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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 19 2014 Office: VERMONT SERVICE CENTER

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 this nonimmigrant petition 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 is a New York corporation, established in 2006, that is engaged in the sale of rubber products, parts and accessories. The petitioner states that it is a subsidiary of [redacted] The petitioner seeks to employ the beneficiary as a sales manager for a period of two years.

The director denied the petition on multiple grounds. First, the director concluded that the petitioner had not established that it has a qualifying relationship with the foreign entity. The director also found that the petitioner had not established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States, or that the beneficiary was employed with the foreign entity in a qualifying capacity.

On appeal, counsel submits additional evidence, including an additional support letter from the petitioner, endeavoring to demonstrate that the beneficiary will be employed in a qualifying executive capacity in the United States. Additionally, the petitioner states that it is owned by three affiliate companies that are all owned by the same corporate parent. Accordingly, counsel asserts that the qualifying relationship requirement has been met.

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.

II. The Issues on Appeal

A. Qualifying Relationship

The first issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the foreign employer.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power

over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

* * *

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or

On the L Classification Supplement to Form I-129, the petitioner stated that 75% of its stock is owned by In a letter submitted at the time of filing, the petitioner stated that it is a "wholly-owned subsidiary" of these two companies, and identified them as "members of the

In support of the Form I-129, the petitioner submitted a chart titled " depicting 22 companies, including the petitioner. In this company organizational chart, the petitioner was shown to be owned 69.4% by Further, the petitioner provided a document titled "shareholder details" dated September 17, 2010 reflecting ownership in the petitioner. This document states that 75% of the petitioner's stock is owned by d. Additionally, Schedule D of the petitioner's 2011 IRS Form 1120, U.S. Corporation Income Tax Return indicates that share ownership in the petitioner was distributed as follows: (1) 47.56% owned by , (2) 33.92% owned by

On December 7, 2013, the director issued a request for evidence (RFE) stating that the petitioner had failed to submit sufficient evidence to establish a qualifying relationship. The director noted the varying statements on the record as to the petitioner's ownership. The director stated that the petitioner could submit some of the following evidence to demonstrate its ownership structure, including: (1) a Form 10-K filed with the Security and Exchange Commission; (2) the company's most recent annual report; (3) meeting minutes relevant to the petitioner's stock ownership; (4) articles of incorporation and/or bylaws; (5) stock certificates; (6) a stock ledger; and/or (7) evidence of stock purchases by the petitioner's claimed owners.

In response, the petitioner re-submitted the same corporate organizational chart reflecting that the petitioner is owned 69.4% by The petitioner also provided its 2011 financial statement indicating that the petitioner is owned by the following companies: (1) 47.56% by and (3) 18.52% by Further, the petitioner submitted its stock certificate number 5. The certificate indicates in the upper right corner that owns 907 of its issued shares. The certificate simultaneously indicates on its face that held "$4,535,000" shares

in the petitioner. The petitioner's articles of incorporation and the stock certificate indicate that the company is authorized to issues a total of 200 shares of common stock.

The director concluded that the petitioner had not submitted sufficient evidence to establish actual ownership in the petitioner. In the denying the petition, the director emphasized that there were inconsistencies in the petitioner's submitted statements and documentation.

On appeal, the petitioner again contends that the petitioner is owned by three affiliate companies in the following percentages: (1) [redacted] The petitioner also asserts that the three aforementioned entities are owned by the same parent company, [redacted], and as such, a qualifying relationship exists. In support of this assertion, the petitioner submits a document titled "U.S. Transfer Pricing Report for the Year Ended December 31, 2010," prepared by an independent accountant, which indicates that the petitioner is owned by the three affiliate companies specified above.

Upon review, the petitioner has not established that it has a qualifying relationship with the 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 regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The petitioner's initial evidence set forth three separate ownership structures for the same company. In response to the RFE, the petitioner failed to rectify various discrepancies on the record with respect to its ownership, and failed to submit much of the relevant evidence of ownership requested by the director such as stock certificates, a stock ledger, meeting minutes of relevant shareholder meetings, or evidence supporting the payment of consideration by the three companies asserted as owning the petitioner's stock. Indeed, the petitioner again submitted conflicting evidence, including a corporate organizational structure indicating that the petitioner was 69.4% owned by and 30.6% owned by a 2011 financial statement specifying that the petitioner was owned by the three affiliates offered on appeal in differing percentages, and a questionable stock certificate number 5 issued to which indicated that the foreign company was issued 907 of the petitioner's 200 shares, and included an unexplained dollar amount of $4,535,000. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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. 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, 591-92 (BIA 1988).

Now, on appeal, counsel again states that the petitioner is owned 47.56% by , 33.92% by , and provides a "U.S. Transfer Pricing Report for the Year Ended December 31, 2010," prepared by an independent accountant reflecting this asserted ownership. However, the petitioner fails to address the previous discrepancies on the record regarding ownership in the petitioner and, again, does not submit any of the evidence proposed by the director as necessary to demonstrate ownership in the petitioner, including, stock certificates, a stock ledger, meeting minutes of relevant shareholder meetings, or evidence supporting the payment of consideration by the three companies asserted as owning petitioner stock. As such, the petitioner's ownership remains unclear and has not been adequately addressed on appeal.

Further, even if the ownership information provided in the independent accountant's report was accurate as of December 2010, the petitioner stated on the Form I-129 filed on February 1, 2013 that it is owned by only two companies. The petitioner now suggests on appeal that the information provided on the Form I-129 was not accurate. Again, 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. at 591-92. While the petitioner consistently claims to be a member of

the same corporate group as the beneficiary's' foreign employer, the petitioner still has the burden to consistently identify and document its actual ownership structure.

Without a consistent and sufficiently supported statement of ownership in the petitioner, it cannot be determined whether a qualifying relationship exists between the petitioner and the foreign employer. For this reason, the appeal must be dismissed.

B. Managerial or Executive Capacity (United States)

The next issue addressed by the director was whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive 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;

(i) establishes the goals and policies of the organization, component, or function;

(ii) exercises wide latitude in discretionary decision-making; and

(iii) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

In denying the petition, the director noted discrepancies in the petitioner's organizational structure, including resumes for the beneficiary's three subordinates indicating that these employees are accountants and not sales and marketing professionals as asserted. Further, the director emphasized that the petitioner had failed to provide further details regarding the beneficiary's duties or address the aforementioned discrepancy on the record, despite the specific requests made in the RFE.

On appeal, the petitioner submits an additional support letter offering more detail regarding the beneficiary's duties and the petitioner's operations. The petitioner contends that the beneficiary will oversee three sales and marketing professionals, for whom it submits resumes. The petitioner contends that the beneficiary will be employed in a qualifying 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). In a support letter submitted with the Form I-129, the petitioner stated that the beneficiary would "devote more of [his] time to developing marketing strategies and creating customer relationships than directing the day-to-day activities of the sales staff." The petitioner further described the beneficiary's proposed duties in his proposed capacity of sales manager as follows:

- Monitor customer preferences to determine focus of sales efforts [15%].
- Determine price schedules and discount rates [5%].
- Review operational records and reports to project sales and determine profitability [20%].
- Direct, coordinate, and review activities in sales and service accounting and recordkeeping, and in receiving and shipping operations [5%].
- Confer or consult with department heads to plan advertising services and to secure information on equipment and customer specifications [5%].
- Prepare budgets and approve budget expenditures [5%].
- Plan and direct staffing, training, and performance evaluations to develop and control sales and service programs [5%].
- Coordinate monthly sales reporting with sales team of the company [10%].
- Confer with potential customers regarding equipment needs and advise customers on types of equipment to purchase [15%].
- Direct clerical staff to keep records of export correspondence, bid requests, and credit collections, and to maintain current information on tariffs, licenses, and restrictions [10%].

The petitioner submitted an organizational chart depicting the beneficiary's proposed position and showing that he would supervise three employees with the job title "sales staff." The chart also depicted an accountant manager position lateral to the beneficiary's proposed position, and indicated that this employee supervises two accounting staff. The petitioner submitted a resume for one of the beneficiary's claimed subordinates, in which he states that he works for the petitioner as a senior accountant. The petitioner also submitted a resume for claimed "sales staff" Sunghee Min, which states that her job title with the company is "accountant."

The director found the initial evidence submitted by the petitioner insufficient to establish that the beneficiary would be employed in a managerial or executive capacity. Therefore, in the RFE, the director proposed that the petitioner submit a letter from an authorized representative of the U.S. entity describing the beneficiary's expected managerial decisions, his typical managerial duties, and the percentage of time he would spend on such duties. The director indicated that the letter should address how the beneficiary would direct the management of the organization, establish goals and policies, and exercise wide latitude in discretionary decision making. The director also acknowledged the petitioner's claim that the beneficiary would supervise three sales staff and asked the petitioner to clarify the apparent discrepancy in job titles observed in the employees' resumes.

In response, the petitioner submitted the same duty description for the beneficiary submitted in support of the petition, as set forth above. Now, on appeal, the petitioner submits a new set of duties for the beneficiary including percentages of time he will spend on each listed task. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the duties submitted on appeal.

Further, the fact that the petitioner has submitted entirely new duties for the beneficiary on appeal, which are significantly different from those previously submitted on the record, leaves question as to the actual day-to-day duties to be performed by the beneficiary in the United States. Additionally, the beneficiary's duties submitted in support of the petition state that the beneficiary will "confer with department heads to plan advertising services and secure information on equipment and customer specifications" and "direct clerical staff to keep records of export correspondence, bid requests, and credit collections, and to maintain current information on tariffs, licenses, and restrictions." However, the petitioner's organizational chart does not include department heads or clerical staff reporting to the beneficiary, but rather three sales staff.

Further, as noted by the director, the claimed sales and marketing professionals were indicated to be "accountants" in the resumes submitted at the time of filing, and this discrepancy has not been adequately addressed or resolved by the petitioner. In response to the RFE, counsel stated that "there is a discrepancy between the submitted Organizational Chart and the attached resumes because the resumes were not updated to reflect the reorganization of the company." Counsel stated that the petitioner was submitting an updated organizational chart with its RFE response, but the document was not included. The petitioner submits a new organizational chart on appeal which again identifies three sales staff reporting to the beneficiary. One of these three employees, , was identified as the beneficiary's subordinate on both charts. Another employee, , was identified as "accounting staff" at the time of filing and as "sales staff (textile business)" on the new chart. According to their attached resumes, both employees identify their roles as "sales and assistance," and list responsibilities for inventory, accounts receivable, shipping documents, logistics and business communications. The third "sales staff" on the new chart indicates on his resume that he was hired several months prior to the date of filing, but he did not appear in the previous organizational chart. This employee indicates his job title as "Import & Export (Sales & Logistics)" in his resume and does not claim to perform any sales duties.

Based on the foregoing unexplained discrepancies, it remains unclear who will actually report to the beneficiary or what duties they perform. Again, 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. at 591-92.

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.

On appeal, the petitioner contends that the beneficiary will act in a qualifying executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex 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.*

The petitioner has not submitted sufficient evidence to demonstrate that the beneficiary will be employed in a qualifying executive capacity. First, the petitioner states that the beneficiary will supervise three sales professionals thereby qualifying him as acting in an executive capacity. However, 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).

In the present matter, the petitioner has not submitted evidence to establish that the beneficiary will be primarily responsible for directing the management of the organization or establishing goals and policies. Indeed, the totality of the evidence suggests that the beneficiary will act merely as a first-line supervisor of sales representatives processing orders from customers. The petitioner has not provided specifics regarding the goals and policies that the beneficiary will be responsible for or the management the beneficiary will direct. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The beneficiary's duties reflect that the he will be primarily responsible for reporting information to his superiors abroad, collecting information, and other operational duties, rather than the actual formulation and implementation of policy for the organization. For example, the petitioner explains that the beneficiary will devote his time to the following tasks: 20% to reviewing operational record and reports, 15% to coordinating monthly sales reporting, 15% to conferring with customers regarding their needs and advising them on types of equipment, 5% to conferring with department heads to plan advertising services and secure information on equipment and customer specifications, and another 10% to directing the keeping of records. As such, the beneficiary's duties indicate that he will devote approximately 65% of his time to operational duties related to the collection of information and the direct provision of services to customers, rather than performing duties relevant to setting goals and policies or directing the management of the organization.

An audited annual report from 2010 submitted on appeal only further supports a conclusion that the beneficiary will primarily perform duties relevant to collecting information for his superiors and performing operational duties, rather than exercising discretionary authority, setting policies and goals, and directing the management of the organization. The aforementioned annual report, authored by certified accountants, confirms that the Korean parent company makes all decisions for the petitioner and states that the petitioner is "merely performing the role of accepting orders on behalf of the parent." The duties of the beneficiary's subordinates support this conclusion, as the petitioner indicates that these employees will be primarily responsible for communicating orders, pricing and delivery information and managing inventory, instead of performing professional-level duties as necessary to raise the beneficiary to a position beyond that of a first line supervisor of non-professional employees. In fact, the petitioner has submitted purchase order and shipping information that lists the beneficiary as a primary contact and emails detailing the beneficiary processing orders for customers, suggesting that the beneficiary will continue to perform these operational duties in his proposed capacity in the United States. As such, the petitioner has not established that the beneficiary will exercise the requisite level of discretionary authority, or that he will primarily perform qualifying duties related to the setting of goals and policies and the direction of management. Therefore,

the petitioner has not established that the beneficiary will be employed in a qualifying executive capacity as asserted on appeal.

Prior to the denial of the petition, the petitioner contended that the beneficiary qualified as a manager through his supervision of three professional sales employees in the United States. 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*). In the present matter, the petitioner does not contend that the beneficiary qualifies as a function manager, as such, the AAO will only consider whether the petitioner has established that the beneficiary acts as a personnel manager. However, as discussed, the petitioner has submitted inconsistent information and evidence regarding who the beneficiary will supervise and what job duties they will actually perform, notwithstanding the petitioner's consistent claim that his subordinates have the job title "sales staff."

The petitioner has not demonstrated that the beneficiary will act as a personnel manager. As noted, the petitioner stated that the beneficiary will have three subordinate employees, none of which have subordinates of their own. Therefore, the petitioner cannot qualify as a personnel manager through the supervision of other managers and supervisors. As such, whether the beneficiary will act as a personnel manager rests on whether the beneficiary's subordinates are professionals, as is asserted by petitioner throughout the record. 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 that the beneficiary's claimed subordinates are professionals as defined by the regulations. Although the petitioner has submitted resumes on appeal that indicate that the beneficiary's three subordinates have baccalaureate degrees, the holding of a degree alone does not establish a subordinate as a professional. The petitioner must establish that the specific degree is a prerequisite to entry into the field and reflective of knowledge or learning of an advanced type gained by a prolonged course of instruction or study. First, the petitioner does not assert, or provide evidence to support, a conclusion that the sales and marketing positions subordinate to the beneficiary require a certain type of prerequisite degree, or even a baccalaureate degree. The petitioner only vaguely states that the beneficiary's subordinates are professionals. Going on record without supporting documentary evidence is

not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Further, the duties of the beneficiary's subordinates include the communication of orders, pricing, and delivery information and the management of inventory, rather than professional-level duties. Therefore, the petitioner has not established that the beneficiary's subordinates are managers, supervisors or professionals as required to qualify him as a personnel manager.

In conclusion, the petitioner has failed to submit a sufficient position description for the beneficiary, despite the director's direct request. Further, the duties submitted do not indicate that the beneficiary will be primarily engaged in setting goals and policies and directing management as necessary to support the petitioner's claim that he will act in a qualifying executive capacity. Also, the petitioner has submitted inconsistent information regarding the beneficiary's claimed subordinate staff and has not demonstrated that the beneficiary will oversee other managers, supervisors, or professionals as required to establish him as a personnel manager. Therefore, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal must be dismissed.

C. Managerial or Executive Capacity (Foreign)

The last issue addressed by the director was whether the petitioner established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity for at least one year during the three years preceding the filing of the petition.

In denying the petition on this ground, the director noted the petitioner's failure to provide information regarding the beneficiary's foreign employment expressly requested in the RFE, including information regarding the percentages of time the beneficiary spent on his proffered duties. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner does not contest the director's finding that the petitioner had not established that the beneficiary was employed in a managerial or executive capacity with the foreign employer. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

The AAO will not disturb the decision of the director. Again, 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 duties provided for the beneficiary's position with the foreign entity are insufficient to establish that the beneficiary primarily performed executive or managerial duties. In fact, the beneficiary's foreign duty description is largely identical to the duties in the United States, which were previously analyzed herein and found to indicate that the beneficiary spent a majority of his time on non-qualifying duties. Further, the beneficiary's duties are overly vague and fail to convey his day-to-day activities. For instance, the petitioner states that the beneficiary spent 20% of his time directing and

coordinating activities involving sale of manufactured products, 20% directing foreign sales and service outlets of [the] organization, and 10% of his time monitoring customer preferences to determine the focus of sales efforts. In each case, the petitioner failed to provide details or examples of the day-to-day activities that make up these general duty categories. It is reasonable to expect that the petitioner would provide these specifics, particularly since the beneficiary is stated to have worked in this role for several years. 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. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Overall, 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).

As such, the petitioner has not established that the beneficiary has been employed in a qualifying managerial or executive capacity abroad for one of the three years preceding the filing of the petition. For this additional reason, the appeal must be dismissed.

III. Conclusion

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

ORDER: The appeal is dismissed.