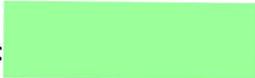




U.S. Citizenship
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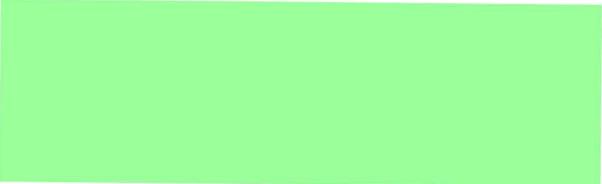
(b)(6)



DATE: **MAY 06 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 a 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 Florida limited liability company, operates a telecommunications products and services company. The petitioner states that it is a subsidiary of [REDACTED], the beneficiary's foreign employer located in the Czech Republic. The beneficiary was previously granted one year in L-1A classification in order to open a new office and the petitioner seeks to extend his status so that he may continue to serve as business development manager.

The director denied the petition finding that the petitioner failed to establish (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; or (2) that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director's conclusions were based on a misinterpretation of the submitted evidence and applicable law.

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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

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

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other

employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

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.

II. U.S. Employment in a Managerial or Executive Capacity

The first issue addressed by the director is whether the petitioner has established that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

A. Facts

On April 15, 2013, the petitioner filed the Form I-129 stating that the beneficiary will be employed as a business development manager. The petitioner stated on the Form I-129 that it has gross annual sales of \$1.2 million and five current employees.

On the Form I-129, the petitioner described the beneficiary's duties as follows:

[The beneficiary] is in charge of the north eastern region of the US to establish relations and bring in key customers, major accounts such as government facilities, school boards, private schools, high security business. . . . He is further

responsible for obtaining securing and negotiation [sic] other major projects and is in charge of managing all matters related to this [sic] projects. [The beneficiary] is a head of a subcommittee developing strategies for purchasing and marketing. [The beneficiary] recommends marketing strategies and practices and discussed new projects and ideas with the subcommittee members.

In a letter dated April 8, 2013, the petitioner stated that the beneficiary was transferred to the United States to serve as an "account manager" and will continue to serve in this position. The petitioner described the beneficiary as "a head of a subcommittee developing strategies for purchasing and marketing." The petitioner stated that the beneficiary is "responsible for analyzing and reviewing sales and marketing practices and creating new marketing applications." The petitioner further stated that "the business development managers are responsible to him as is a research staff and accountants."

The petitioner also provided a copy of the beneficiary's resume, in which he states that his role as business development manager involves searching for and defining new business opportunities, cooperating with the research and development (R&D) department on new products and features required by customers, and cooperating with the marketing department on new sales campaigns.

The petitioner provided a business plan indicating that the company has divided the United States into three regions for sales and strategy purposes. The business plan included a chart depicting the beneficiary as responsible for the Northeastern region of the United States, while two other individuals, [redacted] and [redacted] were each identified as responsible for one of the remaining two regions.

The petitioner's organizational chart depicted [redacted] as chief executive officer (CEO) with five direct subordinates; one of which is the beneficiary identified as business development manager. The remaining four individuals reporting to the CEO included a full-time product specialist, [redacted] and three full-time contractors, [redacted] and [redacted] who are identified as business development managers. The organizational chart did not depict a research staff, accountants, or any other staff subordinate to the beneficiary. Rather, the chart reflects that all employees and contractors directly report to Mr. [redacted]

The petitioner provided evidence of wages paid to the beneficiary and Mr. [redacted] as well as copies of invoices for consulting services submitted by the three contract employees. Finally, the petitioner provided resumes for all other individuals identified on its organizational chart.

On April 26, 2013 the director issued a request for evidence (RFE). The director instructed the petitioner to provide the following relating to the beneficiary's U.S. employment : (1) a detailed statement describing the beneficiary's duties for the previous year and those to be performed under the extended petition; (2) a detailed statement listing the number of employees and types of positions; its payroll summary and IRS Forms W-3 and W-2 evidencing wages paid to employees; and (3) a current organizational chart that clearly identifies the beneficiary's position and all employees under his supervision by name, job title, summary of duties and salary.

In response to the RFE, counsel asserted that the director requested evidence already submitted as part of the initial petition and reiterated that the beneficiary's prior foreign employment and employment in his current position had already been approved in the previously submitted "new office" petition.

Nevertheless, counsel provided additional descriptions of the beneficiary's duties as business development manager. Counsel asserted that during the previous year, the beneficiary oversaw the continuation of the start-up operations and spent a minimum of 60 to 70% of his time engaged in the following activities:

- Prepare a detailed sales plan outlining the company's measurable goals and objectives and determining the methodology to assess whether the company is making suitable progress towards achieving those goals and objectives. [The beneficiary] was on the North East part of the US market (35% of the 60%);
- For the overall corporation, determine necessary on-going funding for the U.S. company, developing a workable budget and assessing financial commitment of the parent company (25% of the 60%);
- For the overall corporation, work with business brokers, attorneys, real estate agents and other professionals to seek out potential business opportunities and review proposals, financials and due diligence assessments to determine feasibility of additional investments (20% of the 60%);
- For the overall corporation, ultimately determine the direction of the company, report to the parent company on suitability of its subsidiary venture and make and execute decisions to enable additional acquisitions and management (20% of the 60%);
- For the first sport facility services, the Beneficiary spent approximately 40% engaged in the following duties:
 - Conduct needs assessment and determine appropriate staffing levels the recruit, hire and train staff (40% of the 40%);
 - Establish policies, processes and procedures for the day-to-day business operations and oversee their implementation (30% of the 40%);
 - Assess historical advertising and marketing activities, determine necessary actions and calculate budgetary requirements and authorize expenditures (15% of the 40%);
 - Negotiate contracts to obtain optimal inventory and control costs, ensure compliance with all government agencies and ensure all licenses are adequately maintained (10% of the 40%);
 - Prepare reports, modify sales plans and develop business (5% of the 40%)

The petitioner also provided a statement of job duties which included essentially the same information. Counsel reiterated that the beneficiary is "in charge of the Northeast Region of the US." Counsel stated that beneficiary meets with the petitioner's CEO on a weekly basis, is head

of a subcommittee developing strategies for purchasing and marketing, and "recommends marketing strategies and practices and discusses new projects and ideas with the subcommittee members."

Counsel further stated that the beneficiary "is responsible for analyzing and reviewing sales and marketing practices and creating new marketing applications." Counsel stated that the beneficiary will continue to oversee other business development managers, accountants and research staff. Finally, counsel indicated that the beneficiary "meets with the city authorities, assigns jobs to his billing administrator to prepare all licensing, permits; has a group of contractors that are in charge of the company's products and services."

In addition, both counsel's letter and the petitioner's statement included the following breakdown of the beneficiary's duties:

Percentage of time spent on each duty:

40% for managerial duties such as:

- Responsible for the day-to-day operations;
- Establish relations with suppliers and manufacturers;
- Plan all sales initiative;
- Prepare marketing meetings with potential customers;
- Conduct all financial operations and work with banks;

40% for business-related duties such as:

- Oversee the development of new investments for the company in the future
- Negotiate new contracts;
- Analyze cost and determine pricing and profit margins;
- Determine the price/quality ratio of all products;
- Track incoming funds and receivables;
- Organize future distribution network;
- Set all business policies and practices;
- Set client credit line;
- Manage fundamental issues as (*sic*) such as permits, legal affairs, contracts,
- Safety regulations.

20% for Administrative duties such as:

- Hire and fire employees in accordance with all applicable laws;
- Recommend Personnel Actions.

In the letter, counsel stated that the petitioner's three other business development managers are "responsible for analyzing the operations including evaluating the staffing structure and implementing changes if required and reviewing and analyzing the sales and marketing practices." These managers were to be "responsible for a thorough assessment of the state of the current business activities and overseeing further market studies, negotiate new lease arrangements and product representations, investigate growth opportunities and manage all activities to plan and implement corporate expansion within the United States." In addition,

counsel stated that the business development managers "will report directly to the shareholders and will be responsible for establishing the new goals and specific objectives and methodologies of the U.S. business operations." Counsel also provided a breakdown of the business development managers' duties which was essentially identical to the beneficiary's duty description.

Finally, counsel indicated that the product specialist is "responsible for all assignments of the manager to complete in timely manner. He is directly responsible for the product introductions and presentations to new business and investors. He will be in charge of technical support and other technical issues."

The petitioner's response to the RFE also included additional evidence of wages and fees paid to employees and contractors, and a copy of its consulting agreement with [REDACTED] Inc.

After a review of the evidence, the director denied the extension petition finding that that the petitioner failed to demonstrate that it would employ the beneficiary in a qualifying managerial or executive capacity. The director observed that, given that the petitioner has only one other full-time employee and three contractors, the beneficiary would primarily perform non-qualifying duties associated with the day-to-day operations of the company.

On appeal, counsel for the petitioner asserts that the director erred by failing to adequately review the evidence and erroneously interpreted the law. The petitioner reiterates that the beneficiary was previously approved for a one year petition to open a new office on behalf of this petitioner and now seeks to extend that stay based on the same managerial position. Counsel states that the director incorrectly assumed that the beneficiary will be engaged in low level tasks merely because of the petitioner's staffing levels.

Counsel asserts that sufficient evidence was submitted to support the petition. Counsel states "the beneficiary is the head of the team of 3 professional managers who travel throughout the United States to their assigned regions promoting the product and working directly with other potential distributors throughout the country." Further, the petitioner asserts "a majority of beneficiary's duties are related to managing a major component of the US business as his focus is on the entire northeastern region of the US market." Counsel contends that the director failed to consider the beneficiary's management of major key accounts, managerial responsibility for the northeastern region of the United States, and his supervision of professional business managers as a whole in adjudicating this petition. Counsel asserts that the petitioner described the beneficiary's duties as follows:

1. Marketing Strategies and Preparation of detailed sales plan for the Northeastern region of the United States market....Approximately 35%
2. Budget, Pricing, and Branding and developing a workable budget and assessing financial commitment of the parent company to present to the CEO of the US company....Approximately 20%
3. Personal Decision-making....Approximately 10%
4. Strategic Planning....Approximately 10%

5. Sales Analysis....Approximately 5%
6. Sales Team Support....Approximately 15%
7. Goals and Objectives....Approximately 5%

In support of the appeal counsel asserts "there is no legal requirement for subordinate employees or team employees to be on the petitioner's U.S. payroll as the Service claims." Counsel asserts that the director overlooked the position descriptions provided for all employees and contractors.

Notably, counsel references a major account held by the petitioning company and states on appeal that "[t]he beneficiary's duties are primarily related to the management of an essential function, specifically, the management of one of the petitioner's major accounts." Counsel claims that "there is a team assigned to this account which includes U.S. employees, foreign entity employees to complete manufacturing and delivery, and other external vendors."

B. Analysis

Upon review, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

At the time of filing, the petitioner submitted a brief and vague description of the beneficiary's duties noting that he is responsible for establishing relations, bringing in key customers and accounts, negotiating and managing "major projects," heading a subcommittee on purchasing and marketing matters, and recommending marketing strategies and practices. While these job duties generally identify the beneficiary's area of responsibility as sales and marketing, the petitioner provided insufficient information to establish that his actual duties would be managerial or executive in nature, or whether he would be directly perform non-managerial sales and marketing functions. The petitioner 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).

In addition, the petitioner referred to the beneficiary's role as "business development manager" on the Form I-129 and as "account manager" in its support letter, job titles which could denote different levels of authority and responsibility. 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).

While the petitioner submitted lengthier position descriptions in response to the RFE, it also provided two different job duty breakdowns for the same position, making it difficult to discern how much time the beneficiary actually allocates to any duties mentioned in either description. The petitioner explained that the beneficiary will be in charge of duties falling into three general categories as follows: 40% managerial, 40% business-related and 20% administrative.

Specifically, the petitioner listed broad and vague tasks such as "responsible for day-to-day operations," "conduct all financial operations and work with banks," and "oversee the development of new investments for the company in the future." Moreover, the petitioner also referred to the beneficiary's duties during the previous year by dividing the beneficiary's time into ten different areas and assigning percentages to each area. The petitioner stated that the beneficiary would continue to perform these same duties; however, the petitioner did not explain how these two different descriptions could be reconciled or what would constitute the beneficiary's primary duties. 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.

On appeal, counsel for the petitioner asserts that the beneficiary has "specific managerial responsibilities" that have been described in the record, but then introduces a third description of duties which provides seven broad and vague headings, each assigned a percentage of the beneficiary's time such as "Personal Decision-making...Approximately 10%" and "Sales Team Support...Approximately 15%." With each position description submitted, the petitioner has provided little insight or clarification into how the beneficiary will spend his day. 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. 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).

A number of the beneficiary's proposed duties as described in the record could be classified as non-qualifying duties associated with the company's sales, marketing, purchasing and financial functions. For example, the petitioner states that the beneficiary will "establish relations with suppliers and manufacturers," "prepare marketing meetings with potential customers," "conduct all financial operations and work with banks," "negotiate new contracts," and "track incoming funds and receivables." The petitioner did not explain how any of these duties rise to the level of managerial or executive capacity or how much time each general task would consume. For this reason, the AAO cannot determine whether the beneficiary would perform duties that are primarily in a managerial capacity. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

In this matter, the petitioner has not corroborated its claims that the beneficiary has subordinate employees or that he otherwise has staff available to perform non-qualifying duties associated with his area of responsibility. The petitioner explained that the beneficiary is responsible as the business development manager for the northeast region of the United States and claims that contractors engaged to perform as business development managers are also responsible to the beneficiary. The evidence of record does not support this claim.

First, the petitioner's organizational chart indicates that all four business development managers report directly to the company's CEO. This information is consistent with the duty descriptions provided for the three other business development managers, which are similar to the beneficiary's and which do not reference any reporting responsibility to the beneficiary. In fact, the descriptions indicate that the consultant business development managers report to the company's managing members. Further, the petitioner's business plan reflects that the business development managers each have their own geographic area of responsibility, information which further supports a conclusion that the positions are lateral to each other. Counsel's claim that the "beneficiary is the head of the team of 3 professional managers who travel throughout the United States" is simply not supported by the evidence. The petitioner has not demonstrated the beneficiary is at the head of a team comprised of business development managers. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's claim that the beneficiary could rely on a research staff and accountants for support is not supported by the record. The petitioner's only documented employee apart from the business development managers is a product specialist. The petitioner has not established that this employee performs research or accounting functions and has not submitted evidence that he reports to the beneficiary. Rather, the evidence submitted tends to confirm the reporting structure depicted in the organizational chart and the absence of any staff reporting to the beneficiary.

Counsel correctly asserts that there is no legal requirement that the beneficiary supervise payroll employees. However, it is necessary for the petitioner to establish that employees or contractors are actually subordinate to, or at least available to, the beneficiary so that he will be relieved from performing the non-managerial duties associated with his area of responsibility. This has not been established in this matter. The petitioner has not established who is available to support the business development and sales function for the northeast region of the United States, nor has it established that the beneficiary's responsibilities associated with this regional responsibility would require him to perform primarily managerial job duties.

Overall, while the petitioner has provided several position descriptions for the beneficiary, the descriptions included non-qualifying duties, are overly-broad, refer to supporting staff who have not been documented (such as a research team and accountants), and are inconsistent when compared. Further, the petitioner has provided an unclear and inconsistent description of its personnel structure, and has not established that the beneficiary would perform primarily

managerial or executive duties or that he would be relieved from performing non-qualifying duties.

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). As discussed, the petitioner has not corroborated its claims that the beneficiary supervises managerial or professional employees or that he otherwise primarily supervises a subordinate staff.

On appeal counsel asserts that the beneficiary's duties are primarily related to "managing a major component of the US business as his focus is on the entire northeastern region of the US market." Counsel further asserts that the beneficiary manages at least one major account which can be considered an essential function of the organization. Counsel states that this account has a team that "includes US employees, foreign entity employees to complete the manufacturing and delivery and other external vendors."

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See section 101(a)(44)(A) and (B) of the Act, see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In this matter, the petitioner has not provided evidence to establish that the beneficiary manages an essential function rather than actually performing the duties of the function. As business development manager and "head of a subcommittee developing strategies for sales, purchasing and marketing" counsel for the petitioner stated that the beneficiary is responsible for "reviewing sales and marketing practices" however the petitioner provided insufficient evidence identifying other subcommittee members or employees engaged in actual sales or sales related duties of the beneficiary's region. Furthermore, the petitioner did not sufficiently establish the employment of

the research staff, accountants and billing administrator that counsel claimed would support the beneficiary.

On appeal, counsel for the petitioner asserts that the beneficiary is responsible for managing a major account; an account that is "a critical link in managing the sales function" between the petitioner and one of the petitioner's key clients in the Northeastern region of the United States. Counsel refers to the petitioner's team of foreign and U.S. employees assigned to "complete the manufacturing and delivery and other external vendors" but does not provide evidence to sufficiently establish the nature and identity of this team. The AAO does not doubt that the beneficiary is responsible for developing significant customer relationships and generating significant sales in his region but the petitioner must establish that the beneficiary is actually managing the function and is relieved from performing those non-qualifying duties relating to the function on a day-to-day basis.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. However, 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. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Further, in the present matter, the regulatory requirements for the extension of a "new office" petition require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The AAO notes that counsel refers to unpublished decisions in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification in different scenarios despite a lack of staff where the beneficiary "was involved in very specialized business functions which require a high degree of sophistication." Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel also cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), to stand for the proposition that the small size of a petitioner and lack of staff will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. The court emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. USCIS interprets the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel available to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on a conclusion that the petitioner failed to establish that the beneficiary would be primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. *Id.*

Based on the evidentiary deficiencies and inconsistencies addressed above, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Foreign Employment in a Managerial or Executive Capacity

The second issue addressed by the director is whether the petitioner established that beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

A. Facts

The petitioner stated the foreign entity employed the beneficiary in the position of regional account manager prior to his transfer to the United States. The petitioner described the beneficiary's foreign duties on its Form I-129 as follows:

[The beneficiary] was the top Account Manager from his region. He managed a team of Managers and Customers Representatives to increase sales in that region. He prepared marketing practices and strategies for his division. He monitored the division sales on a daily basis and was in charge of resolving account issues and conflicts. He directed the day to day activities of that region and his division. He was responsible for establishing goals and policies for efficient operations and sales of his division. He accomplished a total sales of \$24 million in 2009.

According to the beneficiary's resume, he served as an area account manager in the foreign entity's International Sales department for four years. He indicated that he performed the following duties: building long-term relationships with customers and distributors; identifying and targeting prospective customers; setting up and maintaining a strategic sales plan for the territory; preparing sales agreements and negotiating business terms; product presentations and arranging training for customers' sales teams; cooperating with R&D and marketing departments on new products and features and new sales campaigns; participating in tenders, preparing offers

and terms and price negotiation; and participating in exhibitions. The beneficiary indicates that he received a "Salesman of the Year" award in 2009.

The petitioner submitted an organizational chart for the foreign entity that depicts the beneficiary as sole regional account manager subordinate to regional sales director, [REDACTED] of "sales group 54." The chart does not identify any employees subordinate to the beneficiary.

In the RFE issued on April 26, 2013 the director instructed the petitioner to provide: (1) a more detailed description of the beneficiary's duties and the percentage of time he spent on specific tasks; (2) the foreign entity's organizational chart clearly depicting the beneficiary's position; and (3) the names, job titles, job duties, education level and salary for all employees who reported to the beneficiary.

In response to the RFE, the petitioner provided additional documents including a letter from the foreign employer, a revised foreign company organizational chart, and a discussion regarding the beneficiary's employment.

In a letter dated May 22, 2013 the foreign employer described the beneficiary's duties, in part, as follows:

[H]is primary purpose was to prepare sales strategies, sales agreements with key accounts, conduct business terms negotiations, cooperation with R&D department on new products and features development, cooperation with marketing department on new sales campaigns, marketing support for corporate partners, participation in tenders, preparation of related offers as well as terms and price negotiation with our strategic partners/key accounts. [The beneficiary] was managing 3 employees on daily basis: [REDACTED] Marketing Specialist; [REDACTED] Customer Care Supervisor and [REDACTED] Warehouse Manager.

The foreign entity's letter further stated:

[The beneficiary] has been responsible for building long-term relationships with customers and distributors in assigned areas (USA, Canada, Sweden and Denmark), he was in charge of identifying and targeting prospective customers and discovering new business opportunities and all his administrative duties, marketing, warehouse orders were handled by the subordinate employees who have been managed by him to fulfill a number of tasks. [The beneficiary] was authorized to recommend personnel actions such as promotions and terminations of employment to ensure that his International Division is run efficiently and profitably. . . .

[The beneficiary] was responsible for setting up and maintaining strategic sales plan for the assigned territory. He was in charge of identifying and targeting prospective customers and new business opportunities. He was in charge of

directing tasks to his subordinate employees so they could deal with administrative paperwork such as product orders, return of phone calls, scheduling of meetings, printing materials, preparing marketing brochures, arranging travel and dealing with other departments such as billing, ordering, marketing and many other divisions. Two of his subordinates had Degrees from accredited Universities and therefore, [the beneficiary] supervised professionals and was in the position of a manager rather than a first-line supervisor.

The petitioner provided a second version of the foreign employer's organizational chart bearing the same date as the previously provided chart (January 1, 2012). According to this chart, the beneficiary appears to supervise the above referenced, warehouse manager and customer care supervisor (both employees within the customer care division), and a marketing specialist in the marketing division who appears to also report to a marketing manager. None of these employees appeared on the previously submitted version of the foreign entity's organizational chart bearing the same date. Notably, the beneficiary is the only person on the chart who is identified as supervising subordinates outside of his own division or department.

The petitioner also asserts that both the marketing specialist and customer care supervisor are professionals with master's degrees in their respective areas. The foreign entity stated that the beneficiary's claimed subordinates have the following duties:

- Marketing Specialist, [REDACTED] She is responsible for marketing campaigns, arranging events such as shows, exhibitions and marketing research preparation and collecting related data.
- Customer Care Supervisor, [REDACTED] She is responsible for logistic matters, optimization of delivery periods and related costs, matters related to delivery terms, customer's financial standing verification, prices verification, production costs monitoring and communication with customer's procurement departments.
- Warehouse Manager, [REDACTED] Collecting purchase orders and providing related information about deliver times, dispatch of goods and its availability.

The director concluding that the petitioner failed to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. The director observed that none of the evidence established that the beneficiary had assistance with day-to-day activities relating to his role in the sales department.

On appeal, counsel asserts that the petitioner provided ample evidence to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. Counsel asserts that there is no legal requirement that the beneficiary manage professionals within his own division. Counsel contends that the beneficiary "was responsible for essential function of International Sales Division" and "was managing and directing people who contribute on successful business with those accounts." Counsel maintains that the director failed to consider the company's needs.

B. Analysis

Upon review, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity abroad.

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). Here, while the beneficiary managed major accounts in his assigned geographic territories, the submitted job descriptions fail to establish that his actual duties were primarily managerial in nature. For example, the petitioner submitted a copy of the beneficiary's resume, in which he states that his duties included identifying and targeting customers, preparing sales agreements, product presentations, arranging training, participating in preparation of tenders and offers, and attending telecommunications exhibitions as an exhibitor. Many of these duties are non-managerial and are quite different from the duties attributed to the beneficiary on the Form I-129 and in the petitioner's and foreign entity's letters. 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).

The petitioner stated that the beneficiary's primary purpose was to prepare sales strategies and sales agreements, handle business negotiations, cooperate with other departments and prepare offers. While these duties suggest that the beneficiary was responsible for all aspects of business development and sales for his particular territory; however, the petitioner did not provide specific tasks and percentages of time spent on any particular tasks to demonstrate how the beneficiary actually allocated his time. 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 petitioner has also submitted inconsistent information regarding the beneficiary's supervisory responsibilities. As noted above, the beneficiary's job description as stated in his resume included no supervisory functions. The petitioner stated on the Form I-129 that the beneficiary supervised a team of "Managers and Customer Representatives." The foreign entity's organizational chart submitted at the time of filing shows no subordinate employees reporting to the beneficiary. In response to the RFE, the petitioner identified the beneficiary's former subordinates as a customer care supervisor, a warehouse manager, and a marketing specialist and amended the organizational chart accordingly without any explanation for its submission of two different organizational charts bearing the same date. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

While there is no requirement that an employee supervise subordinates within his or her own division or department, the amendment of the original chart, combined with the fact that the beneficiary appeared to be unique in his supervision of employees outside of his own division, raise questions regarding the reliability of the information provided in the revised chart. For

example, the foreign entity indicated that the beneficiary had the ability to promote and terminate staff under his supervision to ensure that the International Sales division runs efficiently. It is reasonable to question whether this was the case given that his subordinate employees also reported to their own division managers. The evidence as a whole does not support a finding that the beneficiary, as a regional account manager responsible for sales in four specific markets, had the authority to fire employees working under other managers in other divisions.

The petitioner has failed to provide consistent, credible evidence to establish that the beneficiary supervised a staff in his role as a regional account manager and therefore cannot establish that he qualified as a personnel manager. Moreover, even if the petitioner had established that the beneficiary supervised the warehouse manager, customer care supervisor and marketing specialist, the record does not establish that these employees relieved the beneficiary from directly selling the foreign entity's products. As noted, the beneficiary indicates that his duties included identifying and targeting customers, preparing sales agreements, product presentations, arranging training, participating in preparation of tenders and offers, and attending telecommunications exhibitions as an exhibitor. The petitioner has not claimed that any of these non-managerial sales-related duties were delegated to the beneficiary's claimed subordinates.

Further, the petitioner has not provided evidence to establish that the beneficiary managed an essential function. The petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary managed the function rather than performed the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* section 101(a)(44)(A) and (B) of the Act, *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). In this matter, as previously noted, the petitioner provided a broad list of the beneficiary's general responsibilities and failed to establish that the beneficiary will have the appropriate and dedicated staff necessary to perform the day-to-day duties essential to supporting the claimed function. Further, the beneficiary's duty description included several non-qualifying duties and there is insufficient evidence that such duties were delegated to the claimed subordinates. Again, while we do not doubt the beneficiary's responsibility for developing customer relationships and generating sales in his assigned regions, the petitioner must establish that the beneficiary's actual day-to-day duties were primarily managerial or executive in nature and that he was relieved from performing non-qualifying duties associated with the function. The petitioner has not met that burden.

Accordingly, the petitioner has not established that the foreign company employed the beneficiary in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

IV. Qualifying Relationship

Beyond the decision of the director, a remaining issue in this matter is whether the petitioner established that it maintains a qualifying relationship with the beneficiary's foreign employer. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). 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).

Here, on the Form I-129, the petitioner indicated that it is a subsidiary of the foreign entity, but at the same time stated the same three individuals own and control both companies, facts which would suggest an affiliate relationship. Specifically, the petitioner stated that it is owned by the following individuals: [REDACTED] (51%), [REDACTED] (29%), and [REDACTED] (20%). The petitioner stated that the same individuals own the foreign entity, but did not provide the percentage interest owned by each person.

The petitioner provided a copy of its operating agreement dated June 20, 2011 which states at Exhibit A that it is owned by [REDACTED] (51%), [REDACTED] (29%) and [REDACTED] (20%). The petitioner also provided copies of three membership certificates, all bearing the same date as the operating agreement, indicating the following members: (1) certificate 001 indicates that [REDACTED] owns 510 membership interests; (2) certificate 002 indicates that [REDACTED] owns either 510 or 290 membership interests¹; and (3) certificate 003 indicates that [REDACTED] owns 200 membership units. In response to the director's request for additional evidence to establish the qualifying relationship, the petitioner also provided minutes from its annual meeting on March 4, 2013 reiterating the percentage of interest held by each of the three members as first noted in the letter.

Regarding the foreign company, the petitioner claimed that both companies were owned by the same three individuals but the petitioner did identify or document the ownership interest of these individuals in the foreign entity. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner initially provided an uncertified extract translation of the foreign company's registration indicating a basic capital of 51150000 CZK but the document provided no ownership information. In response to the director's RFE, the petitioner provided "proof of ownership" dated May 22, 2013, from the County Court of Prague "verifying ownership." The AAO notes that the Czech document appears to be nine pages long while the translated extract is limited to a single page. The single page is titled "The Abstract Of Business Record." The body of the document identifies three "executives" and five board of director members. The three executives

¹ Certificate no. 002 states "This certifies that [REDACTED] is the registered holder of 510 Membership Interest(s). . . ." However, in the upper right-hand corner of the same certificate, the number of interests issued is stated as "290." 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).

listed are [REDACTED] and [REDACTED]. Some additional identifying information was included on the form but nothing that would establish ownership by these individuals or the allocated percentage of ownership. Notwithstanding the director's acceptance of the document, the AAO finds that the document does not sufficiently establish the foreign company's ownership. The regulation at 8 C.F.R. § 103.2(b)(3) provides that any document containing a foreign language submitted to USCIS shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. The petitioner appears to have provided only a partial translation of this document. Further, the translated portion provides no details regarding the ownership of the foreign entity.

In addition, notwithstanding the petitioner's assertions noted above, the petitioner submitted a letter dated April 12, 2013, stating that the foreign company "currently holds a controlling interest" in the petitioning company. This contradictory claim was also not supported by any documentation. 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.

The petitioner has provided inconsistent evidence of its ownership and no probative evidence to establish the actual ownership of its claimed foreign affiliate or parent company. According, the petitioner has failed to establish that it has a 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).

The petitioner noted that USCIS approved the petitioner's previous L-1A petition filed on behalf of the beneficiary. However, the previous petition was a new office petition subject to the evidentiary requirements at 8 C.F.R. § 214.2(1)(3)(v) and the present petition is subject to the evidentiary requirements at 8 C.F.R. § 214.2(1)(14)(ii). The regulations require a new determination with respect to the beneficiary's U.S. employment based on the petitioner's progress in carrying out its business plan during the first year in operation and the beneficiary's actual duties at the end of that year.

Further, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record with respect to the beneficiary's foreign employment and the petitioner's qualifying relationship with the foreign entity, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been

demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

V. Conclusion

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

ORDER: The appeal is dismissed.