



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **NOV 03 2014** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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 a Form I-129, Petition for a Nonimmigrant Worker, seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Rhode Island limited liability company established in 2013, states that it is engaged in the exportation of toys and accessories. The petitioner asserts that it is an affiliate of [REDACTED] located in Lebanon. The petitioner seeks to employ the beneficiary as the chief executive officer of a "new office" in the United States for a period of one year.

The director denied the petition, finding that the petitioner did not establish that the beneficiary is employed by its foreign affiliate in a qualifying managerial or executive capacity. Further, the director concluded that the petitioner did not demonstrate that the beneficiary would be employed in the United States a qualifying managerial or executive capacity within one year of the approval of the petition. Finally, the director found that the petitioner had not established that it will be doing business in the United States.

On appeal, the petitioner contends that the director abused his discretion in concluding that the beneficiary does not act in qualifying managerial or executive capacity abroad. The petitioner states that the director improperly concluded that the beneficiary will not act in a managerial or executive capacity with the petitioner after one year based solely on his non-qualifying position abroad. Lastly, the petitioner asserts that it will not be a mere agent of the foreign entity in the United States, but that it will be doing business by actively acquiring goods for distribution in Lebanon.

I. THE LAW

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

II. THE ISSUES ON APPEAL

A. MANAGERIAL OR EXECUTIVE CAPACITY (FOREIGN)

The first issue to be addressed is whether the petitioner has established that the beneficiary has been employed abroad in a qualifying managerial or executive capacity for one continuous year in the three-year period preceding the filing of the petition.

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.

1. Facts

The petitioner filed the Form I-129 on January 3, 2014. The petitioner stated that the foreign entity imports and sells electronic games and toys in Lebanon. The petitioner indicated that the foreign entity is "the exclusive Lebanese distributor for [REDACTED] located in Dubai" and that it supplies electronics and toys to [REDACTED] retail locations in Lebanon. The petitioner asserts that [REDACTED] purchased more than \$1 million in merchandise from the foreign entity in 2013. The petitioner explained that the foreign entity earns the equivalent of \$80,000 to \$100,000 in net profits annually.

The petitioner indicated that the foreign entity's subordinate staff includes a full-time office manager, a part-time truck driver, a part-time purchasing manager, an "outside accountant," a part-time marketing manager, outside counsel, and a part-time economic consultant. The petitioner described the beneficiary's duties as follows:

[The beneficiary's] position as chief executive officer has involved his supervision of all of the company's other employees and contractors. He has and continues to exercise discretion over day to day operations. He establishes [the foreign entity's] goals and policies and has the ultimate discretion in decision making. He is responsible for making sure that all appropriate tax and other documents are properly filed and timely and that the company is well run. He has had this position since the company was founded in 2006. We envision with only minimal supervision by [the beneficiary] [the foreign entity] will be able to continue to run with the employees and contractors that it now has available to it.

The petitioner further indicated that the beneficiary and the office manager are the foreign entity's only long-term, full-time employees and that "all of the [other employees] are part-time casual workers and not actual employees of [the foreign entity]. The petitioner indicated that these casual workers "don't receive any official documentation from [the foreign entity] concerning their wages." The petitioner explained that the foreign entity was "self-sustaining" due to these employees abroad and that it would continue to operate during the beneficiary's assignment to the United States. The petitioner noted that it employs two part-time purchasing managers and an economic consultant with a master's degree in business administration who "helps in deciding which goods to purchase from [REDACTED] by doing research about the history of the particular product and then determining the number of units that should be purchased if any."

The petitioner submitted a letter from [REDACTED] stating that the foreign entity is "an authorized distributor of all interactive entertainment products . . . for which we have the sole rights to distribution in Lebanon." The petitioner provided various invoices from 2013 indicating the foreign entity's sale of electronic games and toys, each listing the beneficiary as the contact. The petitioner submitted audited financial statements for 2010, 2011 and 2012, none of which indicated any expenses relevant to the payment of wages to employees or fees to independent contractors.

The director later issued a request for evidence (RFE) stating that the petitioner did not submit sufficient evidence to establish that the beneficiary was performing qualifying executive or managerial duties. As such, the director requested that the petitioner submit copies of the beneficiary's personnel records and the foreign entity's organizational chart listing its employees by name, their job titles, duties, education levels and salaries. Further, the director asked the foreign entity to provide a letter describing the beneficiary's executive or managerial duties, including the time he spent on each task, an indication as to whether the beneficiary supervises supervisory or professional subordinates, and an explanation as to how the beneficiary makes daily decisions or establishes the goals and policies of the organization.

In response, the beneficiary provided a statement explaining his duties abroad. The beneficiary stated that he was responsible for the supervision of all of the company's employees and contractors and "ultimately responsible for not only the wholesale purchase of the products that we sell but also for the shipment of those products and their distribution to customers." The beneficiary explained that he oversees two professionals, an accountant and an attorney, both of who are independent contractors. The beneficiary stated that he is responsible for maintaining the company's licenses, including its exclusive license to sell [REDACTED] products, and further tasked with overseeing consultants performing due diligence on potential purchasing. The beneficiary indicated that he spends "the vast majority of my time in supervising the company's employees/consultants and overseeing its professionals." The beneficiary noted that he

meets with his attorney weekly on import and export regulatory issues and with his accountant daily to receive financial advice.

The beneficiary stated that the foreign entity's marketing manager "does marketing and graphic design," that the purchasing manager purchases goods, and that his economic consultant completes "economic analysis." He explained that each one of these employees holds "a degree" and that they provide recommendations to allow him to "make the final decision about which products to purchase and the amount."

Specifically, the beneficiary explained his duties abroad, in part, as follows:

I would estimate my average day in Lebanon as a [sic] CEO to be 10 hours long and would include two hours of administration (20%), reviewing our finances with our accounting firm to determine our financial position including our cash positions, accounts receivables, accounts payables and other appropriate information. Because we are a small company I need to be updated on the company's cash situation on a daily basis. I also use this time to oversee any personnel issues and to consult with our attorney if there are any legal issues that need to be resolved such as contract issues, etc. I also spend two hours (20%) a day assisting our retail customers and overseeing our marketing activities which are handled by [the marketing manager]. An additional two hours (20%) per day are spent in contact with our principle vendor [REDACTED] in negotiating with them for the purchase of additional merchandise and in trying to obtain reductions for products that have been purchased previously but are not selling well. Of course, the information that comes to me from our marketing department and the marketing manager's of our customers is what I must first review and analyze, to negotiate with [REDACTED]. I also rely on [the purchasing manager] to assist me in preparing purchase orders; we can literally order as many as 500 different items from [REDACTED] at one time. [REDACTED] has an ongoing inventory of approximately 750 to 1000 items. Because of the large volume and variety of the items being ordered and sold, I rely on my staff to help me. It is not as if someone could keep that many titles in their head at one time and I rely on their analysis of the data so that I can make the ultimate decision of what to buy, for how much and in what quantity. The remainder of my time (40%) is spent reviewing and marketing research provided to me by my staff and making executive decisions on what product to buy and in what quantities and then directing the buyer to actually make the order and making certain from our accountants that we will have sufficient funds to pay for the order. This time is also spent reviewing sales reports that are received by our office from the marketing manager at our major customers on a one week to ten day interval. I review their analysis and reports and then forward a compilation of them on to [REDACTED] so that we can improve our marketing and sales figures and determine which products are selling and which are not and what changes need to be made to increase sales.

The beneficiary further indicated that he receives market research from his economic consultant and that he uses the information he receives from his various subordinates to set the company's financial goals.

The petitioner submitted a letter from the foreign entity's attorney indicating that he has been working in this capacity for the last five years. The attorney notes that he specializes in corporate law and that the beneficiary makes executive decisions based on the advice he provides, such as deciding on the foreign entity legal entity type. The attorney stated that he speaks with the beneficiary on a weekly basis to go over the company's contracts and "to advise him of changes in the rules and regulations that could impact the company." The petitioner also provided a letter from the foreign entity's accountant acknowledging that he conducted financials audits for the foreign entity in 2010, 2011, and 2012 and that he handles all of the company's tax returns. The accountant explained that he and the beneficiary speak daily regarding the foreign entity's financial position.

The petitioner also provided the foreign entity's organizational chart, which indicates that the beneficiary supervises the subordinates previously asserted on the record. The chart reflected that the foreign entity compensated the beneficiary's subordinates as follows: the economic consultant earns \$300 per research project; the part-time purchasing manager is paid on a commission basis and earned approximately \$3,500 in 2013, the administrative employee makes \$800 per month, the marketing employee \$300-\$500 "per project," that the truck driver earns \$50 per diem plus expenses, and that outside counsel is secured with a \$2,000 retainer.

In denying the petition, the director stated that the evidence did not establish that the beneficiary was relieved from primarily performing non-qualifying operational duties.

On appeal, the petitioner states that the director abused his discretion by concluding that the beneficiary's subordinates have "extravagant job titles" and that they only work part-time. The petitioner asserts that the beneficiary supervises degreed professionals, including the referenced accountant, attorney and economic consultant. The petitioner contends that the foreign entity has sufficient employees to relieve the beneficiary from primarily performing non-qualifying operational duties as evidenced by its plan to continue operating during the beneficiary's absence. The petitioner states that the beneficiary's detailed duty description establishes that it is more likely than not that he primarily performs qualifying duties. Finally, the petitioner asserts that the director erroneously concluded that the beneficiary is engaged in sales when he in fact spends a majority of his time supervising his team members and reviewing their professionally prepared reports.

2. Analysis

Upon review of the record, the petitioner has not established that the foreign entity employed the beneficiary for at least one continuous year in the three years preceding the filing of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

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

The petitioner has submitted a position description which indicates that the beneficiary is primarily engaged in the performance of duties directly related to the provision of goods and services. The petitioner states that the beneficiary is ultimately responsible for wholesale purchase of products and assuring the shipment of the products to the foreign entity's customers. Although the petitioner asserts that the beneficiary receives assistance from a mostly part-time staff, this does not establish that the beneficiary is relieved from primarily performing non-qualifying operational tasks. For instance, the petitioner states that he spends 20% of his time "assisting retail customers" and another 20% working with its primary supplier on completing purchases of goods. The petitioner indicates that he "receives assistance" from his purchasing manager in the preparation of purchase orders, but given the purchasing manager's limited part-time status, it is not clear from the evidence presented that the beneficiary is relieved from non-qualifying activities such as placing orders. In fact, the beneficiary's name appears on each invoice presented on the record and there is no evidence presented to substantiate the assertion that the beneficiary is delegating non-qualifying tasks to his purchasing and marketing managers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The beneficiary's duties reflect that he is receiving assistance and support from his staff in performing his operational duties, but not primarily delegating these duties and directing his subordinates. In fact, despite claiming that the beneficiary is responsible for formulating policies, goals, and financial positions, the petitioner has not provided a specific example of one of these decisions, despite his employment with the company for several years. In sum, the beneficiary's duties indicate that he is primarily engaged in making every purchase and sale relevant to the foreign entity's operations. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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 understanding a beneficiary's actual duties and role in a business.

As noted, the petitioner contends that the beneficiary is relieved from primarily performing non-qualifying duties by his subordinate employees and independent contractors. However, the petitioner has not provided sufficient supporting documentary evidence to corroborate the foreign entity's employment of this staff, such as evidence of salaries and wages paid or invoices from its asserted independent contractors. The petitioner does not indicate or support how many hours per week the beneficiary's subordinates work to confirm that they could reasonably relieve the beneficiary from primarily performing operational tasks, an especially important evidentiary oversight given that five of the beneficiary's six subordinates are stated part-time employees and independent contractors. Although the petitioner states that the foreign entity employs a full-time office manager, it again has not corroborated this assertion with supporting documentary evidence. Again, going on record without supporting documentary evidence is not sufficient

for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

A primary assertion of the petitioner on appeal is that the beneficiary supervises and controls the work of professionals, and thereby, acts in a qualifying managerial capacity. The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

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 acts as a personnel manager with the foreign entity. As noted, the petitioner contends that the beneficiary qualifies as a personnel manager through his supervision of professional subordinates including an attorney, accountant, and economic consultant, stated to have a master's degree in business administration. However, the petitioner has not submitted sufficient supporting evidence to substantiate this assertion. For instance, although the beneficiary provides statements from his attorney and accountant asserting that they are regularly engaged, the petitioner has not provided any supporting evidence to substantiate this claim such as invoices from these professionals or evidence of fees paid. Further, the petitioner asserts that the foreign entity's economic consultant holds a master's in business administration, but has provided no evidence to corroborate this claim, nor documented the amount of time the beneficiary spends overseeing and directing this independent contractor. Indeed, in the absence of supporting evidence, the petitioner has not established that the beneficiary has oversight and control over these employees, since they are not employees of the foreign entity, but independent contractors consulted with from time to time as issues arise. The petitioner states directly on the record that "all of the [other employees] are part-time casual workers and not actual employees of [the foreign entity]." Therefore, the petitioner has not submitted sufficient evidence to demonstrate that the beneficiary is primarily engaged in the supervision of supervisory or professional subordinates. The evidence suggests that the beneficiary consults with mostly part-time independent contractors and does not allocate his time primarily to the oversight of this "casual" staff composed of non-employees.

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 established that the beneficiary is employed in a qualifying executive capacity. The petitioner has not substantiated that the foreign entity employs sufficient employees subordinate to the beneficiary to allow him to primarily focus on broad goals and policies of the foreign entity rather than its day-to-day operations. Indeed, as discussed previously, the petitioner has submitted a duty description reflecting that he is more likely engaged in the primary performance of non-qualifying operational duties.

As such, for the foregoing reasons, the petitioner has not established that the beneficiary acts in a qualifying managerial or executive capacity abroad. For this reason, the appeal must be dismissed.

B. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES)

The next issue to be addressed is whether the petitioner has established that the beneficiary will act in a qualifying managerial or executive capacity within one year. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

1. Facts

In support of the petition, the petitioner submitted a letter from its chief financial officer (CFO) wherein he explained that he works full-time for [REDACTED]. The CFO stated that due to his full-time employment that he would devote approximately 200 hours to the new venture during the first year. The CFO stated that he expected the company to earn \$450,000 during the first year and that the beneficiary would transfer from the foreign entity "to source and negotiate for the purchase of wholesale product" based upon his knowledge of the Lebanese market. The CFO stated that the beneficiary would supervise two professional employees, including a lawyer and an accountant, and that he would be responsible for establishing the new company's goals and policies and for making "significant discretionary and strategic decisions."

The letter explained the beneficiary's proposed duties in the United States as follows:

[The beneficiary] will be the Chief Executive Officer and the purchasing manager, and his position is full time. As Chief executive officer he will be the highest ranking corporate officer and will in charge of and responsible for the management of the entire organization including all employees and consultants. His salary will be \$50,000 for the first year. He will be the face of [the petitioner] to the outside world and will represent [the petitioner] in dealing with vendors. He will be responsible for the hiring and firing

of all subsidiary employees. [The beneficiary] will also be responsible for planning, directing and coordinating the purchasing of goods for sale in Lebanon. In doing such, he will determine the amount of merchandise to be purchased and will coordinate the purchase, shipping and the ultimate sale of goods to insure a profit. He will analyze the ever changing market and the appropriate delivery systems to determine which products to buy and in what amounts. He will represent [the petitioner] in formulating policies and negotiating contracts with suppliers. He will be aware of inventory levels of the ultimate purchasers of products to be sold in Lebanon.

The petitioner submitted a funds transfer notification document indicating that the foreign entity had transferred \$19,963 to the petitioner on November 26, 2013. The petitioner further provided a business plan stating that the objective of the petitioner was to "find multiple sources of reasonably priced toys in the US for shipment to Lebanon" and to "develop the necessary personnel and organizational structure to enable [the petitioner] to source and purchase toys for shipment to Lebanon." The petitioner indicated that the start-up funding for the company is \$27,000, to be provided by the beneficiary. The petitioner explained that the foreign entity would be its primary customer and that it would purchase inventory on a regular basis for shipment to Lebanon twice per month. The petitioner provided financial projections for the first year reflecting that it estimated that it would make \$460,000 in revenue and pay \$15,360 in salaries during the first year. On the very next page of the business plan, another projection indicated that the petitioner projected it would pay \$42,240 in full-time and \$9,984 in part-time wages during the first year.

In the RFE, the director stated that the petitioner had provided insufficient evidence to establish that it would support the beneficiary in a qualifying managerial or executive capacity after one year. Therefore, the director asked that the petitioner provide a letter indicating the proposed number and type of employees the petitioner will hire during the first year; the amount of the U.S. investment; and evidence demonstrating the ability of the foreign entity to pay the beneficiary during the first year. The director requested that the petitioner explain how the new venture will support the beneficiary in a qualifying managerial or executive capacity after one year and a business plan detailing each proposed action during the first year necessary to launch the business. In addition, the director asked the petitioner to provide a copy of its proposed organizational chart including the positions to be filled, duties, expected education levels and the names of any current employees.

In response, the petitioner submitted a statement from the beneficiary. The beneficiary explained that he decided that a presence in the United States was needed, namely, an entity "which could research concerning what product was available, and then negotiate, purchase and ship that product to Lebanon for sale to [foreign entity] customers." The beneficiary explained that he foresaw the petitioner having four employees by the end of the first year, including the beneficiary and the aforementioned CFO who would work "very part time and working nights and weekends as needed" due to his full-time commitment to his existing employer. The petitioner noted that CFO holds a master's degree in economics and stated "we hope he will have sufficient time to prepare and review our budget."

The beneficiary indicated that the petitioner would also hire a buyer/marketer to "locate vendors, review contracts, and analyze market and logistics." The beneficiary stated that it expected this newly hired buyer to have a bachelor's degree in marketing and requisite experience, and that he or she will research marketing and product information and recommend to him the items that should be purchased and in what amounts.

Further, he indicated that the buyer would review the logistics of getting the product from the US to Lebanon. The beneficiary explained that it also anticipated hiring a part time office manager to "answer the telephone, oversee company equipment, review delivery schedules and oversee the administration of our office."

The beneficiary specified that he was "in the process of engaging an accounting firm/CPA to handle the most time intensive accounting activities" not handled by the CFO, including account/bank reconciliations, state/federal income tax returns, quarterly employer returns and any necessary state tax returns. In addition, the beneficiary noted that he was also planning on engaging a corporate attorney to offer advice on contracts, import/export laws, licenses and any other applicable regulations.

The beneficiary reiterated that the goal of the petitioner is to earn \$460,000 in revenue during the first year, but noted that "the forecast does not include specific amounts for the salaries of the office manager and buyer/marketer."

Furthermore, the petitioner submitted a statement from its CFO explaining the beneficiary's proposed capacity in the United States as follows:

[The beneficiary] is our CEO. He will be the catalyst in the Company's explosive growth. We anticipate that the Company will go from no sales in 2013 to sales over one million dollars in 2018. In order to enable that type of growth to occur, we need [the beneficiary] to provide a strategic path to success. [The beneficiary] will be involved in engaging and supervising our professionals, including our accountant and corporate attorney, but also in hiring and training our future employees including our buyer/marketers and replacement CEO. [The beneficiary] will also be responsible for the supervision of all the Company's employees and of the decision to either extend our current lease or the entering into a lease for additional and/or other premises.

Since our Company will be sourcing new and in some ways untried items for sale in Lebanon, [the beneficiary] will have to analyze the market potential of each product that he encounters to determine not only their general marketability in Lebanon but also which [foreign entity] customers would likely be interested in it and at what quantity and price. [The beneficiary] will rely on the company's buyer/marketer, once they are hired, to provide him with the data that he needs to make these decisions. [The beneficiary] will also have to oversee the details of the international shipping of products from the US to Lebanon.

We also anticipate that [the beneficiary] will hire and train our buyer/marketer who will take over the Company's purchasing and research activities from [the beneficiary] when he returns to Lebanon.

The CFO further explained that the beneficiary would be "responsible for creating, communicating and implementing our Company's vision and mission and lead the development and implementation of our overall strategy," formulate and implement the company's strategic plan, and develop marketing plans for the sale of items acquired in the United States. The CFO stated that he would earn approximately \$10,000

during the first year and that the beneficiary would make over \$42,000. He also noted that "we do expect further hires in the first year but don't know when."

The petitioner provided amendments to its business plan, including financial projections that accounted for the addition of a full-time buyer earning \$22,400 annually by the fourth quarter of the first year of the company's operation. The amendments to the business plan indicated that the petitioner would engage an accountant and attorney by March 2014 and that it would hire and train the purchasing manager and office manager by October 2014. Lastly, the plans specified that the petitioner would hire and train a CEO to replace the beneficiary by January 2015.

In denying the petition, the director reasoned that the stated duties for the beneficiary were identical to the non-qualifying operational duties he performs abroad, and as a result, it was not likely he would act primarily in a qualifying capacity after one year.

On appeal, the petitioner states that the director improperly analyzed whether the beneficiary will act in a qualifying capacity in the United States based only upon his foreign employment and not the petitioner's proposed plans for the beneficiary in the United States.

2. Analysis

Upon review of the record, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity after one year.

If a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within one year. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

When examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

Similar to his foreign duty description, the petitioner has submitted proposed duties for the beneficiary in the United States indicating that he will be primarily engaged in the performance of duties directly related to the provision of goods and services. The petitioner states that the beneficiary will be responsible for the purchase of products and their shipment to Lebanon for sale. The petitioner indicates that the company will rely on the beneficiary's knowledge of the Lebanese market in deciding which products to purchase. Although the petitioner asserts that the beneficiary will perform certain qualifying duties such as formulating policies, procedures, visions and strategies, it has not provided details as to these proposed decisions. In fact, given the petitioner's plans to exclusively purchase toys and electronic games for sale in

Lebanon, it is not clear what duties the beneficiary will perform beyond those related to the direct purchase of goods and arrangement for their export. In sum, the beneficiary's duties indicate that he will be primarily engaged in making every purchase relevant to the petitioner's operations. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

In the present matter, the petitioner has provided conflicting explanations of its plans during the first year, thereby leaving question as to whether it will have sufficient staff at the end of the year to relieve the beneficiary from primarily performing non-qualifying operational duties. At the time of filing, the petitioner articulated its intent to hire one part-time employee, the CFO. The CFO states that it will be difficult for him to allocate time to the petitioner during the first year due to his full-time employment with another company and predicts that he will spend only 200 hours during the first year working for the petitioner. The petitioner financial projections reflected that it planned on allocating \$15,360 in salaries during the first year, but elsewhere stated in the same projection that it would spend \$42,240 on full-time and \$9,984 on part-time wages during the first year. The petitioner stated that its first year projections did not account for the asserted office manager and buyer/marketer positions and the CFO stated in response to the RFE that he did not know when the petitioner planned on hiring additional employees. However, in the business plan submitted in response to the RFE, the petitioner changed its projections reflecting that it would hire the buyer/marketer during the first year of operations. 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). As such, the discrepancies discussed above leave question as to whether the petitioner will be sufficiently staffed after the first year to relieve the beneficiary from primarily performing non-qualifying operational duties, or the purchase and shipment of goods back to Lebanon.

In addition, the petitioner states that the beneficiary will oversee an accountant and an attorney. However, the petitioner has not submitted evidence to support the current or prospective engagement of these employees sufficiently to relieve the beneficiary from performing primarily non-qualifying duties. The petitioner does not explain or document how many hours per week these contractors will work or indicate how they will be paid for such regular engagement.

Similar to the beneficiary's foreign employment, the petitioner asserts that the beneficiary will supervise and control the work of professionals pursuant to his capacity in the United States, and thereby act in a

qualifying managerial capacity.¹ The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner has not established that it will employ the beneficiary as a personnel manager. As noted, the petitioner contends that the beneficiary qualifies as a personnel manager through his supervision of professional subordinates including the proposed CFO, attorney, accountant, and purchasing manager, who it states will have a degree in marketing. However, the petitioner has not submitted sufficient supporting evidence to substantiate these assertions. For instance, as previously noted, the petitioner does not articulate the amount of time the stated attorney and accountant will be engaged and there is no evidence to support a finding that he would oversee the work of these independent contracts on a day-to-day basis. In addition, the petitioner submits evidence relevant to the CFO that leaves question as to his level of engagement with the petitioner. For instance, the evidence indicates that he will be employed full-time with another company and that he will be pressed to devote time to the petitioner's operations. Based on this employee's own statement, he anticipates spending only 200 hours per year performing duties for the petitioner. Although the petitioner asserts that the CFO holds a master's degree in economics, it has not submitted any supporting evidence to substantiate this claim.

Further, the petitioner has provided conflicting statements as to when it will hire its proposed buyer/marketer thereby leaving uncertainty as to whether the petitioner will employ this subordinate by the end of the first year of operation. The petitioner has also not established that the proposed purchasing manager position will be professional as defined by the regulations. The fact that a subordinate holds a baccalaureate level degree is not alone sufficient to establish a subordinate as a professional. Here, the proposed duties for the buyer/marketer are not those typically considered to be advanced and acquired through a course of prolonged study, but appear to be those that would be gained through on the job experience, and in this case, primarily knowledge which would transfer from the beneficiary's asserted knowledge of the Lebanese marketplace.

¹ Again, in evaluating whether the beneficiary manages professional employees, we 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).

Therefore, in sum, the petitioner has not submitted sufficient evidence to demonstrate that the beneficiary will likely be primarily engaged in the supervision of supervisory or professional subordinates after one year. The evidence indicates that the beneficiary will consult with mostly part-time employees and independent contractors who may or may not be engaged within one year. Again, 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).

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 established that the beneficiary will be employed in a qualifying executive capacity. The petitioner has provided conflicting explanations of its plans during the first year, thereby leaving question as to whether it will have sufficient staff at the end of the year to relieve the beneficiary from primarily performing non-qualifying operational duties. The petitioner has not substantiated that it will employ sufficient employees subordinate to the beneficiary after one year to allow him to primarily focus on broad goals and policies of the company rather than its day-to-day operations. As discussed previously, the petitioner has submitted a duty description reflecting that the beneficiary will be more likely than not primarily perform non-qualifying operational duties at the end of the initial year.

As such, for the foregoing reasons, the petitioner has not established that the beneficiary will act in a qualifying managerial or executive capacity in the United States after one year. For this additional reason, the appeal must be dismissed.

C. DOING BUSINESS

The last issue to address is whether the petitioner has established that it will be doing business in the United States as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H). Responding to public commenters' concern that the proposed definition might disqualify liaison office arrangements from L-1 classification, the INS explained in the preamble to its final rule that "[t]he Service recognizes that company representatives and liaison offices provide services in the United States, even if

the services are to a company outside the United States. Such services are included in the doing business definition" 52 Fed. Reg. 5738, 5741 (Feb. 26, 1987).

Accordingly, a petitioner may establish that it is "doing business" by demonstrating that it is providing goods and/or services in a regular, systematic, and continuous manner to related companies within its multinational organization. To determine whether a petitioner has met its burden, USCIS considers the totality of the record, including relevant documentation to substantiate the petitioner's business activities. The fact that a petitioner serves as an agent, representative, or liaison between a related foreign entity and its U.S. customers or suppliers does not preclude a finding that it is doing business as defined in the regulations.

As previously discussed herein, the beneficiary would be assigned to the petitioner to establish a new venture for the purposes of acquiring toys and electronic games for sale by the foreign entity in Lebanon. The petitioner projects that it will earn \$460,000 in revenue during the first year. The petitioner explained that the foreign entity would be its primary customer and that it would purchase inventory on a regular basis for shipment to the foreign entity twice per month.

The director denied the petition indicating that the petitioner would not be doing business in the United States as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). The director stated that the petitioner's only purpose is to identify products for purchase in the United States for sale by the foreign entity. The director concluded that the petitioner would act as an agent of the foreign entity and would not provide goods and services in a regular, systematic, and continuous fashion.

Upon review of the record, the petitioner has established that it would be doing business as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

First, a petitioner need not establish in a new office petition that it is doing business regularly, systematically, and continuously as of the date of the filing of the petition, only that it has feasible business plans to commence doing business immediately and develop to a point to support the beneficiary is a qualifying capacity after one year. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Therefore, the nexus of the analysis in this case is not whether the petitioner is currently doing business, but whether the petitioner's planned business constitutes doing business as defined by law if and when such business plans are put into place.

As noted above, a petitioner may establish that it is doing business by demonstrating that it is providing goods and/or services in a regular, systematic, and continuous manner to related companies within its multinational organization. A petitioner will have met this burden if it is established that it has immediate plans to provide goods and services to another entity within its corporate organization. The petitioner has met this burden. The petitioner plans to create an operation in the United States devoted to acquiring goods for sale by its foreign affiliate. The evidence does not indicate that the petitioner will act as a mere agent, but that it will have staff and a permanent office, and that it will garner regular income through payments made by the foreign entity for goods the petitioner purchases for the benefit of the foreign entity. The petitioner will also provide market research as well as procurement services for its foreign affiliate. Therefore, the petitioner has established that its projected business would constitute doing business as defined by law. The decision of the director as to this issue is withdrawn.

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.