, information regarding the proposed nature of the new office, describing the scope of the entity, its organizational structure, and its financial goals.

In response to the RFE, counsel for the petitioner described the beneficiary's position in the U.S. as follows:

As President/CEO, [the beneficiary] will be responsible for providing strategic leadership for the company by working with the Board of Directors and other management to establish long-range goals, strategies, plans, and policies. And through this executive-level position, he will have the ability to shape the future investments and progress of both companies via [the petitioner]. . . .

His responsibilities involve the directing the overall [*sic*] organization of [the petitioner] while simultaneously protecting the investments of both the subsidiary and thus the parent company. In addition to ensuring profitability and efficiency of the businesses, [the beneficiary] will also take a broader approach in establishing the goals for the short- and long-term. Policies and procedures will need to allow room for growth and further diversification into the U.S. market while incorporating the needs, priorities, and advice of [the foreign entity]. As a President/CEO, one of his major responsibilities involves being a liaison between the subsidiary and the foreign company's shareholders and directors. . . .

* * *

In conclusion, Petitioner is a new office and [the beneficiary] is an executive employee overseeing the management of U.S. Operations. [The beneficiary] is not a first line manager

and will not perform day-to-day work activities; instead he will oversee and direct the management and performance of key company goals and functions. [The beneficiary] will supervise the work of other supervisory, professional or managerial employees who are degreed individuals. [The beneficiary] is the executive at the very highest levels of decision-making within a company.

The petitioner submitted an updated business plan, dated July 25, 2013, summarizing the beneficiary's responsibilities and duties as follows:

President & CEO – [Beneficiary]

- Serve as the executive leader of the U.S. affiliate company to provide control and direction to the overall business[;]
- Serve as the key U.S. contact for the shareholders and directors of the Pakistan affiliate[;]
- Plan and develop the organizational policies and objectives of the U.S. investment[;]
- Consult with the shareholders of the Pakistan affiliate company to ensure the investment in the U.S. based operation is performing to set goals and standards[;]
- Hold monthly conference calls with the shareholders of the affiliate company to update them on the status of the U.S. investment[;]
- Provide top-down leadership and maintain a rigorous approach to management via metrics throughout the company[;]
- Evaluate organizational efficiencies for profitable operation, developing the organization to its full potential and keeping personnel motivated and productive[;]
- Study market research and trends to determine consumer demand, potential sales volumes and effect of competitors' [redacted] offering on sales and profitability[;]
- Responsible for the overall executive control of the business, providing leadership and direction to the managers and guiding them in their supervision and decision making regarding the employees beneath them[;]
- Work with outside professionals such the [sic] CPA who files quarterly payroll and annual corporate taxes[;]
- Directly supervise the management level staff such as the Sales Manager, Marketing Manager, Project Manager and Administration Manager, make decisions as necessary[;]
- Ensure the Sales Manager is promoting the business through advertising, marketing and social media to ensure maximum exposure to customers[;]
- Work with the Sales manager to formulate strategies for the acquisition of new customer accounts[;]
- Analyze sales statistics to formulate policies and to assist promoting and gaining more business[; and]
- Review financial statements and cash flow statements and make decisions accordingly[.]

The business plan also includes a brief list of job duties for the sales manager, marketing manager, project manager, and administration manager. It also includes a chart indicating that the petitioner has seven employees in 2013: president/CEO, vice president, sales manager, website developer, two sales executives, and a marketing manager; 10 employees in 2014, adding two more sales executives and a data entry executive; 15 employees in 2015, adding a project manager, two data entry executives, and two network administrators; 19 employees in 2016, adding two sales executives, a data entry executive, and an

administration manager; and 23 employees in 2017, adding a data entry executive, two website developers, and a sales executive.

The petitioner also submitted an organizational chart for the U.S. company "for the year ending 2014" depicting the beneficiary as president & CEO, reporting to the foreign entity's board of directors, and supervising the vice president, the sales manager, the marketing manager, and two "future managers." The vice president does not have any subordinates; the sales manager supervises four sales executives; one of the "future managers" supervises a website developer; and the other "future manager" supervises a data entry executive.

The petitioner submitted a letter from the foreign entity describing the U.S. company's organizational structure as follows:

This year, [the petitioner] is looking to immediately full 7 positions including:

- President/CEO – [Beneficiary]
- Vice President – Dr. [REDACTED]
- Sales Manager – [REDACTED]
- Website Developer – Starting August 2013
- Sales Executives – 2 professionals
- Marketing Manager – Starting September 2013

* * *

By the end of one year, [the petitioner] will employ 10 individuals by adding the following positions:

- 2 more Sales Executives
- Data Entry Executive

. . . By this time, our company will be fully functioning and [the beneficiary] will be focusing his efforts on driving the company forward and accomplishing our goals.

The foreign entity's letter went on to describe the beneficiary's duties at the U.S. company as described above by the petitioner and counsel and added other duties with a percentage of time allocated to completing those duties as follows:

Duty #1: 30% of time spent

President/CEO is responsible for setting strategy and vision for the company. . . .

- Serve as the executive leader of the U.S. affiliate company to provide control and direction to the overall business by working with the Directors and using past work experience in [the foreign entity] to promote the goals of [the petitioner][.]
- Develop short/long term company and product roadmap.
- Continue open communications with the board of directors.



- Establish and implement short and long term goals, objectives, policies, and operating procedures.
- Create and revise all content while building a world-class content development team.
- Ensure company and its business comply with all applicable legal and regulatory requirements and, where appropriate, best practices.
- Establish, achieve, and report on milestones to the Board of Directors.
- Develop a plan to ensure that company will be performing in par with the sales goals set by the Directors[.]
- Serve as the key U.S. contact for the shareholders and directors of the Pakistan affiliate[.]
- Plan and develop the organizational policies and objectives of the U.S. investment[.]
- Consult with the shareholders of the Pakistan affiliate company to ensure the investment in the U.S. based operation is performing to set goals and standards[.]
- Hold monthly conference calls with the shareholders of the affiliate company to update them on the status of the U.S. investment[.]

Duty #2: 25% of time spent

The CEO's second duty is organizational development. . . .

* * *

- Build and lead an effective and cohesive executive management team to include all company employees, while establishing a basic personnel policy, initiating and monitoring policies relating to personnel actions and training and professional development programs.
- Responsible for the overall executive control of the business, providing leadership and direction to the managers and guiding them in their supervision and decision making regarding the employees beneath them[.]

Duty #3: 25% of time spent

Team Building. The CEO hires, fires, and leads the senior management team. . . . He sets direction by communicating the strategy and vision of where the company is going. . . .

- Provide top-down leadership and maintain a rigorous approach to management via metrics throughout the company[.]
- Build and motivate a world-class sales and marketing team.
- Develop and lead execution of product development, sales, and marketing.
- Ensure company objectives and standards of performance are not only understood but owned by management and employees.
- Work with outside professionals such the [sic] CPA who files quarterly payroll and annual corporate taxes[.]
- Directly supervise the management level staff such as the Sales Manager, Marketing Manager, Project Manager and Administration Manager, make decisions as necessary[.]
- Ensure the Sales Manager is promoting the business through advertising, marketing and social media to ensure maximum exposure to customers[.]

Duty #4: 20% of time spent

Capital allocation. The CEO sets budgets within the firm. . . .

- Evaluate organizational efficiencies for profitable operation, developing the organization to its full potential and keeping personnel motivated and productive[.]
- Oversee operating plan, budget, cash flow, and company finances.
- Study market research and trends to determine consumer demand, potential sales volumes and effect of competitors' offering on sales and profitability[.]
- Work with the Sales manager to formulate strategies for the acquisition of new customer accounts[.]
- Analyze sales statistics to formulate policies and to assist promoting and gaining more business[.]
- Review financial statements and cash flow statements and make decisions accordingly[.]

* * *

[The beneficiary's] employment as President/CEO will afford him complete authority to establish goals and policies and exercise discretionary decision-making authority based upon policies and procedures developed by shareholders. He will further assume sole responsibility of all discretionary actions regarding profitable operations taken by the U.S.-based entity. [The beneficiary] will also supervise other professional and managerial employees, establish goals and policies for investment in the United States, and exercise wide latitude in discretionary decision-making under the mentoring of directors and shareholders of the Foreign Company.

The foreign entity's letter also provided additional duties that the beneficiary would perform at the end of the U.S. company's first 12 months of operation.

The director denied the petition on August 15, 2013, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive position within one year. In denying the petition, the director found that the petitioner failed to demonstrate that the beneficiary's subordinates will be employed in professional, managerial, or supervisory positions. The director further found that the record does not demonstrate that the beneficiary would be relieved from performing non-qualifying duties within one year of approval of the petition.

On appeal, counsel for the petitioner reiterates the same description of the beneficiary's position provided with the petition and in response to the RFE, and asserts that the evidence of record establishes that the beneficiary will be employed in an executive capacity.

The first line managers handle all the administrative functions. All the non-qualifying functions and back-end support will be conducted through the Foreign Entity . . . in Pakistan. In fact, [the foreign entity] employs more than 60 individuals that directly provide these services to the U.S. customers, such as performing the actual medical transcription, manning the call centers 24/7, conducting the bookkeeping and other services. The U.S. Entity will procure the accounts and oversee the expansion of the Foreign Entity's business, while the Foreign Entity will provide the labor.

* * *

[The beneficiary] is responsible for all our planning, expansion, banking, budgeting, and marketing. In addition, he hires and trains other managers and employees and is in charge [sic] of increasing the sales of the company. He is employed at the highest executive level and has complete authority to establish goals and policies and exercises discretionary decision-making authority based upon policies and procedures developed by shareholders. [The beneficiary] assumes sole responsibility of all discretionary actions taken by the U.S. entity to ensure its profitable operation.

[The beneficiary] is responsible for the success or failure of the company. Operations, marketing, strategy, financing, creation of company culture, human resources, hiring, firing, compliance with safety regulations, sales, PR [sic], etc. – it falls on his [sic] shoulders. [The beneficiary's] duties are what he actually does, the responsibilities he doesn't delegate. Some things can't be delegated. Creating culture, building the senior management team can be done only by the President.

The senior management team can help develop strategy. Investors can approve a business plan. But the President ultimately sets the direction. . . . [The beneficiary] decides, sets budgets, forms partnerships, and hires a team to steer the company accordingly.

[The beneficiary] hires, fires, and leads the senior management team. They, in turn, hire, fire, and lead the rest of the organization. He must resolve differences between senior team members, and keep them working together in a common direction. He sets direction by communicating the strategy and vision of where the company is going. Strategy sets a direction [sic]. With clear direction, the team can rally together and make it happen. Work gets done through people, and people are profoundly affected by culture. . . .

[The beneficiary] sets budgets within the firm. He funds projects that support the strategy, and ramps down projects that lose money or don't support the strategy. He considers carefully the company's major expenditures, and manages the firm's capital. . . .

As a President of [the petitioner], [the beneficiary] is the key U.S. contact for the shareholders and directors of the parent company. [The beneficiary] is employed at an executive position within the U.S. Company, and oversees supervises [sic] managers who supervise employees running day-to-day operations. [The beneficiary] plans and directs the management of the Petitioner through its own employees, as well as outside contract employees who perform the legal and accounting duties. The beneficiary is the individual responsible for establishing goals and policies and exercising wide latitude in discretionary decisions making [sic] duties, which includes supervising managerial level employees. In sum, [the beneficiary], has the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, supervising all financial aspects of the company and developing policies and objectives for the company.

. . . At [the petitioner], [the beneficiary] will supervise and control the work of other supervisory, professional, or managerial employees.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a managerial or executive position within one year of beginning operations for the United States business entity.

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/executive 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.*

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").

On review, it appears that the beneficiary's job duties have evolved throughout the record. At the time of filing, the beneficiary's job duties were described as "directing the overall organization;" "protecting investments;" "take a broader approach in establishing the short- and long-term goals;" "being a liaison

between the subsidiary and the foreign company;" "overall responsibility of planning and developing the U.S. investment;" "placing a management team to run the operations;" "determining [the petitioner's] future investments;" "leading, guiding, directing, and evaluating the work of other executive leaders including vice president and directors;" and "formulating and implementing the strategic plan that guides the direction of the U.S. business." In response to the RFE, the petitioner submitted an updated business plan and expanded the beneficiary's duties stating that the beneficiary will "serve as the executive leader of the U.S. affiliate company to provide control and direction to the overall business;" "hold monthly conference calls with the shareholders of the affiliate company to update them on the status of the U.S. investment;" "provide top-down leadership and maintain a rigorous approach to management via metrics throughout the company;" "evaluate organizational efficiencies for profitable operation, developing the organization to its full potential and keeping personnel motivated and productive;" "study market research and trends to determine consumer demand, potential sales volumes and effect of competitors' offering on sales and profitability;" "directly supervise the management level staff such as the Sales Manager, Marketing Manager, Project Manager and Administration Manager, make decisions as necessary;" "ensure the Sales Manager is promoting the business through advertising, marketing and social media to ensure maximum exposure to customers;" "work with the Sales manager to formulate strategies for the acquisition of new customer accounts;" "analyze sales statistics to formulate policies and to assist promoting and gaining more business;" and "review financial statements and cash flow statements and make decisions accordingly." The foreign entity then provided a breakdown of the percentage of time the beneficiary allocates to sets of duties, such as, setting strategy and vision for the company-30%; organizational development-25%; team building-25%; and capital allocation-20%. The breakdown included additional duties and categorized the previously submitted duties under one of the sets of duties allocated a percentage.

The described job duties fail to establish that the beneficiary will be engaged in a primarily managerial or primarily executive position. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its president and CEO, the petitioner has not provided sufficient consistent information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or an executive. Although the petitioner submitted multiple position descriptions and lists of job duties for the beneficiary throughout the record, the petitioner failed to provide detailed explanations of the beneficiary's actual duties and failed to provide information concerning the amount of time the beneficiary would devote to each specific duty. In fact, the percentage breakdown provided by the foreign entity broadens the beneficiary's duties more so than the position descriptions themselves. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Where the petitioner did attempt to clarify the beneficiary's duties, it simply paraphrased the statute for executive and managerial capacity at sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Based on the current record, and the fact that the beneficiary's duties have evolved throughout the record, the AAO is unable to determine what his actual duties would be and thus cannot classify them as managerial or executive. It is not possible to discern from the record whether the claimed managerial duties and executive duties would ever constitute the majority of the beneficiary's duties, let alone in one year of filing the petition, or whether the beneficiary will primarily perform non-managerial administrative or operational duties. The petitioner's multiple descriptions of the beneficiary's job duties do not establish what proportion of the beneficiary's duties are managerial in nature, what proportion are executive in nature, and what proportion are actually administrative or operational. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or 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 would realistically develop to the point where it would 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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

Although the petitioner and counsel have consistently asserted that the proffered position is a position in an executive capacity, for thoroughness, we will briefly discuss duties in relation to a managerial capacity position. 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. 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 will manage 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, although the petitioner claims that the beneficiary's subordinates, Dr. [REDACTED] vice president, [REDACTED] director, and [REDACTED] director hold advanced degrees, the petitioner failed to provide position descriptions or lists of job duties for these positions to demonstrate that the positions themselves require a professional degree. Additionally, the petitioner did not provide any evidence of the subordinates' claimed degrees. Thus, the petitioner has not established that the beneficiary's subordinates require a bachelor's degree or higher, such that they could be classified as professional. Nor has the petitioner demonstrated that the beneficiary's direct subordinate(s) supervise or will supervise other subordinate staff members, or manage a clearly defined department or function of the petitioner, such that the beneficiary's direct subordinate(s) could be classified as managers or supervisors. Although the description of duties for the sales manager, marketing manager, and administration manager indicate that they will focus on a clearly defined department of the petitioner, the duties demonstrate that they will be performing the necessary tasks to provide a service or produce a product, rather than actually managing the specific department or function of the petitioner. Thus, the petitioner has not shown that the beneficiary's direct subordinate employee(s) are supervisors, managers or professionals, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted an organizational chart depicting the beneficiary as president and CEO supervising a vice president, sales manager, marketing manager, and others, the petitioner has not shown how the subordinate employees would free the beneficiary from performing non-qualifying operational duties. The petitioner has not provided credible evidence of an organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is or will be higher than a first-line supervisor of non-professional employees.

The petitioner has not established, in the alternative, that the beneficiary would be 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 performs as a function manager. The petitioner did not articulate the beneficiary's duties as those of a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate he manages or will manage an essential function of the U.S. company.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. 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 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 the petitioner claims that the beneficiary is an executive at the U.S. company, the only executive duties listed for the beneficiary merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

We note that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, 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)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Here, the petitioner provided a current organizational chart and projected organizational charts, both indicating that the beneficiary will at least directly supervise the vice president. The current chart indicates that there are two additional directors supervised by the beneficiary; however, the petitioner failed to indicate what they are directors of, just that they hold MBA degrees. Additionally, the current chart indicates that the vice president supervises the sales manager, who supervises the sales, admin, and marketing departments, and the projected chart indicates that the beneficiary directly supervises the department managers and the sales manager only supervises sales executives. The petitioner does not explain why the vice-president by the year end of 2014 will no longer supervise the sales manager, CPA and Project Managers. The petitioner does not explain why the beneficiary, in the claimed executive position of president, will in the future directly supervise the sales manager and future managers. The petitioner does not explain why initially the description of the beneficiary's duties did not include the beneficiary's direct supervision of the sales manager, marketing manager, project manager, and administration manager as indicated in the updated July 25, 2013

business plan. Due to the inconsistent position descriptions and lists of job duties for the beneficiary, the extremely short and vague description of job duties provided for some of the beneficiary's subordinates, and the inconsistent organizational charts, it remains unclear how the subordinates will relieve the beneficiary from performing non-qualifying administrative and operational duties in one year from the approval of the petition.

Thus, we affirm the director's determination that the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity within one year of the approval of the petition. Accordingly, the appeal will be dismissed.

B. Physical Premises

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

The petitioner filed the Form I-129 on June 21, 2013, and therefore must establish that it satisfied the requirements at 8 C.F.R. § 214.2(l)(3)(v)(A) as of this date. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

On the Form I-129, the petitioner indicated its address as [REDACTED]

[REDACTED] The petitioner submitted a copy of its lease at the listed address for an office space of approximately 141 square feet. The lease commences on May 21, 2013 and continues on a month to month basis. The signature page of the lease agreement contains a photocopied signature for the landlord and an original signature for the tenant, the petitioner. Further, the name typed under the signature line for the tenant, which appears to be that of the beneficiary, is "whited-out" and the name of [REDACTED] is written in ink.

The director denied the petition concluding, in part, that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director observed that the petitioner's lease is for 141 square feet of office space and the petitioner stated that it intends to employ 6-11 employees by the end of the first year of operations. Therefore, the director found that 141 square feet of office space is insufficient to house the new operation.

On appeal, counsel for the petitioner contends that the petitioner leased a smaller office space with the intention to expand upon approval of the L-1A petition. The petitioner now submits an expansion agreement in which the petitioner intends to expand into an 1100 square foot office space on January 1, 2014.

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

The AAO acknowledges that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office. The phrase "sufficient physical premises" is broad and somewhat subjective, leaving flexibility in adjudicating this legal requirement. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at

8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations.

Here, the petitioner explains that it will use the premises for its entire business operations, such as sales, marketing, administration, accounting, etc. The lease indicates that the office space is approximately 141 square feet. The petitioner did not submit a floor plan of the office space to demonstrate how it will house the new operation within the 141 square foot space. The petitioner's business plan states that it has seven employees and will employ 10 individuals by then end of 2014. As the petitioner did not submit a floor plan or other information regarding how it will fit the seven current employees in the leased office space, the AAO cannot reasonably determine that an executive and at least four managers will share an office space of 141 square feet, or approximately a 12' x 12' room. In this instance, it does not appear that the petitioner's leased premises will be of sufficient size to accommodate its planned employees within the first year of operations.

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

III. QUALIFYING RELATIONSHIP

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

The petitioner stated on the Form I-129 that it has an affiliate relationship with the foreign entity, and stated "[the foreign entity]: 34% [redacted] 33% [redacted] and 33% [redacted]; [the petitioner]: 25% [redacted] 25% [redacted] In its letter, the petitioner indicates that the foreign entity acquired 50% ownership and control of the U.S. company.

The U.S. company's Certificate of Formation indicates that it is authorized to issue 1,000 shares at \$1.00 par value. In support of the petition, the petitioner submitted copies of its 2012 IRS Form 1120. The 2012 Form 1120, at Schedule K-1, indicates that [redacted] owned 100% of the voting stock of the U.S. company. The petitioner submitted a document titled, Meeting Minutes, dated May 9, 2013, stating that "Dr. [redacted] welcomed new members Mr. [redacted] and Mr. [redacted] from [redacted] Pakistan . . . Both joined the corporation by acquiring 25% shares each from Dr. [redacted]

In response to the RFE, counsel for the petitioner states that "all shareholders in both companies have assigned Mr. [redacted] their voting rights in order to consolidate the control into one individual. . . . Dr. [redacted] has granted all of his voting rights to Mr. [redacted] The petitioner submitted two documents titled, "Assignment of Right to Vote on Interest of Partnership and to Consolidate Voting," dated May 9, 2013, granting [redacted] all of [redacted] voting rights and [redacted] voting rights in the foreign entity. The petitioner also submitted a document titled, "Assignment of Right to Vote Stock for Interest of Corporation and Assignor, with proxy," dated May 9, 2013, granting [redacted] all of [redacted] voting rights in the U.S. company, specifically 500 shares. The petitioner submitted the same document, also dated May 9,

(b)(6)

2013, granting [REDACTED] all of Dr. [REDACTED] voting rights in the U.S. company, specifically also 500 shares. The petitioner submitted a letter from [REDACTED] stating that the U.S. company sold 50% of its stock to [REDACTED] and [REDACTED] in May 2013.

Upon review, the petitioner has not provided clear evidence as to the actual ownership and control of the U.S. company. The petitioner claims that [REDACTED] initially owned 100% of the shares of the U.S. company, namely 1,000 shares. Then, on May 9, 2013, [REDACTED] gave away 50% of his shares to [REDACTED] and [REDACTED] equally. Then, also on May 9, 2013, [REDACTED] and [REDACTED] granted [REDACTED] all of the voting rights for their shares of the U.S. company. Here, the petitioner has not provided any evidence that the shares of the U.S. company were distributed, purchased, sold, or transferred to or from any individuals; the petitioner did not submit any share certificates, stock ledgers, or other financial information to demonstrate that shares were sold and purchased by any individuals. 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, the document granting voting rights to [REDACTED] shares of the U.S. company states that he owns 500 shares, and [REDACTED] document also states that he owns 500 shares; thereby creating an inconsistent number of shares that does not add up to the 50/25/25 distribution claimed by the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Due to the inconsistencies and deficiencies detailed above, the petitioner has not met its burden to corroborate its claimed qualifying relationship with the foreign entity. For this additional reason, the petition cannot be approved.

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

IV. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.